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THE
FEDERAL REPORTER
WITH KEY-NUMBER ANNOTATIONS

VOLUME 186
PERMANENT EDITION

CASES ARGUED AND DETERMINED IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES

JUNE—JULY, 1911

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JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS

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¹ Died March 6, 1911.

² Appointed June 6, 1911, to succeed Francis C. Lowell.

³ Appointed December 20, 1910. Designated to serve five years in Commerce Court.

⁴ Appointed January 31, 1911. Designated to serve four years in Commerce Court.

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^a Resignation accepted May 18, 1911, effective on appointment and qualification of his successor.

^b Appointed June 7, 1911, to succeed William H. Brawley.

^c Resigned to take effect October 3, 1911.

^d Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

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* Appointed Circuit Judge to take effect October 3, 1911, in place of Henry F. Severens, Circuit Judge.

⁹ Resigned to take effect July 1, 1911.

¹⁰ Appointment effective July 1, 1911, in place of Henry H. Swan, District Judge.

¹¹ Appointment effective October 3, 1911, in place of Arthur C. Denison, District Judge.

¹² Appointed January 31, 1911. Designated to serve one year in Commerce Court.

¹³ Appointed January 31, 1911. Designated to serve two years in Commerce Court.

¹⁴ Died April 16, 1911.

¹⁵ Appointed July 6, 1911, to succeed John H. Rogers.

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¹⁶ Appointed June 7, 1911, to succeed John E. Carland.

¹⁷ Appointed January 31, 1911. Designated to serve three years in Commerce Court.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS

FOERSTNER v. CITIZENS' SAVINGS & TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. April 25, 1911.)

No. 2,078.

1. BANKRUPTCY (§ 184*)—UNFILED CHATTTEL MORTGAGE OR CONDITIONAL SALE—TITLE.

Rev. St. Ohio, § 4150, provides that a chattel mortgage, not accompanied by immediate delivery and followed by actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, subsequent purchasers, and mortgagees in good faith, unless the mortgage or a true copy thereof be forthwith deposited for filing. *Held*, that under such section, as construed by the Supreme Court of Ohio, as between the chattel mortgagee and mortgagor of an unfiled mortgage and the vendor and vendee of an unfiled conditional sale contract, the mortgagee and vendor respectively hold the legal title, which is good as against all creditors who have not, before bankruptcy proceedings intervened, acquired a lien by legal proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

2. BANKRUPTCY (§ 184*)—MORTGAGES—EXECUTION—INVALIDITY—STATE STATUTES—CONSTRUCTION.

Rev. St. Ohio, § 4106, declares that a mortgage of any estate or interest in real property shall be signed by the mortgagor and acknowledged in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation. Section 4133 provides that all mortgages so executed shall be recorded, and shall take effect from delivery to the recorder of the proper county. *Held*, that where a real estate mortgage executed by the bankrupt, though filed for record, was not witnessed, it created no lien on the bankrupt's title, but only conferred on the mortgagee an equity to maintain a suit for reformation, on the theory that it amounted to a contract to give a lien, and, no such suit having been instituted before bankruptcy, the property passed to the bankrupt's trustee, under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), providing that the trustee shall be vested with the bankrupt's title to all property which might have been levied upon and sold under judicial process against him, freed from any claim or lien of the mortgagee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 184.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from, and Petition to Review, an Order of the District Court of the United States for the Northern District of Ohio, in Bankruptcy.

Petition by the Citizens' Savings & Trust Company for satisfaction of its alleged mortgage on certain property belonging to the Colonial Paint Company, a bankrupt, sold by the bankrupt's receiver, to which claim C. C. Foerstner, trustee in bankruptcy, filed objections. From an order allowing the claim, the trustee appealed, and filed petition for review. Reversed.

A. A. & A. H. Bemis, Thompson & Hine, and Walter De Camp, for appellant.

Hills & Van Derveer, for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SEVERENS, Circuit Judge. This case is brought here by way of an appeal and a petition for review. It is founded upon a proceeding in the bankruptcy court in the matter of the Colonial Paint Company, a bankrupt. The question involved relates to the validity of an unrecorded real estate mortgage under the laws of Ohio. On April 24, 1904, the Colonial Paint Company executed a mortgage to the Dime Savings & Banking Company of certain real estate then and afterwards occupied by the Colonial Paint Company. There were no witnesses to the mortgage, and it was, as is alleged by the trustee of the bankrupt, defective on that account, and did not convey the title, and was not entitled to record. It was, however, delivered to the recorder of Cuyahoga county, where the premises are situated, on the 28th day of June, following. The mortgagee never acquired possession of the property. Some four years after this, the Dime Savings & Banking Company, having become insolvent, made an arrangement for liquidation of its assets with the Citizens' Savings & Trust Company, who is the appellee here, and transferred the above-mentioned mortgage and its other assets to that company. But prior to this assignment, and on May 20, 1908, an involuntary bankruptcy proceeding was commenced against the Colonial Paint Company by its creditors, and upon the consent of the company a receiver was appointed on the day of filing the petition, who immediately took possession of the assets of the company, including this mortgaged real estate. In June following the receiver filed an application in the bankruptcy court for an order to sell the real estate at private sale, and such an order was made and entered on June 29, 1908. The receiver sold the property and reported the sale to the court. Whereupon the Citizens' Savings & Trust Company filed its petition, claiming a lien upon the real estate and the proceeds of the sale thereof, and claiming that it should be first satisfied in the disbursement of the proceeds. It was decreed that the petitioner was entitled to the lien claimed, and it was ordered that it have priority in the proceeds of the real estate to the extent of \$15,097.50, and the sale made by the receiver was confirmed. A few days after the entry of this decree and order, the Colonial Paint Company was adjudged

bankrupt. A trustee was elected and qualified, and was ordered to execute a proper deed to the purchaser under the sale, and to pay to the Citizens' Savings & Trust Company the amount which had theretofore been found due to it.

[1] The fundamental question here presented is whether a mortgage not witnessed creates a valid lien upon real estate under the laws of Ohio. From the record we gather that the allowance of the lien was made upon the view that the question at issue was foreclosed by the decision of the Supreme Court in the case of York Mfg. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and if that decision is applicable the action of the court was unquestionably right. A number of decisions of the Supreme Court of Ohio are cited by the appellant which might tend to show that the Supreme Court mistook the law of the state in that case; but we think that neither the court below, nor this court, is at liberty to entertain that question, and we think that decision settled the law to be that, under its statutes concerning the validity and effect of unfiled chattel mortgages and unfiled conditional sales of personal property, such unfiled instruments as between the owner of the property or the vendee by the conditional sale, and the mortgagee or vendor in the conditional sale, holds the legal title, and that such title is good as against all creditors who have not, before bankruptcy proceedings intervened, acquired a lien by legal proceedings.

[2] But this is a case of a real estate mortgage, while the case of York Mfg. Co. v. Cassell involved the validity of liens upon personal property, and there is an important difference in the provisions of the statutes relating to mortgages of real estate and those relating to mortgages of personal property. Under those statutes a chattel mortgage conveys the title to the mortgagee. In the case of a conditional sale, the vendor has also the legal title. When the bankruptcy of the mortgagor, or of the vendee of the conditional sale, takes place, the trustee takes the property subject to the mortgage, or, if there has been a conditional sale, subject to the right of the vendor to reclaim it, if the condition be unperformed. This was the situation which existed in the case of York Mfg. Co. v. Cassell. This confessedly would be the situation in such cases, when not affected by the provisions of the bankrupt act. But the further question arose concerning the status of general creditors of the mortgagor; that is to say, those who, though they had a right to acquire a lien, had not in fact obtained any before the property came into the hands of the trustee in bankruptcy. And the court employed the oft-repeated language that the trustee stands in the shoes of the bankrupt, and acquired the property in the same plight that the bankrupt held it at the time of bankruptcy. The court did not in terms refer to those provisions of the bankruptcy act which create other rights and duties than those which had belonged to the bankrupt. It must be presumed, nevertheless, that the court did not overlook those provisions; for we find that in a subsequent case (Security Warehousing Co. v. Hand, 206 U. S. 424, 425, 27 Sup. Ct. 720, 51 L. Ed. 1117), Mr. Justice Peckham, who wrote the opinion in the York Mfg. Co. Case, goes into an explanation, which

imports that the court had not in the former case failed to regard those exceptions to the general rule just mentioned.

For the purpose of comparison we quote here section 4150 of the Statutes of Ohio relating to the filing of chattel mortgages. It reads as follows:

"A mortgage, or conveyance, intended to operate as a mortgage of goods and chattels, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged shall be absolutely void as against the creditors of the mortgagor, subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, be forthwith deposited as direction in the next section."

It will be seen upon the reading of this section that it concerns the means for giving notice to creditors, purchasers, and mortgagees of the existence of the mortgage. It has no effect upon the rights of the original parties to it.

On the other hand, it will be convenient here to note the statutes of the same state concerning mortgages of real estate and the recording thereof. Section 4106 of the Revised Statutes provides that:

"A deed, mortgage, or lease of any estate or interest in real property, shall be signed by the grantor, mortgagor, or lessor, and such signing shall be acknowledged by the grantor, mortgagor or lessor in the presence of two witnesses, who shall attest the signing and subscribe their names to the attestation."

And section 4133 reads as follows:

"All mortgages, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the mortgaged premises are situated, and shall take effect from the time the same are delivered to the recorder of the proper county for record and if two or more mortgages are presented for record on the same day, they shall take effect from the order of presentation, for record, the first presented shall be first recorded and the first recorded shall have preference."

Upon the construction given by the Supreme Court of the state to these provisions, it appears that they are treated as regulations touching the execution of the instrument, and indicate requirements which are necessary to its validity, and not, as in the case of chattel mortgages, regulations which are made for the purpose of giving notice of the existence of valid instruments. It is held by that court that an instrument not executed in the manner and form required by the statute does not pass the legal title and is absolutely void as to all persons, except only the mortgagee. And as to him it does not pass the title and creates no lien. Its only consequence is to put him in a position of one having a promise or agreement to give a mortgage which will create a lien. This is confirmed by the decisions of that court, holding that a person who, having full notice of the existence of such a defective instrument, buys, or takes a lien upon, the real estate covered by it, acquires a valid title, according to the import of his deed. *Fosdick v. Barr*, 3 Ohio St. 471; *Langmede v. Weaver*, 65 Ohio St. 35, 60 N. E. 992.

This necessarily imports that it is property which the mortgagor could have transferred. In equity the court recognizes, as we have said, an equitable right to a mortgage, but in order to make this right

effectual the holder of the instrument must institute a suit for a "reformation," as it is termed; that is, for an order or decree directing a completion of the instrument in such a form as to make it valid which means, providing for its acknowledgment, if it has not been acknowledged, and for its attestation in the presence of two witnesses and for the subscribing their names to the attestation, if these things have been omitted. *Straman v. Rechtine*, 58 Ohio St. 443, 51 N. E. 44. It follows, from this, that where the property passes into the hands of a trustee in bankruptcy before any proceedings are taken to reform the instrument, the trustee takes it in the plight in which it then stood: that is to say, the title is still in the bankrupt though there is an outstanding equity in the mortgagee of which he has never taken the advantage. So it is held by the Supreme Court that, where the property is assigned for the benefit of creditors, the title which the assignee gets is superior to that of the mortgagee under the defective title, and his title is unaffected by any such outstanding equity, even though he had full notice of the defective mortgage. *Betz v. Snyder*, 48 Ohio St. 492, 28 N. E. 234, 13 L. R. A. 235.

And in *Cheney v. Maumee Cycle Co.*, 64 Ohio St. 205, 60 N. E. 207, it was held that:

"A mortgage of real property, which has not been delivered to the recorder of the proper county for record before the appointment of a receiver for the property of the mortgagor, is not a valid lien upon the property as against the receiver; and the receiver, for and in the interest of general creditors, is entitled to the proceeds of sale of such mortgaged premises in preference to the mortgagee."

These rules of property in Ohio should guide the federal courts. It would be an incongruous condition that property, which would pass to a receiver in a state court for the benefit of creditors, should not also pass to the receiver or trustee in a bankruptcy court for the benefit of creditors. We have confined our references mainly to the more recent decisions of the Supreme Court of Ohio, for the reason that the earlier cases are reviewed in the later decisions.

In *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986, there was a conditional sale of machinery which had been put up in the bankrupt's works. The contract for the conditional sale had not been filed as required by the New York statute. The purchase price had not been paid. Bankruptcy having supervened, the vendor claimed the goods, and for an order giving him possession of the same. The District Court and the Court of Appeals held that he was entitled to the goods and ordered the trustee to surrender them. The trustee thereupon appealed to the Supreme Court. In dealing with the merits, the Chief Justice said:

"This sale was a conditional sale, and the title did not pass to the vendee because the condition was not fulfilled (*Ballard v. Burgett*, 40 N. Y. 314; *Cole v. Mann*, 62 N. Y. 1), unless the statutes of New York otherwise provided."

He then refers to the applicable statute, which declared that such conditional sales should, unless filed as required by the act, "be void against subsequent purchasers, pledgees or mortgagees in good faith." It will be noticed that the statute did not declare such unfiled contract void as to creditors. And the Chief Justice goes on to say:

"But if the trustee was not a subsequent purchaser, pledgee, or mortgagee in good faith, the omission to file the contract of sale was immaterial."

Then section 70a (5) is referred to which declares that the trustee shall be vested with the title of the bankrupt to all property "which might have been levied upon and sold under judicial process against him," and points out that the property could not have been sold on process against him, because creditors were not protected by the statute, which only declared the otherwise valid title of the vendor void as to purchasers, pledgees, and mortgagees. The declaration of the Circuit Court of Appeals for the Second Circuit, that if the lien claimed "is one which has been obtained in contravention of some provision of the act which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the trustee" is approved. The Chief Justice says that this holding of the court that the fact that creditors were not included in the protection accorded to other persons named by the New York statute prevented the trustee from claiming in their behalf the benefit thereof, and said that this conclusion "is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors." The opinion of the court is summed up as follows:

"In our opinion, these machines were not, prior to the filing of the petition, property which under the law of New York might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of section 70a. See *Low v. Welch*, 139 Mass. 33 [29 N. E. 216]. The company's title was good as against the trustee, who could not claim as a subsequent purchaser in good faith."

This discussion of the effect of section 70a (5) and the statement of the conclusions reached show by inevitable implication that such unfiled instruments, in states where they are declared void as against creditors for want of filing, do not prevent creditors from levying judicial process upon the property therein described, and consequently that the property passes to the trustee under the operation of 70a (5) of the bankrupt act. In *York Mfg. Co. v. Cassell* the bankrupt never had the legal title, and the creditors had done nothing toward subjecting it to their claims. It is upon these grounds that that decision rests. It is not applicable to a case where the bankrupt has held the legal title, and the question is whether he had transferred it by an instrument sufficient for the purpose of transferring title.

Our conclusion must be that the appellee's mortgage should not be enforced against the trustee, and that the order of the court below to the contrary should be reversed.

It is so ordered.

HAMILTON v. LOEB.

(Circuit Court of Appeals, Third Circuit. April 12, 1911.)

No. 16 (1,457).

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS—CONCLUSIVENESS.

Findings of fact by a trial court on disputed points are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. CORPORATIONS (§ 244*)—STOCKHOLDERS—PERSONAL LIABILITY.

Under Rev. Laws Minn. 1905, §§ 2863, 2864, regulating stock transfers, a transferee, who never was a registered stockholder, who never held himself out as a stockholder, who has not interfered with his transferees' liability, the registered owners, nor exercised a stockholder's privileges, nor participated in the corporate management, is not liable under Const. Minn. art. 10, § 3, making stockholders in certain corporations liable for corporate debts to the amount of their stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 960-977; Dec. Dig. § 244.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by Charles E. Hamilton, receiver of the Evans-Johnson-Sloane Company, against Ferdinand L. Loeb. From a judgment (179 Fed. 728) for defendant, plaintiff brings error. Affirmed.

James E. Trask, E. H. Morphy, and George W. Carr, for plaintiff in error.

John G. Johnson and Abraham Israel, for defendant in error.

Before GRAY and BUFFINGTON, Circuit Judges, and YOUNG, District Judge.

GRAY, Circuit Judge. This action was brought in the court below by plaintiff, as receiver of Evans-Johnson-Sloane Company, an insolvent Minnesota corporation, in behalf of, and as the statutory representative of, its creditors, to recover the individual or constitutional liability of the defendant, as a stockholder of said corporation, upon an order or decree of assessment made by the state court, assessing the capital stock of the corporation to an amount equal to the par value thereof, viz., \$100 a share. The action is in assumpsit, and defendant asserts as a defense, that he was never a registered stockholder.

Article 10, § 3, of the Constitution of Minnesota reads as follows:

"Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of the stock held or owned by him."

Section 2863 of the Revised Laws of Minnesota reads as follows:

"Transfer of Stock.—The delivery, by the rightful owner, or by one by him intrusted therewith, to a bona fide purchaser or pledgee for value, of a certificate of stock duly transferred in writing by the holder personally, or accompanied by his power of attorney authorizing such transfer, shall be sufficient to transfer title, but shall not affect the right of the corpora-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tion to pay any dividend thereon, or to treat the holder of record as the owner in fact, until such transfer has been recorded on its books, or a new certificate issued to the transferee, who, upon delivery of the former certificate to the treasurer, shall be entitled to receive such new one."

Section 2864 of the said Revised Laws reads as follows:

"Effect of Transfer—Stock Books.—The transfer of shares is not valid, except as between parties thereto, until it is regularly entered on the books of the company, so far as to show the names of the person, by whom and to whom transferred, the number or other designation of the shares, and the date of the transfer; but such transfer shall not in any way exempt the person making such transfer from any liabilities of said corporation which were created prior to such transfer. The books of the company shall be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same."

Article 5 of the by-laws of said corporation reads as follows:

"Section 1. The stockholders of said company shall be entitled to certificates of stock signed by the president and secretary, with the corporate seal affixed thereto, and shall be numbered and registered as issued.

"Sec. 2. Transfer of stock shall be made only on the books of the company, either in person or by attorney, and the possession of said stock shall not be regarded as evidence of ownership of the same unless issued or duly transferred to the person holding the same."

It appears from the evidence that the defendant, Loeb, on the 25th day of February, 1905, purchased from John F. Elwell 264 shares of stock of the Evans-Johnson-Sloane Company, and from William A. Alden 265 shares thereof, making in all 529 shares, for which he paid about 33 per cent. of their par value. The certificates for said shares were assigned and transferred in writing, and were delivered to the said defendant, it being stated on the face thereof, that the stock was transferable only on the books of the corporation. Such transfer on the said books was never made, and the shares remained standing in the names of Elwell and Alden.

At the close of the testimony, motions were made for binding instructions by counsel for plaintiff and defendant, respectively. The familiar rule that, when both sides ask for binding instructions, the determination of the questions of fact is thereby submitted to the court, was called to the attention of counsel. Counsel on both sides agreed that this was so, and the jury were thereupon discharged. The court thereafter made its findings of fact, and of the law applicable thereto, in favor of the defendant, upon which judgment was entered in due course.

[1] These findings of fact are conclusive, and must be kept in mind in any discussion of the law applicable thereto. This is the more important, as the plaintiff in error has at some length discussed the circumstances surrounding the transfer of this stock, and in his statement of the questions involved, has embodied certain assumptions of fact which are the basis of much of his subsequent argument. This is especially notable as to the assumption that the defendant, at the time of the purchase of the stock and the indorsement to him of the certificates therefor, "for the purpose and with the effect of inducing

creditors to give the corporation credit, represented that he had acquired, or was acquiring, the stock," and that it was a matter of arrangement between him and his transferrors that he should hold the stock in their name.

The findings of fact by the court below were as follows:

- "(1) That the defendant was not a registered stockholder.
- "(2) He did not hold himself out as such.
- "(3) He has in no way interfered with the liability of his vendors, who were and are the registered owners of the stock.
- "(4) He did not exercise any of the privileges of a stockholder, or take part as such in the management of the corporate affairs."

[2] Under these circumstances, the counsel for defendant in error has correctly stated the question involved to be:

"Is a person, who is not and never was a registered stockholder, who never held himself out as a stockholder, who has in no way interfered with the liability of his vendors (which vendors were and are the registered owners of the stock), who did not exercise any of the privileges of a stockholder, or take part as such in the management of the corporate affairs, exposed to the liability declared by the Minnesota law?"

The elaborate argument made for the plaintiff in error, for the most part ignores the provisions above quoted from the statutes of Minnesota. Unless the Legislature of Minnesota has transcended its powers, in defining the word "stockholder," as used in section 3, art. 10, of the Constitution of Minnesota, and in prescribing how a stockholder may transfer his status as such to another, it would seem that we were compelled to agree with the court below, that the defendant is not exposed to the liability of a stockholder, as declared by the Minnesota law in that behalf. No serious argument is made by the plaintiff in error, that the provisions of the Minnesota statutes, as above recited, are repugnant to the provision of the Constitution of Minnesota, which we have quoted. No decision of the Supreme Court of that state has been cited, declaring such repugnancy. Many, however, have been referred to, in which the constitutionality of these provisions of the Minnesota Law must have been assumed, though the precise question now before us has never been decided by that court.

The very exception in section 2864 of the Revised Statutes (*supra*), "except as between parties thereto," gives emphasis to the negation of validity to the transfer of shares in all other respects. The obvious necessity for some definition by municipal law of the status of a stockholder, and of regulation as to the transfer from one to another of the same, seems to have controlled the legislation of all the states, and unless such definition and regulation are such as to grossly violate the ordinary concept of the word "stockholder," that word, as used in the Constitution of Minnesota, must be taken to mean a stockholder as defined by the laws of that state. Corporations are artificial beings, created and regulated by the state, and the policy of the state in regard to their creation and regulation may vary according to time and circumstance. It would seem, then, to be an inherent necessity, that the state should specifically define the status of a stockholder in the corporations that it creates. It might, in the exercise

of its plenary power in this regard, provide that the shares of capital stock were non-transferable, and neither this nor any modification of so rigid a rule could be objected to, as repugnant to the constitutional provision referred to, in regard to double liability of a stockholder. We must infer, therefore, that it was entirely within the competence of the Legislature of Minnesota to declare any transfer of stocks (except as between the parties thereto), not regularly on the books of the corporation, to be invalid. This being so, how could the defendant in error be a stockholder, within the meaning of the constitutional provision in question? It can only be claimed that he became so by the assignment or transfer of the certificates of stock held by certain registered stockholders, but the law declares that such transfer, not being registered, was invalid. The status of a stockholder having not been successfully transferred, the transferrors still retain that status, and whatever may have been the rights between the parties to the transaction to claim compensation, the one from the other, the status of a stockholder, as declared by the law, cannot be affected thereby.

We must therefore conclude that the transfer in this case of the certificates of stock from the transferrors to the defendant, in the manner set forth, did not confer upon the defendant the status of stockholder in the corporation in question, and that therefore he is not a stockholder, within the purview of section 3, article 10, of the Constitution of Minnesota. The plaintiff in error, however, insists, among other things, that there are certain extraneous circumstances attending the transfer of the stock, which equitably estop the defendant from claiming non-liability as a stockholder.

Counsel for plaintiff in error has assumed in his argument, as we have pointed out, that there was something in the nature of an arrangement between the defendant and transferrors of the stock, by which the former allowed the stock to remain in the name of his transferrors, and that they consented to hold the registered ownership as agents or trustees for defendant. There is nothing in the record upon which to found this assumption, and it is, moreover, inconsistent with the findings of fact by the court, as above recited. There is nothing in the case, except the mere assignment of the shares of stock by indorsement on the back of the certificates thereof, and this attempted transfer is declared by the statute of Minnesota to be invalid, except as between the immediate parties thereto. Nor is there any foundation in the findings of fact by the court below, for the assumption by the plaintiff in error, that the defendant in error, when he purchased the stock, or at any time thereafter, had for the purpose and with the effect of inducing creditors to give the corporation credit, represented that he had acquired, or was acquiring, the stock. The findings of fact directly contradict this assumption.

Counsel for the plaintiff in error strenuously contends that it is a rule of law, made necessary for the protection of creditors, and to prevent fraud on the legal provision for double liability of stockholders, that what he calls the real stockholder is in all cases liable to creditors, even though the stock may never have stood in his name on the books of the company. But the real stockholder, as we have pointed

out, is the one who is recognized as such by the statute. By its express provision, the unregistered transferee of stock does not become a stockholder of the corporation. He has certain rights as against the transferor, and he also has the right to demand of the corporation to register him as a stockholder, but until he is accepted as such by the corporation, he is not a stockholder, within the meaning of the law.

These provisions of law in regard to registration have been found necessary for the protection of creditors and the prevention of fraud by secret transfers and other devices, in contradiction of the record evidence on the books of the corporation. The policy of such provisions of law as have been above recited from the Revised Statutes of Minnesota, is too obvious to require explanation. It is the same as that of the laws requiring mortgages, bills of sale, mechanics' liens, etc., to be recorded or registered. By the laws of Minnesota, as well as in other states, corporations created by the state are required to provide for registering all transfers of the stock of such corporations for the protection, not only of the corporation, but also of the public. Creditors and others interested in the ascertainment of who are stockholders, are protected by the law which declares invalid all transfers not registered on the books of the company, as they cannot be defrauded by secret or unregistered transfers. Those upon whom the double liability to creditors is imposed are those who at any moment of time, when such liability is sought to be enforced, appear as the registered stockholders of the corporation. In the absence of any decisions by the Supreme Court of Minnesota, those of the federal Courts in relation to double liability under the national banking law, are in point.

In 1899, the United States Circuit Court of Appeals for the Second Circuit, in *Robinson v. Southern National Bank*, 94 Fed. 964, 36 C. C. A. 584, had before it a case where the defendant bank became pledgee of certain shares of stock, under contracts by which they were authorized, in case of non-payment of the loan, to sell the shares without notice, at public or private sale, and apply the proceeds to the payment thereof. The pledgee had sold the stock to itself, exercising such right of sale for the benefit of the pledgor under the fiduciary obligation of the pledge agreement. The pledgees were held not to be liable as stockholders under the double liability provision of the national banking act, for, although they became the purchasers of the stock, they did not become its registered holders, the registration remaining in the name of a third person selected at the time of the pledge by the pledgee, for the purpose of its own security.

As we agree with the counsel for defendant in error, that this case deals with the precise question we have before us, we quote from it at large, as follows:

"The certificates for the stock remained in the possession of the defendant from the time of the purchase until after the making of the assessment by the Comptroller of the Currency, but the stock was never transferred to the defendant upon the books of the bank. The facts certainly would have justified a finding by the jury that the relation of pledgor and pledgee had been terminated by the defendant, and the defendant had become the purchaser of the stock with the intention of becoming the exclusive owner, and was in this sense its owner, when the bank failed. The only ground

upon which it could be ruled that the plaintiff was not entitled to recover was that, as the stock had never been transferred to the defendant upon the books of the bank, and remained in the name of the original owner, the defendant was not a shareholder, within the meaning of section 5151 [U. S. Comp. St. 1901, p. 3465]. By section 5139 of the Revised Statutes [page 3461], the capital stocks of national banks is made 'transferable on the books of the association, in such manner as may be prescribed by the by-laws or articles of association.'

"It is the generally accepted doctrine of the courts that, notwithstanding a provision of this kind in the organic law of a corporation, the legal title to its shares of stock passes, as between vendor and vendee, upon a transfer of the certificates, accompanied by a power of attorney for their transfer upon the books, without an actual transfer upon the books. Until registration, however, the purchaser does not acquire the privileges of a stockholder of the corporation. He can compel the corporation to recognize him as a stockholder; but, until he has been registered as such, he has no right to vote, and dividends are payable to the stockholder of record. Is such a purchaser a shareholder, within the meaning of section 5151 of the Revised Statutes, which declares 'Shareholders of every national banking association' shall be individually responsible to the extent of the amount of their stock for the debts of their association? It is somewhat remarkable that in all the litigations which have been presented to the Supreme Court involving the liability of shareholders of national banks upon assessments made by the Comptroller of the Currency, the question which is thus presented has never been distinctly decided.

"An examination of the cases cited by the Supreme Court fails to disclose one in which the owner of the shares has been held liable, under the section, who has never been the owner upon the books of the bank; and the cases in which the 'real owner' has been liable were those in which, being the registered owner, he had transferred his shares to another for the purpose of escaping the liability of a stockholder, or caused them to be registered in the name of an irresponsible transferee. Such was the case in *Bank v. Case*, 99 U. S. 628 [25 L. Ed. 448], where the registered owner caused the stock to be transferred to one of its clerks, who acquired no beneficial interest in it, and upon the understanding that he would transfer it at request. In *Bowden v. Johnson*, 107 U. S. 251, 2 Sup. Ct. 246 [27 L. Ed. 386], the registered shareholder, in apprehension of the bank failure, had transferred his stock to an irresponsible person. It is well settled that one to whom stock has been pledged as collateral security, and who has caused it to be registered upon the books of the bank in his name as owner, is liable as a shareholder for the benefit of creditors, as though he were the real owner. The courts have placed his liability upon three grounds: That he is estopped from denying his liability, because he has voluntarily held himself out to the public as the owner of the stock; that, by taking the legal title, he has released the former owner from liability; and that, after having taken the apparent ownership, and become entitled to the privileges of a stockholder, it would be unreasonable to release him from the responsibilities of a shareholder. None of these reasons applies in the case of one who, like the defendant, has never been a stockholder upon the books of the bank, has never held himself out as such a stockholder, has not defeated the liability as a stockholder of the pledgor, and has not enjoyed the privileges of a stockholder.

"Our conclusion is that the defendant, never having been a registered shareholder of the bank, is not liable to the assessment. The judgment is accordingly affirmed."

The cases referred to in the foregoing opinion, in which so-called "dummy" stockholders, though registered, have been held not to be bona fide stockholders, the real owners, for whom the stock is held in trust, continuing liable under the statute, are not inconsistent therewith or with the principles which we think applicable to the present case. Such transfers, though registered, were in fraud of the act. They

were nullities, and the transferrors did not thereby divest themselves of their registered ownership, or escape the legal liability attaching to such ownership.

It is not necessary to consider at length the multitude of cases cited by counsel on both sides, which illustrate the various aspects under which the requirement of registry of a transfer on the books of the corporation, whether by statute or by the by-laws of the company, may be viewed. It is sufficient to say that reason and the great weight of authority support the proposition that, until a transfer has been recorded on the transfer books of the corporation, the transferee not being recognized as a stockholder, is not chargeable either with corporate debts or unpaid balances of the subscription. He is bound to protect and indemnify the transferror, but he is not liable to the corporation or corporate creditors, or other stockholders. Cook on Corp. § 258.

As the defendant was not a registered stockholder, and had done nothing whereby he had become estopped from denying that he was a stockholder, and as there are no countervailing equities to be considered, we must conclude that he is not exposed to the liability declared by the Constitution of Minnesota.

The judgment of the court below is affirmed.

BALTIMORE & O. R. CO. v. O'NEILL.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1911.)

No. 2,099.

1. RAILROADS (§ 348*)—INJURY TO PEDESTRIAN AT CROSSING—NEGLIGENCE—EVIDENCE—SUFFICIENCY.

Evidence *held* sufficient to show that the headlight was not burning on a locomotive which struck a pedestrian at a street crossing, though the train crew testified it was burning.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 348.*]

2. EVIDENCE (§ 594*)—WEIGHT.

Testimony contrary to reason, or opposed to natural and physical laws, cannot support a verdict.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2431; Dec. Dig. § 594.*]

3. RAILROADS (§ 350*)—INJURY TO PEDESTRIAN AT CROSSING—CONTRIBUTORY NEGLIGENCE—JURY QUESTION.

Whether a pedestrian struck at a street crossing by a train at night was guilty of contributory negligence *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by James O'Neill, by his next friend, Daniel O'Neill, against the Baltimore & Ohio Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Kline, Tolles & Morley and A. E. Clevenger, for plaintiff in error.
D. F. Anderson, for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SATTER,
District Judge.

KNAPPEN, Circuit Judge. The defendant in error (hereinafter called the "plaintiff") was struck and injured by a freight engine while walking across defendant's railroad track at the Clay street crossing in Niles, Ohio. Several grounds of negligence were charged, the most prominent being the alleged lack of headlight upon the engine, the failure to give warning of the train's approach by bell or whistle, and the fact that the electric gong at the Clay street crossing was out of commission. The accident happened at about 9:30 o'clock in the evening. There was evidence that the night was dark and cloudy, the electric lamp at the Clay street crossing was not burning, and the electric gong at that crossing was out of commission. The engine in question was the foremost of two engines hauling a long freight train.

The plaintiff testified that about six feet before reaching the crossing he stopped, looked and listened, saw and heard no train, passed on, and just as he was stepping over the further rail was struck by the engine. There was testimony that the engines were "drifting" (the steam being shut off), and were moving at a rate variously estimated at from 5 to 15 or 20 miles an hour; the evidence preponderating in favor of the lower speed. There was also direct testimony that there was no headlight on the engine, and that no whistle or bell was sounded as the crossing was approached. There was a straight, clear track for about 1,300' feet east of Clay street.

At the close of the testimony the defendant moved for direction of verdict in its favor, on the ground that the evidence showed conclusively, as a matter of law, that the plaintiff was contributorily negligent. The court, in an unexceptionable charge, submitted the case to the jury, and instructed them that if the headlight was burning on the engine plaintiff was negligent, and could not recover. The denial of the motion for directed verdict is the only ground urged for reversal.

It is contended: First, that there was not sufficient evidence to create a conflict upon the issue that the headlight was not burning; and, second, that even if the headlight were not burning, the physical and conceded facts conclusively show that the plaintiff was contributorily negligent. We will consider these two propositions in the order stated.

[1] The entire crew of the freight train testified that the headlight was burning, and defendant contends that the testimony to the contrary is merely negative, and so cannot be allowed to override the positive testimony of the trainmen. It is unnecessary to refer to the authorities cited by defendant upon this proposition, for the evidence that there was no headlight is not, in our opinion, merely negative. Two witnesses seated upon a porch which faced the railroad track and only about 40 feet distant therefrom, and at the crossing in question, testified that there was no headlight on the engine, and that the train was not seen or heard by them until after both engines had passed

the porch. The record shows that the railroad track in question was regularly used by pedestrians. Two witnesses, a man and wife, who came upon the track at Olive street, 250 feet east of Clay street, testified that they both looked and listened for the train, but saw and heard none, and that no headlight was burning. Both were looking and listening to avoid danger in walking upon the track. One of these witnesses testified:

"I most certainly can state there was no headlight burning. I could not have failed to see the headlight if it had been lighted."

These witnesses, who were walking toward Clay street, were overtaken by the train soon after leaving Olive street. Another witness upon the track between Clay and Olive streets, and walking toward the latter street, met the train on the way, not seeing the train (as we understand the record) until within 15 or 20 feet of it, at or near which point this witness met the two witnesses who were walking from Olive street toward Clay street. Notwithstanding the positive testimony of the railroad employés that the headlight on the engine was burning, and the alleged improbability that a train such as this would have been run at that time of night without a headlight, we think that, in view of the testimony of other witnesses, who should have seen the light if burning, to the effect that they did not see it, the question was one for the jury. Detroit Southern Ry. Co. v. Lambert (Sixth Circuit) 150 Fed. 555, 80 C. C. A. 357; Lonis v. Railway Co., 111 Mich. 458, 69 N. W. 642; Crane v. Railroad Co., 107 Mich. 511, 65 N. W. 527. It happens that in the three cases we have cited the alleged negligence related to failure to give warning by bell or whistle; but there is no difference in the principle as applied to a headlight.

Coming to the proposition that the physical and conceded facts conclusively show that the plaintiff was negligent, even if the headlight was not burning:

[2] The proposition is too well settled to require more than the merest reference to authority that testimony contrary to reason, or opposed to natural and physical laws, cannot support a verdict. Pennsylvania Co. v. Whitney (Sixth Circuit) 169 Fed. 572, 576, 95 C. C. A. 70. And in this case, notwithstanding the well-settled rule that the credibility of a witness is peculiarly a question for the jury, and cannot be disregarded in the absence of established facts and circumstances with which it cannot be reconciled, it is clear that if we can say from the record that conditions were such in this case that, had the plaintiff looked as he testified, he must have seen the approaching train, or, had he listened for it, he must have heard it, a verdict should have been directed for the defendant. Was the testimony such that we can so say? We are not justified in so holding.

The proposition that the plaintiff, although looking for the train, did not see it, is supported by the testimony of the witnesses we have referred to. There was testimony that the lamp was burning at the Olive street crossing, 250 feet east of the Clay street crossing, yet the three witnesses, two of whom were overtaken by the train, the other of whom met it, near the Olive street crossing, notwithstanding the greater light at that place, were unable, according to their testimony,

to distinguish the train until within 20 or 30 feet from it. The witnesses who were upon the porch of the house near the track did not see the train until both engines had passed the house. We could not, without violating the record, hold that the plaintiff, whose opportunities for seeing the train were less than those of the three witnesses near the Olive street crossing, could have seen the train from the Clay street crossing. The decision of this court in the case of Blount v. Grand Trunk Ry. Co., 61 Fed. 375, 9 C. C. A. 526, is cited to the proposition that, under the circumstances stated, it must be held that the plaintiff could have seen the train. That case is readily distinguished from the one we are considering, for there the night was clear, while here there is testimony that it was cloudy and dark. Under those conditions the extent of straight and clear track cuts but little figure. The plaintiff's testimony that he did not hear the train, although he listened for it, is corroborated by all of the five witnesses mentioned. There was testimony that no steam was escaping from either engine, that the drifting train was slowing down as if for the purpose of stopping at a railroad crossing several hundred feet west of the Clay street crossing, and that it was not heard by the pedestrians upon the track, who especially had it in mind by reason of the danger they incurred in walking there, to say nothing of the fact that its approach was so comparatively quiet that the attention of the witnesses upon the nearby porch was first attracted to the presence of the train, not by the noise, but by seeing before them the freight cars which followed the engines.

[3] In view of the testimony as to the darkness of the night, the lack of headlight on the engine, the absence of light at Clay street, the fact that the electric gong at the crossing of that street was out of commission, the quietness with which the drifting train approached the crossing in question, and the fact that others, whose situation was similar to that of the plaintiff, and whose opportunities for observing the train were in some respects even better than his, failed to see or hear it until within a few feet from it, it was not error to submit the case to the jury. See Texas & Pacific Ry. Co. v. Cody, 166 U. S. 612, 17 Sup. Ct. 703, 41 L. Ed. 1132.

The judgment of the Circuit Court is affirmed.

ERIE R. CO. v. ROONEY.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1911.)

No. 2,076.

1. TRIAL (§ 174*)—INSUFFICIENCY OF EVIDENCE—MANNER OF RAISING.

The insufficiency of the evidence to support a verdict for plaintiff may be raised by oral motion for a directed verdict for defendant, or by a written request for an instructed verdict, before submission to the jury.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 174.*]

2. TRIAL (§ 178*)—MOTION FOR DIRECTED VERDICT—REVIEW OF EVIDENCE.

The court, on a request for a directed verdict, must take the view of the evidence most favorable to the adverse party, and a verdict is properly directed only when the case is palpably for the party asking for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

direction; and in the absence of established facts, with which testimony cannot be reconciled, the court may not disregard it as incredible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401-403; Dec. Dig. § 178.*]

3. TRIAL (§ 140*)—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

The variance between plaintiff's original and amended petitions, and his admissions to defendant's claim agent, contradicting his testimony on the trial, are proper for the jury, as affecting his credibility as a witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

4. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Whether a coal car on a switch track communicating with a lead track in railroad yards, on which an engine hostler was driving an engine, was in motion at the time of a collision between the car and the engine at the switch, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

5. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an engine hostler, injured in a collision between an engine which he operated over a lead track in a railroad yard and a coal car projecting over from a switch track, was guilty of contributory negligence, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

Action by Frank J. Rooney against the Erie Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Cushing, Siddall & Palmer, for plaintiff in error.

Skiles, Green & Skiles and R. B. & A. G. Newcomb, for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

KNAPPEN, Circuit Judge. The defendant in error (hereafter called the plaintiff) recovered verdict and judgment against the plaintiff in error (defendant below) on account of personal injuries received by plaintiff in the course of his employment by defendant as engine hostler. A motion for a new trial was denied. The facts are these:

While plaintiff was driving a locomotive over a lead track in defendant's yard at Kent, Ohio, for the purpose of coaling the tender at the tipple, the cab in which the plaintiff was riding collided with the end of an empty coal car, projecting or pushed over from a switch track communicating with the lead track, as the engine driven by plaintiff was passing the switch. It was plaintiff's contention that the coal car was pushed from the switch track into collision with the cab of the locomotive by the action of defendant's so-called "west end" switching crew. The negligence alleged in plaintiff's amended petition was, first, permitting the coal car to be so close to the lead

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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track as to be pushed over onto that track when the string of cars of which it was a part was bumped into, as alleged, by the switch engine at the other end of the string; and, second, causing the string of cars to be so bumped as to push the coal car upon the lead track, while the locomotive in question was passing the switch. Plaintiff testified that as he approached the switch in question, at a speed of from 5 to 7 miles an hour, and when 50 or 60 feet from it, he saw that the lead track was entirely clear; the track being substantially straight. He testified:

"Everything looked clear, and seeing the injector was not shut off tight, and I reached, and it was leaking, and I reached in and shut it off tight, and looked down, and as I looked up I suddenly saw a coal car coming into me"

—and that the car then crashed into the cab of the engine where the plaintiff was standing. His testimony, if believed, supported his contention that the coal car was entirely out of striking distance from the lead track, until pushed thereon just before the locomotive on which plaintiff was riding reached the switch.

At the close of all the testimony, the defendant requested, in writing, a verdict in its favor, which was denied. The jury was instructed that the plaintiff could not recover, "if the accident happened merely because there was a string of cars or a car that projected standing out on the lead track," and that no recovery could be had unless the coal car was pushed or bumped over from the switch track onto the lead track as the locomotive was passing the switch. The court, after instructing the jury generally upon the subject of the care required of the plaintiff, said, with special reference to the plaintiff's act in turning to attend to the injector:

"Now, if you find that his thus withdrawing his attention, to whatever extent he may have done so, from the situation was such a violation of his duty to look out as to be a lack of ordinary care under the circumstances, * * * and that such lack of ordinary care approximately contributed to the accident, then he cannot recover in this case, and your verdict should be for the defendant."

Defendant took no exception to the charge of the court in any respect. The only alleged errors argued in briefs of counsel relate to the refusal to grant defendant's request for a direction of verdict. We do not understand the other errors assigned are relied upon.

Defendant contends that such direction of verdict should have been given, first, for lack of evidence that the coal car was in motion at the time of its collision with the locomotive; and, second, that the plaintiff by his own admission was contributorily negligent. The case seems to have been tried, upon both sides, upon the theory that the defendant was negligent if the coal car was pushed onto the lead track while plaintiff's engine was passing over it. Such was the charge of the court, which was not excepted to, and no suggestion of a contrary rule seems to have been made in connection with the motion for a direction of verdict. We are thus not called upon to consider the correctness of that proposition.

[1] Plaintiff contends that the insufficiency of the evidence to support a verdict can only be raised by motion at the close of the testi-

mony, as distinguished from a written request for an instructed verdict. There is no merit in this proposition. It is immaterial whether the request for directed verdict be made orally or in writing. The only requirement is that it be made at the close of all the testimony and before submission to the jury. The rules governing the action of the court on request for directed verdict are well understood.

[2] It is the duty of the court to take the view of the evidence most favorable to the party against whom the direction is asked, and a verdict is properly directed only when the case is palpably for the party asking for the direction. *M. & O. Ry. Co. v. Yockey* (6th Circuit) 103 Fed. 265, 43 C. C. A. 228; *Milwaukee, etc., Ins. Co. v. Rhea* (6th Circuit) 123 Fed. 9, 60 C. C. A. 103; *Rochford v. Pennsylvania Co.* (6th Circuit) 174 Fed. 81, 98 C. C. A. 105. The credibility of a witness is peculiarly a question for the jury, and in the absence of established facts and circumstances, with which the testimony cannot be reconciled, it cannot be disregarded as incredible. *Rochford v. Pennsylvania Co.*, *supra*; *Byers v. Carnegie Steel Co.* (6th Circuit) 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214.

The argument that the evidence did not justify a finding that the coal car was in motion at the time of the collision is based upon the propositions, first, that plaintiff's evidence to that effect is unsupported by other witnesses; second, that it is shown by testimony of members of other switching crews that the coal car was not in motion at the time of the collision; third, that there was testimony, not denied by plaintiff, that the latter after leaving the hospital admitted to defendant's claim agent that he was not sure whether the coal car was moving or not; and, fourth, that plaintiff's original petition alleged that the coal car was at the time of the collision standing upon the switch track and so close to the lead track as not to leave sufficient clearance for the engine on which plaintiff was riding.

There was testimony by members of each of the three switching crews that the respective engines belonging to those crews were not working where they could possibly have bumped or pushed the string of cars to which the coal car belonged. There was also testimony that no other engines, except those belonging to the three regular switching crews, were working at the time in that part of the yard. There was, however, testimony that regular train engines did work in the yards, coupling or pulling out and putting in their trains, and the yard conductor of one of the regular switching crews, who was in sight of plaintiff when the collision occurred, was unable to say that there was no other engine working in the neighborhood at the time of the collision. Moreover, the defendant's foreman of car inspectors and repairmen testified that just before the accident he heard a sudden jar of cars shunted one or two car lengths on the left field track, towards the engine driven by plaintiff, and that he also saw the cars move. It is true that on cross-examination he testified that he should say he saw the moving cars "probably 15 minutes" before the accident; but as he did not see the accident, and as plaintiff had been removed to the hospital by the time the witness reached the place of the accident, his testimony was at least consistent with plaintiff's the-

Plaintiff's testimony that the coal car was in motion at the time of the collision was corroborated by these facts: The engine was at the time of the collision moving backward, the tender being thus in front of the cab. The tender and the cab were of precisely the same width. The testimony was practically uncontradicted that the tender received no substantial injury and gave no appearance of severe collision; the testimony of one witness being that it was merely scratched. The cab, on the other hand, was shown by the testimony of defendant's employés to have been seriously injured, the side being torn out or crushed in, and a steam pipe burst or broken. There was also testimony that the condition of the coal car was as "if the car had been cornered, the iron corner torn off, the end sill damaged, and the end plank broken." The testimony of these physical facts tended to show that the coal car was in motion at the time of the collision, from the fact that the greater force was apparently exerted against the cab.

It is urged by defendant that the difference in degree of impact upon the tender and cab may be explained by the swaying of the one or the other, either toward or from the coal car, at the time of passing. But this argument is, at best, addressed to the consideration of the jury. We think the testimony, taken together, presented a case peculiarly for the jury, involving, as it did, not only the credibility of witnesses, but the weight to be given to the physical facts referred to.

[3] The variance between plaintiff's original and amended petitions, and the testimony as to his admissions to defendant's claim agent, were proper subjects for consideration by the jury, as affecting the credibility of the plaintiff. We are unable to say that the jury, who saw and heard the plaintiff, were not justified in believing him, notwithstanding the discrepancies referred to, especially in view of the testimony of the serious injury to plaintiff's nervous system occasioned by the accident, and the action of the court in overruling a motion for a new trial.

[4] We think the court did not err in submitting to the jury the question whether the coal car was in motion at the time of the collision.

[5] We also think that the court would not have been justified in instructing the jury, as a matter of law, that the plaintiff was guilty of contributory negligence in momentarily turning his attention from what was, as testified, a clear track a considerable distance ahead, to an adjustment of the injector. Whether this brief diversion of attention was, under the circumstances, negligence, was properly a question of fact for the jury.

In our opinion, the court did not err in submitting the case to the jury, and the judgment of the Circuit Court must accordingly be affirmed, with costs.

KING et ux. v. LAMBORN et al.

(Circuit Court of Appeals, Ninth Circuit. March 10, 1911.)

No. 1,913.

1. VENDOR AND PURCHASER (§ 33*)—VALIDITY OF CONTRACT—FRAUDULENT REPRESENTATIONS.

To entitle a purchaser of land to a rescission on the ground of fraudulent representations, they must be clearly and satisfactorily established, must have been material, and have been relied on, constituting the very ground on which the transaction took place.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40-44; Dec. Dig. § 33.*]

2. VENDOR AND PURCHASER (§ 33*)—VALIDITY OF CONTRACT—FRAUDULENT REPRESENTATIONS.

To invalidate a contract for the purchase of land on the ground of false representations, it is not always essential that the party making them knew them to be false, but it is sufficient if he made them without knowing whether they were true or false.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40-44; Dec. Dig. § 33.*]

3. VENDOR AND PURCHASER (§ 33*)—VALIDITY OF CONTRACT—FALSE REPRESENTATIONS—RIGHT TO RELY ON REPRESENTATIONS.

A purchaser cannot disaffirm a contract for the purchase of land on the ground that it was induced by false representations made by the other party, if he had the means of ascertaining the truth readily at hand, whether or not he made use of any such means.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40-44; Dec. Dig. § 33.*]

4. VENDOR AND PURCHASER (§ 108*)—RIGHT OF PURCHASER TO RESCIND—FRAUDULENT REPRESENTATIONS—INVALIDITY OF CONTRACT.

Misrepresentation by a vendor as to material facts by which a purchase of property is intentionally induced amounts to a fraud which vitiates the contract, and entitles the purchaser to rescind, even though he may have sustained no pecuniary loss.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 108.*]

5. VENDOR AND PURCHASER (§ 36*)—CANCELLATION OF INSTRUMENTS (§ 55*)—RIGHT OF PURCHASER TO RESCIND—FALSE REPRESENTATIONS.

A complainant who was induced to purchase an interest in land containing a coal mine owned by defendant by false representations as to the quantity of coal which had been taken from the mine within the past year, which, it was stated, had all been marketed locally, there being no facilities for shipping, whereas, in fact, not more than a third of such quantity had been mined, and there was not market for more, was entitled to a rescission of the contract in equity, although his co-complainant, who acted as agent for defendant in making the sale to him and who also purchased a separate interest at the same time, was a party to the fraud, or presumably cognizant of the true facts, and was not entitled to relief.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 52, 53; Dec. Dig. § 36,* Cancellation of Instruments, Dec. Dig. § 55.*]

6. WORDS AND PHRASES—“DAMNUM”—“INJURIA.”

There is a distinction between “damnum” and “injuria.” The former means only harm, hurt, loss, damage; while the latter comes from “in,” against, and “jus,” right, and means something done against the right of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the party, producing damage, and has no reference to the fact of the amount of damage.

[For other definitions, see Words and Phrases, vol. 2, pp. 1823, 1824; vol. 4, p. 3614.]

Appeal from the Circuit Court of the United States for the Southern Division of the District of Idaho.

Suit in equity by Arthur H. Lamborn and John G. Richards against Harry G. King and Maria J. King, his wife. Decree for complainants, and defendants appeal. Reversed as to complainant Richards, and affirmed as to complainant Lamborn.

Clark & Budge, for appellants.

J. H. Richards and Oliver O. Haga, for appellees.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. Appellant Harry G. King purchased in September, 1907, from one F. M. Pollard a coal mine comprising 480 acres of land, at a price of \$30,000, situated from two to three miles from Salmon City, in Idaho. The defendant Richards was at the time living in Salmon City, and an intimate friend and acquaintance of King. At the suggestion of King, they visited the mine and inspected the tunnel and room in which Pollard had been extracting coal, known as the "Pollard Workings." Richards became fairly familiar with the conditions of the mine, but without making any scientific investigation of the quality of the coal found therein. Then and thereafter they discussed with each other the possibility of selling the mine, King wanting Richards to sell it for him. Tentatively they fixed the selling price at \$75,000, and Richards was to receive \$25,000 for his services. No definite agreement was arrived at, however, until Richards had gone to Winfield, Kan., when the parties entered into a written contract whereby King gave to Richards an option to purchase the mine, including the lands, at the price of \$80,000; it being understood between them, aside from the agreement, that, if Richards succeeded in making a sale at that figure, he should receive \$30,000 as his compensation. A correspondence continued between them, Richards suggesting and insisting that they would be more successful in the end if he would sell a one-half interest only at first, and later the balance, and, further, he was of the opinion he could do better if he himself would pretend to take an interest while negotiating the sale. Such was clearly the idea and purpose of Richards in pursuing his endeavor to dispose of the mine. In evidence of this he wrote to King January 23, 1908:

"Am offering one half interest and supposed to be taking care of the other half with you. Of course, I must be supposed to be putting in some money myself."

Again on March 12, 1908, he wrote:

"Of course, I am selling only a one half, but I desire to represent that I am investing some too so that a contract for the whole is necessary."

And still later wrote, to wit, June 13, 1908:

"I am trying on a basis of \$40,000 for the $\frac{1}{2}$ interest representing that I am buying the $\frac{1}{4}$ which we can fix up all right between us."

Richards personally had some acquaintance with Lamborn, meeting him while traveling. They became quite friendly, and discussed somewhat possible investments if opportunity should arise. After procuring the contract from King, Richards went to New York, the home of Lamborn, with a view of selling him an interest in the mine. Lamborn became favorably impressed with the project, and was induced to make a trip from New York to Salmon City for closing the negotiations. While in Ohio, either at Bethel or Cincinnati, and on his way to New York, Richards received a letter from King, telling him, among other things, that he had supplied about 2,000 tons of coal to the local market. The letter having been lost, the contents were testified to, but it was shown to Lamborn in New York, and during the time of Richards' discussion with Lamborn respecting the sale to him of an interest in the mine. Richards, at the request of Lamborn, telegraphed to King from New York for a statement from him respecting the tonnage of coal produced by King, to which he received King's reply, "2,300 tons." Lamborn testified relative to the letter that it stated in a general way that the output had been 2,300 tons during the period from the previous September up to the time the letter was written, namely, April or May. As to the telegram, he says the reply came back that the product was 2,300 tons; the same being received either the 10th, 11th, or 12th of June. Richards says the reason for Lamborn's wanting the information was that "he was considering becoming a partner with me in taking over this property." Richards returned to Salmon City, and Lamborn came out later, arriving the latter part of July, 1908. Richards and Lamborn visited the mine three different times, but were unable to get far into it because of bad air. A new tunnel had been driven since the purchase by King from Pollard, and the Pollard entry was practically obstructed by a caving of the wall or ceiling, so that it could not be conveniently entered. King, while he was working the mine, carried the old tunnel beyond the Pollard workings some distance, and the coal produced for the market previous to the negotiations with Lamborn was from the workings, which locality is subsequently spoken of as the "Old Room." After different conferences between King, Richards, and Lamborn, an agreement was arrived at for the sale by King to Lamborn and Richards of a three-fourths interest in the mine. This was later, on July 30, 1908, reduced to writing, and is in purport as follows: King agreed to convey the mine, including the 480 acres of land, to the Idaho Coal & Land Company, Limited, a corporation to be subsequently organized, in consideration of which Richards and Lamborn agreed to pay King \$7,500 in cash, the further sum of \$22,500 on or before January 1, 1909, and Lamborn to execute to King in addition four promissory notes for \$2,500 each, payable, respectively, January 1, 1910, 1911, 1912, and 1913, making a total consideration of \$40,000. It was further agreed that when the corporation was formed, which was to be capitalized at

\$200,000, King should have one-fourth of the stock, Richards one-fourth, and Lamborn one-half. The mine was then to be bonded for \$80,000, and from these King was to receive \$40,000, and Richards and Lamborn the remainder; the contract stating \$7,500 to Richards and \$32,500 to Lamborn. At the time of closing the contract, however, Lamborn paid King by check \$5,000, Richards paid him \$1,000, and gave him his notes, two in number, aggregating \$1,500. On or about January 1, 1909, Lamborn paid to King the further sum of \$15,000, and Richards delivered to King his three promissory notes for \$2,500, each payable in six months from January 1st, and according to the agreement Lamborn executed and delivered to King the four notes specified in the contract aggregating \$10,000. Richards and Lamborn entered into possession of the mine, and continued to work it until in January, 1909, when Richards claimed to have ascertained that King had misrepresented certain facts which induced himself and Lamborn to purchase, and in March following they concluded on account of such misrepresentations and fraud to rescind the contract in toto. Accordingly in June following this suit was instituted for that purpose. The complaint, after setting forth the agreement and payments made and obligations executed in pursuance thereof, alleges as ground of fraud for rescission, among other things:

"That the said defendant stated and represented that the entire breast of what was known and designated as the 'old room' in the workings and excavations on said property was clean coal, and did not require any sorting, and was the same strata as the upper strata then exposed at the breast of the new entry, when in truth and in fact at the time of making the above-mentioned statements and representations the said defendant Harry G. King knew the same, and each of them, to be false and untrue. * * * The defendant Harry G. King fraudulently and falsely stated and represented to your orators, and each of them, that during the 11 months immediately preceding the making of such contract, 'Exhibit A,' that the said defendant Harry G. King, in developing such property and in extracting coal therefrom, had mined 2,300 tons of coal from such property, and had sold that amount of coal to consumers residing in and around the said town of Salmon City, and that, had he (the said Harry G. King) not been prevented from soliciting orders personally by reason of his banking and other business, he could have mined therefrom and sold in said community 3,000 tons of coal during such time. * * * The said defendant Harry G. King falsely and fraudulently stated that he had mined and sold from such premises during the time above mentioned 300 tons of coal to the Copper Queen mine, when, in truth and in fact, the said Harry G. King at the time of making such statements and representations knew the same to be false and untrue, and knew that the said defendant had not during the said time mined or extracted from the said premises or sold to consumers to exceed 700 tons of coal, and that the defendant during such time had not mined from said premises for or sold to the said Copper Queen mine to exceed 25 tons of coal. And your orators were greatly deceived and injured by such false and untrue statements; and the said premises and property are practically of no value whatever."

The plaintiffs prevailed in the Circuit Court, and the defendants are appellants herein. In support of the suit, the plaintiffs, appellees here, base their right of relief upon three specific representations alleged to have been made by King, claimed to be false and fraudulent within the knowledge of King, and made for the purpose of deceiving

and misleading Richards and Lamborn, and inducing them to enter into the agreement to purchase, namely:

"(1) That the entire breast of what was known as the 'old room' in the workings of the property included in such contract contained more than five feet of clean coal that would not require sorting.

"(2) That during the 11 months immediately preceding the making of such contract the appellant Harry G. King had extracted and sold from such property more than 2,300 tons of coal to the people around Salmon City.

"(3) That during the same time he had also mined from such property and sold to the Copper Queen mine 300 tons of coal."

The appellants deny that the representations were made or that they were designed to mislead or deceive the appellees, or that they were so induced to enter into the agreement.

As it relates to all these specifications of misrepresentation and fraud, it is not at all probable that Richards was either deceived or misled by any of them to his injury in any respect. He had been in the mine prior to any negotiations looking toward a sale, and had seen the Pollard workings, and was otherwise familiar with its product from whatsoever point it was obtained. But beyond this he and King were on the most familiar terms, and he was King's confidential agent in disposing of the mine. Their correspondence alone shows this, and the oral testimony adduced herein is strongly corroborative of the relationship. Indeed, it is satisfactorily shown in connection with the negotiations for this particular sale. Richards says in his letter from New York to King, while then trying to sell the property to Lamborn, "I am * * * representing that I am buying the $\frac{1}{4}$ th which we can fix up all right between us." Six days later, to wit, on June 19, 1908, he, at the instance of Lamborn, telegraphed an inquiry as to whether King would accept certain definite terms for a sale of a three-fourths interest in the mine, but on the next day wired to King suggesting the answer he should make to the telegram, in words as follows: "Impossible to accept terms, wish you would come on here." King answered as suggested. Following this correspondence, Richards preceded Lamborn to Salmon City some time, and had ample opportunity to discuss fully all the features of the proposed transaction before the latter arrived. If Richards was not in reality a party to all these alleged false representations, he was so intimately related to King that he can scarcely be heard to deny knowledge, or deny that they were made with his assent. Manifestly he has not come into court with clean hands such as will entitle him to relief in equity. If there was intrigue attending the transaction, he was at least presumably a party to it.

We are to inquire, then, touching what misrepresentations were made by King, if any, and, if made, how they affected Lamborn. Mr. Lamborn testified concerning the particular specifications of misrepresentations as follows:

"Q. I wish you would state what he said relative to the production of the property for the previous 11 months, if anything.

"Witness: He reiterated the statement he had made to Mr. Richards in writing, and stated that he had produced and sold and delivered 2,300 tons and more in the city of Salmon, in addition to which he had produced, sold, and delivered 300 tons to the Copper Queen mine, some 30 or 40 miles away,

and that he had the anticipation of delivering a very much larger quantity to them, because they had shut down after using this quantity and expected to open up again.

"Mr. Richards: Q. What statement did he make relative to the workings that you were not able to investigate because of the bad air and—

"A. I called Mr. King's attention to the upper vein, and he told me that in the old workings the quality of the coal was exactly like they were delivering in town, and that it didn't need sorting. At that time they were not delivering, but he said there was some in the bins, and we examined that.

"Q. What did he say as to the face of the breast you couldn't see being that kind of coal?

"A. He said it was clean coal. He said the whole breast was $5\frac{1}{2}$ feet of clean coal; he pointing out the fact that as we went into the tunnel the seams became wider and wider. He said that eventually would come out in the same way that they had in the old workings. * * *

"Q. What induced you, then, to enter into this contract?

"A. My confidence in Mr. King.

"Q. And upon that basis you made the contract?

"A. I did. * * *

"Q. Upon what percentage investment basis did Mr. King say that the property would pay, relative to the production he had stated to you?

"Witness: When I came to Salmon, I specifically asked him to show me just exactly what interest—not dividend, understand—but what interest on the bonds this would pay; and he figured out that on the 2,300 tons that it would pay \$7,800 on the total production that he had had; that 6 per cent. on the amount of bonds that we would issue to ourselves on this property would require \$4,800, and the balance would go to working capital, developing the property, and getting it in a position so that, if a railroad ever came through there, we could mine it much faster than the consumption of Salmon, Idaho, would take.

"Q. And you invested your money and entered into a contract on that basis?

"A. I did."

The witness further stated that he became dissatisfied with the purchase because it subsequently developed that King had not produced by a very large margin the amount of coal from the mine that he represented he had, and this constituted his principal reason for wanting to rescind.

In operating the mine under Richards' and Lamborn's charge, it soon became apparent that the output of the mine was falling largely short of what it had been represented to yield in the previous year, and yet the demand for the product in Salmon City was kept fully supplied. In reality it was found that the demand would not warrant any greater output.

Lamborn's testimony touching the alleged misrepresentations made by King is substantially corroborated by Richards, and, as to the principal, one is further substantiated by the alleged lost letter and telegram to Richards, both of which were shown Lamborn. The testimony of Richards and Miller, the latter of whom was the superintendent of the mine under King, show that King produced within the specified 11 months not to exceed 700 or 800 tons of coal, and had shipped to the Copper Queen mine less than the alleged 300 tons. King denies that he ever represented to Lamborn that the coal did not need sorting, but it is significant that, while admitting practically that he made the reputed representation respecting the quantity of the coal produced, he was unable to show with any convincing detail

the truth of his statement. King was a man of high standing for business integrity, and Lamborn relied, as we believe, upon his statements. And, while the first specification of misrepresentation may not be established with that clear and satisfactory proof as is required for rescinding, we are convinced that the latter two specifications are fully substantiated. It is enough to say that these misrepresentations were knowingly made with a view of misleading and deceiving Lamborn and inducing him to enter into the purchase in question, and that relying thereon he did make the purchase. Whether Richards purchased a one-fourth interest, or whether he was simulating a purchase only, is problematical. While in New York we are left to infer that he was representing only to Lamborn that he was buying, and left the matter to be finally arranged between King and himself. But, whether or not he finally purchased a one-fourth interest, the interest was kept distinct from the interest of Lamborn. This is established by the manner in which the payments were made, each paying and becoming obligated to the extent only of his own interest. Lamborn knew that Richards was to share with him the commissions he would be entitled to in making the sale, but in what proportion was not arranged, nor was he advised as to that until Richards wrote him upon the subject. The circumstance, however, is not material. Richards accepted bonds in lieu of his commission, which proved to be unmarketable.

The principal question of legal import is whether the relief demanded can be administered without its being first established by the appellees that they have suffered some substantial injury in a pecuniary way. We may say before proceeding to an examination of the question and kindred subjects that, while it is clear that Richards ought not to recover, that fact ought not to militate against Lamborn's obtaining relief, if otherwise entitled to it under the law. He was, so far as the facts go to show, the innocent party in the transaction, and he ought not to suffer because he was misled and overreached by a fraudulent co-purchaser in whom he placed faith and reliance. As between Richards and King, the court will leave the parties where it found them.

[1] Fraud is never presumed; and, where it is sought to recover on account of imposition through alleged fraud and deceit, the facts sustaining the charge should be clearly and satisfactorily established. This is true wherever it is sought to be shown, whether in an action at law or suit in equity. If misrepresentations are made to form the basis of relief, they must be shown to have been predicated of a material fact, and to be in truth what they are alleged to be. Furthermore, the party complaining must have relied and acted upon them either implicitly, or in the reasonable belief of the truth of what they purport to assert, and, of course, they must constitute the very ground on which the transaction took place, being proximate, immediate, and material.

[2] Nor is it always essential that the party making the representations knew them to be false. It is sufficient that he ventured the assertions without knowing whether they were true or false; "for" it is said that "the affirmation of what one did not know or believe to

be true is equally in morals and law as unjustifiable with the affirmation of what is known to be positively false." Southern Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42; Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219, 37 L. Ed. 1215; Trenchard et al. v. Kell (C. C.) 127 Fed. 596; Simon v. Goodyear, 105 Fed. 573, 581, 44 C. C. A. 612, 52 L. R. A. 745.

[3] If the party complaining has the means of knowledge as readily at hand as the party making the false representations, upon which the former has occasion to act, it is incumbent upon him to avail himself thereof, and, if he neglects or omits so to do, he will not be entitled to favorable consideration, for he cannot shut his eyes to the things that are before him. So, if it be that such a party has investigated for himself, seeking from other quarters the verification of the statements, has not been impeded in his inquiry, and has made it as full and searching as he chose, he cannot well insist that he relied upon the verity of such statements. *Farrar v. Churchill*, *supra*; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; *Slaughter v. Gerson*, 13 Wall. 379, 20 L. Ed. 627.

In the case at bar it is clear that the means of knowledge for obtaining information touching the quality of the product of the mine, also as it respects the quantity of coal sold the previous 11 months and the extent of the market therefor within and about Salmon City were not at hand, and that complainants were without available opportunity to investigate for themselves. Furthermore, it does not appear that Lamborn attempted any independent investigation of his own. He could not investigate the old room of the mine because it was closed to entrance at the time, and he could not know how to direct inquiry to verify King's statement as to the quantity of coal produced and the market for its sale.

[4] Now to the principal question. It is quite true that, where pecuniary recovery is sought on the grounds of misrepresentation and deceit, the measure of damages is the difference between the actual value of that which the complainant parts with and the actual value of that which he receives under his contract. The rule excludes all speculation and is limited to compensation only, and relates to the loss really sustained in a pecuniary sense. *Smith v. Bolles*, 132 U. S. 125, 10 Sup. Ct. 39, 33 L. Ed. 279; *Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113. The rule, however, does not always afford relief to one who has been misled and entrapped into purchasing something he did not bargain for. There may be an injury without pecuniary loss that is as revolting to conscience as if actual damages had ensued. So it is there is a distinction between "damnum" and "injuria." The former means only harm, hurt, loss, damage, while the latter comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact of the amount of damage. *West Virginia Transportation Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 56 L. R. A. 804, 807, 88 Am. St. Rep. 895.

As was said by Archbald, D. J., in *Mather v. Barnes, etc.* (C. C.) 146 Fed. 1000, 1004:

"The general principles upon which a suit of this kind proceeds are too well settled to need the citation of authorities. A misrepresentation with regard to material facts by which a purchase of property is intentionally induced amounts to a fraud which vitiates the transaction, and entitles the purchaser to be relieved. * * * Neither does it matter if misrepresentation be proved that the bargain, even so, was a good one, from which the purchaser is likely to sustain no loss. In an action of deceit, no doubt, this would be relevant on the question of damages in order to show that there were none; * * * but not so upon a bill to rescind. *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805; *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049. The purchaser is entitled to the bargain which he supposed and was led to believe that he was getting, and is not to be put off with any other, however good. It is of no consequence in the present instance, therefore, that the plaintiffs got coal lands of intrinsic value, which are worth perchance all that was paid for them, if they were fraudulently induced to believe by representations for which the defendants are responsible that the upper Freeport vein, for which they negotiated, underlaid the whole property, whereas, in fact, it extends over but a comparatively limited part."

The principle is pointedly illustrated in *Hansen v. Allen*, the case cited by Judge Archbald. The plaintiff was shown one piece of land, but purchased another, believing in reliance upon the representations of the agent of the vendor that he was purchasing the one shown him. In deciding the case, Cassoday, C. J., speaking for the court, said:

"It is claimed that even if the plaintiff was induced to make the contract by such fraud, yet there is a failure on the part of the plaintiff to show that he was actually damaged by reason of such fraud. It is enough to say that the plaintiff was entitled to have the particular piece of timbered land with a stream of water upon it which had been pointed out to him, and for which he had actually contracted, instead of a different piece of land situated at some other place."

So it was directly held in *MacLaren v. Cochran*, 44 Minn. 255, 258, 46 N. W. 408, 409:

"If a party is induced to enter into a contract by fraudulent representations as to a fact which he deems material, and upon which he has a right to rely, he may rescind the contract upon the discovery of the fraud, and the party in the wrong should not be heard to say that no real injury can result from the fact misrepresented."

To the same purpose, see *Williams v. Kerr*, 152 Pa. 560, 25 Atl. 618; *Potter v. Taggart*, 54 Wis. 395, 11 N. W. 678; *Martin v. Hill*, 41 Minn. 337, 43 N. W. 337; *Harlow v. La Brum*, 151 N. Y. 278, 45 N. E. 859; *Wainscott v. Occidental Bldg. & Loan Ass'n*, 98 Cal. 253, 33 Pac 88; 14 Am. & Eng. Ency. of Law (2d Ed.) 140.

Authorities are cited, none from the federal courts, however, which are in apparent conflict with these. Among them are the following: *American Bldg. & Loan Ass'n*, 48 Neb. 455, 67 N. W. 500; *Jakway v. Proudfit*, 76 Neb. 62, 106 N. W. 1039, 109 N. W. 388; *Cochran v. Pascault*, 54 Md. 1; *Wenstrom Consolidated Dynamo & Motor Co. v. Purnell*, 75 Md. 113, 23 Atl. 134; *Bom v. Rosser*, 131 Ala. 215, 31 South. 430. But they do not appeal to our judgment as founded upon the better reasoning or voicing the sounder rule.

[5] The complainant Lamborn was led to believe and supposed that he was purchasing a mine that was producing about 2,600 tons

of coal per annum, and that for 2,300 tons thereof there existed a local market wherein it could be readily and continuously disposed of as produced at a rate which would yield a good profit, namely, \$6 per ton and above. This it was calculated would produce returns sufficient to pay the accruing interest on the eighty thousand dollar bond issue and leave a margin of \$3,000, with which to develop the mine. Now a mine that will do this having an ample market for its product is a very different thing from a mine that produces not to exceed 800 tons of coal per annum, and with a market of no greater proportion. The profits at best would yield but half enough to pay the fixed charges so arranged for by the very terms of the contract to purchase, saying nothing of any surplus for development purposes. So it is that Lamborn in good conscience did not get the thing he bargained for. And it could make no difference that the mine was in reality worth all that he agreed to pay for it, or that the land is now worth that amount for agricultural purposes. He was not buying agricultural land, but a mine capable of a certain tonnage product of coal, having a local market for the disposal of such product. This he did not get, and is therefore entitled to have the contract rescinded.

The decree of the Circuit Court will be modified, awarding the relief prayed for as to Lamborn, but dismissing the complaint as to Richards, with costs in favor of the appellee Arthur H. Lamborn and against the appellants.

KATALLA CO. v. RONES.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1911.)

No. 1,919.

1. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

In an action for injuries to a servant by the fall of the hammer attached to a pile driver, evidence *held* to require submission to the jury of the questions whether a "chock block" was attached to the pile driver as a safety appliance for the hammer to rest on when suspended, and whether such block was a usual adjunct of a pile driver as a reasonable device designed to protect workmen against injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1050; Dec. Dig. § 286.*]

2. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMED RISK.

An employé may assume that reasonable care will be observed by his employer for his protection, except that the employé assumes the risk of a defect in machinery which is known to him, or is so patent and obvious as to be readily observable while engaged in the work, in case he continues to operate the defective machine notwithstanding such defect.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

3. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—ASSUMED RISK.

Plaintiff, a laborer at work on the third platform of a pile driver 50 feet or more in height, was injured by the accidental fall of the hammer due to the alleged absence of a "chock block" to hold the hammer suspended when not in use. The block should have been attached on the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fifth platform or within 10 feet of the top of the machine. Plaintiff was at the top of the pile driver twice during his prior work about it to oil the pulleys. *Held*, that the absence of the block was not such an apparent defect that plaintiff would be charged with notice thereof so as to impose on him an assumption of risk as a matter of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—EVIDENCE.

In an action for injuries, the complaint alleged that by reason of the injuries plaintiff had lost the use of the muscles of his left leg, had lost a great deal of feeling, and that he could not properly control his left foot. Plaintiff's physician testified that there was some swelling in the limb extending to the foot and ankle; that there had been a sore on the heel which would not heal, apparently made from pressure; and that it might have been by direct injury or have resulted from pressure. *Held*, that defendant was not prejudiced by the court's permitting plaintiff to testify over objection that he had a sore on his heel, that suppurated at times, which was nearly half an inch deep, and to exhibit his foot to the jury, though the testimony was not strictly relevant under the allegations and complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153; 4166; Dec. Dig. § 1050.*]

5. TRIAL (§ 296*)—INSTRUCTIONS—INSTRUCTION AS A WHOLE.

An instruction was not erroneous as eliminating the defense of assumed risk, where such defense was fully presented by another instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-718; Dec. Dig. § 296.*]

6. COURTS (§ 321*)—FEDERAL COURTS—CONTROVERSIES BETWEEN CITIZENS AND ALIENS.

Under Act Aug. 13, 1888, c. 866, 25 Stat. 433 (U. S. Comp. St. 1901, p. 508), giving Circuit Courts original cognizance over controversies between citizens of a state and foreign states' citizens or subjects, an alien may sue a citizen in the Circuit Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 845-849; Dec. Dig. § 321.*]

7. REMOVAL OF CAUSES (§ 41*)—SUIT BY ALIEN AGAINST CITIZEN.

A suit by an alien in a state court against citizens or a corporation being a resident of a state other than that in which the suit was instituted is removable to the federal Circuit Court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 82½-84; Dec. Dig. § 41.*]

8. REMOVAL OF CAUSES (§ 86*)—JURISDICTION—PETITION.

A federal court can only acquire jurisdiction of a removed cause when the petition for removal states facts sufficient to warrant the process, as neither consent, agreement of the parties, nor estoppel can confer such jurisdiction; it being essential that the record shall affirmatively show that jurisdiction exists.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 132, 166-179; Dec. Dig. § 86.*]

9. REMOVAL OF CAUSES (§ 100*)—FAILURE OF JURISDICTION—EFFECT.

On removal of an action to a federal court, if the record does not affirmatively show jurisdiction, the court will on its own motion decline to exercise further jurisdiction over the cause.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 213; Dec. Dig. § 100.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

10. REMOVAL OF CAUSES (§ 108*)—DISMISSAL—GROUNDS—DISTRICT—WAIVER.

Plaintiff, who was in fact an alien, sued defendant in the state courts of Washington to recover for an alleged injury while in defendant's employ; defendant being a citizen and resident of New York. Defendant filed a petition to remove the cause to the federal court sitting in Washington, alleging that plaintiff was a citizen of Washington and a resident of the Western district thereof. Defendant after removal answered the complaint, and entered on the trial without objection where it appeared that plaintiff was an alien, whereupon defendant moved to dismiss for want of jurisdiction. *Held*, that since the removal petition showed a valid ground for removal and the evidence disclosed an equally sufficient, though different ground, and defendant by its removal proceedings had waived its right to be sued in the district of its residence, the court had jurisdiction to try the cause, and that the motion to dismiss was properly denied.

[Ed. Note.—For other cases, see Removal of Causes, *Cent. Dig.* § 217; *Dec. Dig.* § 108.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by Iver Rones against the Katalla Company. Judgment for plaintiff (182 Fed. 946), and defendant brings error. Affirmed.

Bogle, Merritt & Bogle, for plaintiff in error.

J. A. Sorley and L. C. Stevenson, for defendant in error.

Before GILBERT and MORROW, Circuit Judges, and WOLVERTON, District Judge.

WOLVERTON, District Judge. This writ is from a judgment obtained by the defendant in error against the plaintiff in error on account of personal injuries received while in the latter's employ. The case was commenced in the state court, and on petition of the defendant in the original cause was removed to the Circuit Court of the United State for the Western District of Washington. The defendant was engaged in construction work which required the use of a pile driver. While at work upon such pile driver the plaintiff was injured by the accidental and unintentional falling of the hammer. The pile driver was about 50 feet in height, being provided with 5 platforms, one above the other, at a distance of about 8 feet apart, upon which the men worked in adjusting the piling within the leads for receiving the blows from the hammer. The plaintiff was at work on the third platform, and at the instant was trying to pry loose a pile that had become fastened up against the fourth platform or "guard," as it is termed in the testimony, when the hammer fell, striking him a glancing blow on the hip and thigh, causing the injury complained of. The negligence complained of is set forth in the complaint as follows:

"That the defendant was grossly negligent in the construction of said pile driver, and in not furnishing plaintiff a safe appliance and safe place to work, in this: that said pile driver was so carelessly and negligently constructed that the framework was loose and was not properly fastened or braced, and would sway back and forth to such an extent that the hammer which hung suspended would jerk the cable, and that defendant was negligent, in this: that it failed and neglected to provide a chuck or block at or near the top of said pile driver for the hammer to rest upon when so sus-

*For other cases see same topic & § NUMBER in *Dec. & Am. Digs.* 1907 to date, & Rep'r Indexes

pended, so as to guard and prevent the hammer from dropping down and injuring the workmen underneath it."

The plaintiff was employed by defendant as a common laborer, and began work as such on March 15, 1909. On April 2d he was put to work on the pile driver. He worked in that capacity part of that day, the next day, and was injured on the 4th. This was the extent of his work on the pile driver at that particular time, but he had worked on one for about a month the year previous. He did not notice, so he testifies, whether there was a chock block for securing the hammer when not in operation on this machine or not at the time or before he was hurt. Another witness testified, however, that he examined the pile driver shortly after the accident, and that it contained no such device. There is further slight corroboration of this. Upon the other hand, the defendant produced a witness who says that when the machine was erected on March 29th, previous to the accident, the chock block was put in place, and another who remembers that the block, with the other parts of the pile driver, was shipped from Tacoma to Cordova, the place where the accident occurred. Other testimony was adduced tending to show that the usual method of construction of a pile driver was to provide it with a chock block attached near the top for the hammer to rest upon while not in operation, this as a means of safety to the workmen, as the hammer was liable to fall while being held suspended by the engine. The cable for raising the hammer was operated around a drum which in the present instance was held stationary by a dog, by means of which instrumentality the hammer was allowed to remain suspended while the work of getting the piling in place was going on. Opposed to this evidence was adduced to the effect that the chock block was not always used on pile drivers, and that their operation was safe without it. Under this state of the evidence, the jury, being instructed by the court, found for the plaintiff.

Several errors are assigned upon the record. We will take them up, examine, and dispose of them in the order in which they are presented by the argument of counsel in their brief.

It is first insisted, this upon motions for a nonsuit, directed verdict, and judgment notwithstanding the verdict, that the evidence shows, first, that the pile driver was furnished with a chock block, the want of which is complained of; and, second, that, if the block was not in place, plaintiff should have known it, and therefore assumed the hazard attending his service. A glance at the evidence, the purport of which, as it pertains to the question involved is above set forth, demonstrates that there was a sharp dispute first, as to whether any block or attachment of the kind was in place or affixed to the pile driver at the time; and, second, as to whether the block was a usual adjunct to such a machine as a reasonable device designed to protect the workmen against injury. Both these questions were therefore for the jury, and were properly submitted for their consideration.

As to the second contention, there exists an exception to the general rule that an employé may assume that reasonable care will be observed by his employer for his protection, which is that where a defect in machinery is known to an employé or is so patent and obvious as to

be readily observable while engaged in his work, and he continues in the use and operation thereof notwithstanding the defect, he assumes the risk and hazard attending such use. The reason for the exception is that having such knowledge or possessed of the ready means of acquiring it and shutting his eyes to palpable conditions, he elects to engage in the service, and therefore to undergo the hazard on his own account. It is said that "the question of assumption of risk is quite apart from that of contributory negligence," and that "the employé is not obliged to pass judgment upon the employer's methods of transacting his business but may assume that reasonable care will be used in furnishing the appliances necessary for its operation." Choctaw, Oklahoma, etc., R. R. Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 25, 48 L. Ed. 96.

The pile driver was a structure of considerable proportions, being 50 feet or more in height. The block in question should have been attached on the fifth platform, or within 10 feet of the top of the machine, and the plaintiff was working on the third platform, about 16 feet below where the block should have rested. These dimensions are taken from defendant's Exhibit 1, showing the plan of a pile driver. Now, can it be said as a matter of law that the plaintiff should have seen and comprehended this specific defect in the machine under such conditions? True, the plaintiff was at the top of the pile driver twice during the time he was working about it for the purpose of oiling the pulleys over which the cables ran for raising and lowering the hammer and passed above the position for the block. But it cannot be expected of employés that they shall examine machinery in detail with or about which they are required to work to determine as to the safety of its operation; nor was it to be expected that plaintiff should take pains to ascertain as to this particular defect. A prudent person might have gone up and down as he did and his attention not have been attracted to the absence of the block, or the particular condition of the structure at the point where it should have been. As, generally speaking, an employé does not assume the risk incident to his employer's negligence, the case ought to be a clear one under the exception to charge him with the assumption of the hazard which arises by reason of such negligence in failure to provide a safe place in which to work or safe implements with which or machinery about which to work. We are satisfied that the case was a proper one for the consideration of the jury.

Dr. E. M. Brown was examined as a witness touching the extent of the injuries received by the plaintiff. Among other things, he testified that there was some swelling in the limb, extending to the foot and ankle; that there has been a sore at all times on the heel which would heal over for a week or two at a time; that it was apparently made from pressure; and that "it might have been by direct injury, or it might have been from pressure." This testimony went in without objection. Prior thereto the plaintiff as a witness in his own behalf was permitted to testify, over objection, that he had a sore on his heel that suppurated at times, which was nearly one-half an inch deep, and at the same time removed his shoe and exhibited his foot

to the jury. Error is assigned because of the action of the court in permitting the testimony to go to the jury on the ground that it was irrelevant under the allegations of the complaint. The complaint states, among other things:

"That by reason thereof [the injuries received], and as a direct result thereof, plaintiff has lost the use and control of the muscles of his left leg, and has lost a great deal of feeling, and that he cannot properly control his left foot."

It may be that this testimony was not strictly relevant under the allegations of the complaint, but from a survey of the entire testimony, both that admitted with as well as that admitted without objection, it is manifest that the error was harmless. Dr. Brown explains in effect that the sore might or might not have been the result of the injury. The testimony of plaintiff, with this explanation of the physician, is too inconsequential upon which to base a reversal of the cause.

The next exception is to the instruction of the court as follows:

"Now, gentlemen, by going into these principles of law with some detail, I have not departed from the general principle, which is an easy one to bear in mind, viz.: That the defendant was under the obligation to use reasonable and ordinary care such as I have defined to provide the plaintiff with a reasonably safe place to work on, and, if it did that, it has discharged its duty. If it did not do that, it did not discharge its duty, and, if its negligence caused the injury, then, in the absence of contributory negligence, the plaintiff would be entitled to recover."

The ground of exception is that it told the jury that they could find against the defendant if they found defendant negligent as alleged, unless the plaintiff was guilty of contributory negligence. This, it is claimed, eliminated the defense of assumption of risk. That was not all of the court's instruction, however. A little later it continues:

"Now, further, even though the defendant company did not do its duty in regard to furnishing a chock block, if you find that the chock block was required under the rules that I have given you, nevertheless, if the absence of the chock block was an obvious and apparent thing, then the plaintiff by going to work or continuing to work in the absence of the chock block would assume the risk of that absence; the rule being that an employé finding himself, or being put in a position, where it is apparent and obvious to him that the employer has not furnished a reasonably safe place, nevertheless, if he continues, in spite of that apparent condition of affairs, to work there, he assumes the risk of injury resulting from that apparent condition which is open and obvious to him."

This further instruction is a complete answer to counsel's objection. The entire instructions should be construed together, and such construction obviates the objection.

The next and last exception insisted upon goes to the jurisdiction of the Circuit Court of the United States to try the cause. The removal from the state court was procured by the defendant upon its petition showing diverse citizenship, in that the plaintiff was a citizen of the state of Washington and a resident of the Western district thereof, and the defendant a citizen and resident of the state of New York. It early developed at the trial and during the introduction of evidence that the plaintiff was an alien, a subject of Norway, that he had taken out his first papers, but had not as yet been admitted to citizenship, whereupon the defendant moved to dismiss the case for want of juris-

diction; and the question presented is whether the court should have done so, it having denied the motion. It should be further stated that the defendant filed its answer to the complaint after the removal of the cause had been perfected. Under the grant of power giving the Circuit Courts original cognizance over controversies between "citizens of a state and foreign states, citizens, or subjects" (1 Sup. R. S. p. 611), there has never been any doubt that an alien may sue a citizen in such Circuit Courts. We do not understand the proposition to be questioned in the present case. The question once arose whether the statute by the limitation providing that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, etc., prohibited an action by a citizen against an alien corporation, but it was held that such limitation was inapplicable to an alien or foreign corporation sued here; the court saying, among other things:

"To construe the provision as applicable to all suits between a citizen and an alien would leave the courts of the United States open to aliens against citizens, and close them to citizens against aliens. Such a construction is not required by the language of the provision, and would be inconsistent with the general intent of the section as a whole." In re Hohorst, Petitioner, 150 U. S. 653, 660, 14 Sup. Ct. 221, 224, 37 L. Ed. 1211.

Furthermore, a suit brought by an alien in a state court against a citizen or a corporation, being a resident of a state other than that in which the suit is instituted, is removable into the Circuit Court. Barlow v. Chicago Ry. Co. (C. C.) 164 Fed. 765; Sherwood v. Newport Co. (C. C.) 55 Fed. 1; Stalker v. Pullman Co. (C. C.) 81 Fed. 989.

But it is urged that the federal court can only acquire jurisdiction when the petition for removal states facts sufficient to warrant the process, and that no consent or agreement of the parties, or estoppel, can confer such jurisdiction to hear or determine any case wherein the essential jurisdictional facts do not appear from the record—citing Old Wagon Works v. Benedict, 67 Fed. 1, 14 C. C. A. 285; Utah-Nevada Co. v. De Lamar, 133 Fed. 113, 66 C. C. A. 179. There can be no quarrel with this contention; and it is further true that, if the record does not affirmatively show jurisdiction in the Circuit Court, the court will upon its own motion decline to exercise further jurisdiction over the cause. Minnesota v. Northern Securities Co., 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 870.

But this does not solve the controversy here, for the record as made by the petition for removal does show the requisite jurisdictional facts. One of the essential facts alleged, however, namely, that the plaintiff was a citizen of the state of Washington, developed on the trial to be not true, but a fact equally as cogent for removal appeared in its stead, which was that the plaintiff was an alien, and, whether the plaintiff was a resident of the state of Washington or an alien, a removal could have been had by the defendant. It cannot be denied that the very record in the case showed, when the evidence was adduced, the essential fact of alienage. In this connection, too, it must be considered that, the court having been given general cognizance of the cause, the defendant has waived jurisdiction as it respects the particular district in which it was triable. There is a fundamental distinction

between the general grant of jurisdiction over controversies between citizens of different states, or between "citizens of a state and foreign states, citizens, or subjects," and the limitation under the statute respecting the particular district in which the action is required to be instituted. The former jurisdiction can never be waived, nor can it be conferred by consent, agreement, or estoppel, but the latter sort of jurisdiction—that is, the jurisdiction to try the cause in a particular district—may under certain circumstances and conditions be waived, while even such jurisdiction may not be conferred in the first instance by consent or agreement. The distinction is clearly recognized by this court in *Utah-Nevada Co. v. De Lamar*, *supra*, wherein the court, speaking through Hawley, District Judge, says:

"The cases cited and relied upon by defendant have no application to the facts of this case. They apply solely to the class of cases which are brought under other provisions of the statute, in which certain actions may be brought in the district where the defendant resides. This character of actions does not touch the general jurisdiction of the court over such a cause between the parties."

So it was said by Mr. Chief Justice Waite in *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

Again, in *St. Louis, etc., Railway Co. v. McBride*, 141 U. S. 127, 131, 11 Sup. Ct. 982, 983 (35 L. Ed. 659) it was said:

"Assume that it is true, as defendant alleges, that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different states, but that it comes within the scope of that other clause, which provides that 'no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant,' still the right to insist upon suit only in the one district is a personal privilege which he may waive and he does waive it by pleading to the merits."

So also in *Central Trust Co. v. McGeorge*, 151 U. S. 129, 132, 14 Sup. Ct. 286, 287, 38 L. Ed. 98, a case instituted subsequent to the act of 1888, in which neither party was a citizen of the state or resided in the district in which the action was brought, Mr. Justice Shiras said:

"Undoubtedly, if the defendant company which was sued in another district than that in which it had its domicile had, by a proper plea or motion, sought to avail itself of the statutory exemption, the action of the court (in dismissing the complaint) would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicile is a personal privilege which may be waived, and which is waived by pleading to the merits."

And in *Interior Construction & Improvement Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 273 (40 L. Ed. 401) Mr. Justice Gray says:

"Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court of its own motion will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties; but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance, without taking the objection."

These are cases, it is true, where the suit or action was originally instituted in the wrong district, but the principle of waiver is the same and is of like cogency and force, whether applied in such cases or in causes removed into a wrong district. It was held in *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, that an action commenced in a state court by a citizen of another state against a non-resident defendant, who is a citizen of a state other than that of the plaintiff, cannot be removed by the defendant into the Circuit Court of the United States. This rests upon the principle that a cause cannot be removed into a federal court or any district thereof unless it might have been brought in such court in the first instance. The case was thought to be adverse to a waiver where the removal was had from a state court to a federal district wherein the action could not have been originally instituted. But in that case the question arose on a motion to remand, there being no further or more general appearance in the federal court, so that there was no assent to jurisdiction in any way. A subsequent case, however, set at rest the application of that case. We refer to *In re Moore*, 209 U. S. 491, 506, 28 Sup. Ct. 585, 591, 52 L. Ed. 904. The facts of that case are in all respects like this, save that the plaintiff here is an alien, while there he was a citizen of a state other than that in which the district was situated to which the removal was had. In that case the court, speaking through Mr. Justice Brewer, after indicating the fact that a petition for removal and bond are in the nature of process, says:

"They constitute the process by which the case is transferred from the state to the federal court, and, if when the defendant is brought into a federal court by the service of original process he can waive the objection to the particular court in which the suit is brought, clearly the plaintiff, when brought into the federal court by the process of removal, may in like manner waive his objection to that court. So long as diverse citizenship exists, the Circuit Courts of the United States have a general jurisdiction. That jurisdiction may be invoked in an action originally brought in a Circuit Court or one subsequently removed from a state court, and, if any objection arises to the particular court which does not run to the Circuit Court as a class, that objection may be waived by the party entitled to make it."

Then he concludes:

"As we have seen in this case, the defendant applied for a removal of the case to the federal court. Thereby he is foreclosed from objecting to its jurisdiction. In like manner, after the removal had been ordered, the plaintiff elected to remain in that court, and he is equally with the defendant precluded from making objection to its jurisdiction."

The doctrine of this case is reaffirmed in *Western Loan & Savings Co. v. Butte & Boston Consolidated Min. Co.*, 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

In the case at bar the defendant company not only petitioned for the removal, but appeared in the Circuit Court, and filed an answer to the complaint of the plaintiff and entered upon the trial of the case, all without objection. These acts are unquestionably tantamount to a waiver of jurisdiction, as to the particular district into which the case was removed; the court having general jurisdiction of the cause. The circumstance that defendant was mistaken respecting the citizenship of the plaintiff does not alter the case. It is altogether probable that, if it had known the real fact, it would have applied for removal just the same. But, that aside, the cause was just as well removable on the ground that plaintiff was an alien, and the defendant, having petitioned for the removal and having appeared generally in the federal court, must be taken to have waived all objection that the case was taken into the wrong district.

These considerations affirm the judgment of the court below, and it is so ordered.

MCKELL v. CHESAPEAKE & O. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. January 9, 1911.)

No. 1,977.

1. CONTRACTS (§ 216*)—CONTINUING CONTRACTS—DURATION—TERM FIXED BY IMPLICATION.

It does not necessarily follow that, because a continuing contract does not fix the time of its duration, it may be terminated at will by either party, nor is it necessary that a contract shall definitely fix the period of its duration, even when it is not intended to be of unlimited duration, but it may supply the term by implication; and, where by a contract between an owner of coal land and a railroad company the landowner agreed to develop mines on his land, and the company agreed to purchase the coal produced at the ruling price of a certain other coal "not less than 100,000 tons a year," although the contract fixed no time during which it should continue in force, it would by implication terminate when the owner's coal became exhausted, so that the stipulated quantity per year could not be furnished.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 996-1010; Dec. Dig. § 216.*]

2. CONTRACTS (§ 56*)—CONSIDERATION—MUTUAL UNDERTAKINGS.

Where, by a contract, the owner of coal land agreed with a railroad company to develop mines thereon to produce not less than 1,000 tons per day, to coke a certain part thereof, and to furnish free right of way for a branch line from the company's line to the land, while the company agreed to build the line and to take as much coal as the owner would agree to furnish, not less than 100,000 tons a year, at the ruling price of a certain other coal, the several undertakings on one side furnished a sufficient consideration for all those on the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 344; Dec. Dig. § 56.*]

3. CONTRACTS (§ 59*)—CONSTRUCTION—CONTRACT GIVING OPTION.

Such contract gave the landowner the option, based on a valuable consideration, to furnish as much more than the minimum quantity of coal

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

required as he might from time to time elect, without further agreements therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 348; Dec. Dig. § 59.*]

4. CONTRACTS (§ 123*)—VALIDITY—PUBLIC POLICY.

A contract by a railroad company with a private individual, based on a valuable consideration, by which it agrees to build, maintain, and operate a spur track to certain coal mines is not invalid as contrary to public policy, where its performance does not interfere with any of the company's duties to the public.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 570-575; Dec. Dig. § 123.*]

5. CORPORATIONS (§ 446*)—CONTRACTS—VALIDITY.

A railroad company cannot avoid a contract for the purchase of coal, for which it has a legitimate use, on the ground that it bought for the purpose of reselling it, which was not within its charter powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1785; Dec. Dig. § 446.*]

On rehearing. Former judgment adhered to.

For former opinion, see 175 Fed. 321, 99 C. C. A. 109.

Holt & Duncan, Brown, Jackson & Knight, and Paxton, Warrington & Seasongood, for plaintiff in error.

Harmon, Colston, Goldsmith & Hoadly, F. B. Enslow, and A. W. Goldsmith, Jr., for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges, and McCALL, District Judge.

SEVERENS, Circuit Judge. On January 4, 1910, we announced and filed the opinion in this case which is reported in 175 Fed. 321, 99 C. C. A. 109, and in pursuance of which a judgment for reversal and for a new trial was entered. On the petition of the defendant in error, and mainly on account of the importance of the case and of the principles involved, we granted a rehearing. The whole case has been thoroughly and ably reargued.

It is an action upon a contract which the plaintiff says the defendant made with her husband, the original plaintiff, for the purchase of the coal in a tract of land owned by him on Dunn Loup creek in the state of West Virginia. The contract alleged was made by correspondence between McKell and M. E. Ingalls, the president of the Railway Company, in March and April of 1892. The conditions which induced it and the objects which the parties had in view are fully stated in the preface to our original opinion, and a reference thereto will relieve us from repetition. We will summarize McKell's first letter to Ingalls of March 28, 1892, by saying that he had for several years owned a tract of coal lands in West Virginia, and that he wished to make his investment productive. After stating various methods which had occurred to him as practicable, he solicited from Mr. Ingalls his view as to how he had best proceed, and proposals of some agreement by which his object could be effected. Mr. Ing-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

alls on March 31, 1892, replied to this letter; and, as it constitutes the main basis of the controversy, we reproduce his reply:

"Mr. Thomas G. McKell, Chillicothe, Ohio.

"Dear Sir: I am in receipt of your communication of the 28th. Of course, if you build a railroad up Loup Creek and connect with us we shall be glad to do business with you, as we are with every branch that connects with us. If, however, you desire us to build it, in connection with the development that you may make in the coal business, I think we have about come to the following conclusion; that we will build a branch of reasonable cost for any parties who will furnish the right of way and who will agree to put in a coal plant of not less than a thousand tons of coal per day and coke ovens that shall use one-third of the same, and who will furnish the coal at the same price as the Pocahontas people do. We will agree them to take from them at this price whatever amount of coal they agree to furnish, not less than 100,000 tons a year; or, if they prefer to ship it themselves, we will give them the lowest rate made to any parties. We think that any new developments made should be upon the basis of Pocahontas region, as it is only by getting the coal at the same price it is furnished there that we can hope to compete.

"I trust that you may be able to work on one or the other of these plans and develop your property.

"Very truly yours,

M. E. Ingalls, Pres."

McKell by letter of April 25, 1892, accepted these propositions in the alternative that the Railway Company should build the road, and upon his understanding that the guaranty of 1,000 tons per day meant working days, and the work not prevented by strikes, etc. On the day following Mr. Ingalls addressed a letter to McKell, saying that his own letter of March 31st and McKell's of April 25th "together seem to correspond, and clearly express our meaning." But he also wishes to "add one or two verbal understandings." The first, and only material one, was:

"It is understood that you turn over to us the surveys which you have had made and that you will give us the right of way for any extensions of this line that we may want to build, or any branches, where they go over your land."

And the letter concludes:

"If these are as we agreed and as you understand them, kindly answer, and the letters will form all the contract we shall need."

McKell replied the same day, saying that he would turn over the maps and surveys, and would give the "right of way for any extensions of this line through land owned by me, on condition, however, that this right of way should be utilized inside of five years." The correspondence ended here, the contract was closed, and the parties proceeded with its execution. The Railway Company by its conduct in thus proceeding without dissent must be deemed to have acquiesced in McKell's requirement that the railroad extensions should be made within five years.

The president of the Railway Company had ample power to make the contract. One of the by-laws of the company, adopted at a stockholders' meeting, provided that:

"The president shall have general charge, control and supervision of all the business and affairs of the company, and over all its officers, agents and employees."

Moreover, this very contract was recited as of force in a coal contract with McKell's lessees approved by the board of directors on June 30, 1893. And as late as June, 1900, President Stevens, in answer to McKell's complaints that the Railway Company was not living up to its contract, and suggesting an arbitration, addressed to him the following letter:

"Chesapeake and Ohio Railway Company,
President's Office.

"Geo. W. Stevens, President.

"Mr. T. G. McKell, Chillicothe, Ohio.

"Richmond, Va., June 11, 1900.

"Dear Sir: I have yours of the 8th instant. After a careful review of the points made by you, I cannot see in what particular the Railway Company has violated its contract, except, perhaps, in declining to take the entire output of coal that is being mined on your land, which the company is prohibited from doing by law. We are exceedingly desirous of cultivating and maintaining friendly relations with you, and trust that you will appreciate our present situation, and will not do anything that will cause friction in future. We should not consent to arbitration without knowing more definitely what questions are to be arbitrated.

"Yours truly,

Geo. W. Stevens."

The contract was never disaffirmed by either party in respect to any part or parts of it until the company attempted to relieve itself from some of them. And no ground for escaping its obligations was ever suggested, except that it was an impossibility for the company to perform it, and again, that its performance would be unlawful, until after the suit was commenced.

This suit was commenced March 4, 1902. The petition set forth the contract as the plaintiff claimed it to be and alleged its breach by the defendant. The answer of the defendant in its first defense, denied that it made such a contract, admitted that the plaintiff turned over the maps and surveys and conveyed to the Railway Company rights of way, and that the company built a railroad of eight miles in length and certain extensions, but denied that any of these things were done under the contract alleged in the petition; denied that the plaintiff had performed the conditions imposed upon him by the contract set out in the petition, denied that the plaintiff elected to sell all the coal to be mined on his land; denied that it received any coal under the alleged contract; denied that it had refused any coal in violation of any contract it had with the plaintiff; and denied all other allegations of the petition not admitted. For a second defense, it denied that the defendant had lawful authority to make such a contract as was set out in the petition. For a third defense it denied that the president had authority to make the contract.

At the trial the plaintiff proved the letters above referred to, and the by-law of the company delegating the powers to the president, and tendered further proof in support of the allegations of the petition including the breach thereof and the damages sustained. At this stage of the proceedings the court arrested the trial and directed a verdict for the defendant, being of opinion that the letters did not bear the construction claimed by the plaintiff, but led to the conclusion that:

"Assuming there was an agreement here entered into for the building of the road, I am of the opinion that under the contract the defendant company agreed to make another contract with the party or parties who donated the right of way and constructed a coal plant of not less capacity than one thousand tons per day and coke ovens such as are mentioned in this letter of March 31, 1892, if such party or parties did not themselves elect to ship coal. It does not appear that such other contract was ever made."

And therefore that the contract alleged was not proven. If the judge's opinion was correct, the course pursued was proper.

Owing to the fact that the production of evidence by the defendant was precluded by the action of the court, it is obvious that we are restricted to the consideration of the case made by the plaintiff and the tendency of the evidence produced by that party; for, if the evidence had any fair tendency to prove the allegations of the petition, its weight was for the consideration of the jury, even if the proof was to stop at that stage of the trial. And so, also, further evidence may be adduced to show the understanding of the parties as to the existence of a contract governing their conduct, and, if there was, what their understanding of its stipulations was.

The construction which the court put upon the contract was one which the parties themselves do not appear to have ever thought of during the eight or ten years they were operating under it, and, it seems to us, is wholly unwarranted. The object which the parties had in view would not have been secured. Neither of them could have contemplated that the recompense for the very considerable outlay which they undertook to make should depend upon the willingness of either of them to make some other contract. And the defendant itself was the least likely to take such a risk. If McKell should have concluded that some other way of developing his coal lands and disposing of the coal would be more to his interest, and had broken away from his relations to the company, could it be doubted that he would be liable to an action for damages, or to a remedy in equity? If the language of the contract were doubtful, the maxim of construction that the law will assume is that the parties intended that their purpose should bear fruit, rather than that it should prove futile. Thus the defendant's counsel say that when Mr. Ingalls in his letter of March 31st says, "We will agree then to take from them at this price," he intended the word "then" to designate the time when we "will agree," and not, as the plaintiff contends, to designate the time when we will take their coal. Standing alone and uninfluenced by any internal signs, or any external circumstances, it must be admitted that this language might bear either construction. But, when read in its context and in view of the circumstances and the objects of the parties, it is at once seen that the defendant's interpretation would make the whole scheme of the contract break down at the period when they should approach its substantial object and no further obligation would rest upon the parties. Moreover, there was no need of any further contract. The price had been fixed, namely, the Pocahontas market price—and the quantity had been fixed, namely, 100,000 tons a year, and as much more as McKell would elect to deliver. And Mr. Ingalls rightly said in conclusion, "The letters will form all the contract we shall need."

In our former opinion we discussed this subject at much length, and we shall forbear to prolong the discussion further than to state our conclusion that the possible literal construction which the court put upon some of the words in Mr. Ingalls' letter of March 31, 1892, is opposed to the many controlling reasons why such a construction should not be adopted; and to briefly indicate some further considerations leading to the same result. It jeopardizes the object which the parties had in view, and is antagonistic to the construction which the parties put upon it when they proceeded to carry it into execution. The letter itself shows that the coal to be furnished was to be not less than "100,000 tons a year." And McKell's reply of April 26, 1892, grants the right of way for extensions, but requires that the extensions must be made "within five years." But counsel now say that another contract after the preliminaries were accomplished was intended. An afterthought thus constructed which subverts the basis upon which the parties have acted ought not to prevail, unless it is founded upon very clear and indisputable reasons.

We come now to the suggestion that for other reasons than those the defendant had ever suggested, or the court assigned, the ruling of the court below was right. If these reasons are valid and conclusive, the judgment ought not to be reversed. Counsel for the defendant as a keynote say:

"We claim there was no contract of the Railway Company to purchase coal from McKell; but that, if there was such contract, it was to purchase only the output of the single plant referred to in the letter of March 31, 1892. Defendant did purchase that output from one of plaintiff's lessees."

With regard to the first of these propositions, we do not deem it necessary to repeat what we said in our former opinion, and have in part here repeated. The other propositions come so nearly to the view taken by the court below that we think they are covered by what we have said in regard to the construction of the contract there adopted. There is one argument, however, which was much pressed by one of the counsel for defendant which we ought to notice and this seems the proper place. It is urged that it is highly improbable that the president of the Railway Company would enter into a contract of such prodigious proportions as the purchase of all the coal under 25,000 acres. And at first thought it would seem so. But, when we come to look into the circumstances, the impression fades away. It is not to be admitted that the mere magnitude of a contract when the performance of it is possible is any reason why it should not be enforced. It is only a make-weight in determining whether such a contract was made. For that purpose it may be considered. The proof shows that in the year 1893 the company used, for its locomotives only, 502,535 tons of coal, and that the quantity increased during succeeding years until in 1904 it used for that purpose alone more than 1,000,000 tons, and that it increased from that time on, to the extent that it used for its locomotives, shops, stations, and tugs in 1908 1,392,484 tons, a good-sized train load for each day in the year. These figures serve to show what Mr. Ingalls may have contemplated for the future, and what he was making provision for. And it would

be a convenience to the company to make sure of a large and convenient supply, and at a price not larger than that prevailing from time to time in that locality. It was because Mr. Ingalls was so much impressed by the value of the contract he was making that, whereas on March 31st he had only secured a minimum of 100,000 tons a year, he, by his letter of April 26th following, exacts of McKell a stipulation that he will prepare himself to deliver three times that quantity. And this requirement is a clear recognition of McKell's right to elect to deliver more than the stipulated quantity.

Another term of the contract shows beyond doubt that the parties were not intending to limit their contract, as now contended, to the preparatory period while they were getting ready to do business. By the fourth paragraph of the letter of Mr. Ingalls of April 26, 1892, he makes it a condition:

"That you will commence on the coal development at the same time (that is, as we begin the building of the railroad) and push it as fast as is consistent with economy and the weather, until it reaches the amount per day, to-wit, 1,000 tons per day."

It is further urged that there was no time fixed for the duration of the contract, and that, in such case, either party may determine it upon giving notice of its intention to the other. It is not true that such a result would always follow. It would not follow when the nature of the contract shows that the parties intended it to be permanent. This is shown by the cases cited from 5 De Gex & Sm. 138, L. R. 8 Ch. App. 942, and L. R. 7 H. of L. 550; Franklin Telegraph Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; Western Union Tel. Co. v. Penn. Co., 129 Fed. 849, 64 C. C. A. 285, 68 L. R. A. 968, in our former opinion. Among the Circuit Court decisions to which we there referred (175 Fed. 332, 99 C. C. A. 109) are the cases of Baltimore & O. R. Co. v. Ohio & M. R. Co. (not reported) and Chattanooga R. & C. R. Co. v. Cincinnati N. O. & T. P. Ry. Co. (C. C.) 44 Fed. 456, both cases decided in this circuit, the former by Jackson, Circuit Judge, and the latter by Key, District Judge. The latter case was decided upon the authority of the former. Both cases have been cited by counsel for defendant, and it must be admitted they are not in harmony with those upon which we relied. But both of them were decided before the decision of the Supreme Court in Franklin Tel. Co. v. Harrison. We cannot doubt that if this later case had been earlier, and had been brought to their attention, the judges would not have held as they did. Nor is it necessary that a contract shall definitely fix the period of its duration, even when it is not intended that it shall be of unlimited duration. It may itself by implication supply the term of its duration. It would in many cases be implied that it was to be terminated when its object had been accomplished and all had been done that was agreed to be done. So here, when the plaintiff's coal should be exhausted, the end of the performance of the contract would be reached.

Another contention is that the stipulations of the contract do not impose mutual obligations upon the parties, and that for such reason the contract is void. This proposition can have no other relevant

meaning here than that some of the stipulations are not supported by a sufficient consideration. The contention cannot be sustained. Each of the several undertakings on one side is a sufficient consideration for each and all of the undertakings on the other, and is not to be attributed solely to any one of the things agreed by the other side, although both concern the same matter.

Again, it is contended that the contract is void for uncertainty. The particular stipulation which is said to be void on this account is contained in the letter of Mr. Ingalls of March 31, 1892, and reads as follows:

“We will then agree to take from them at this price whatever amount of coal they agree to furnish, not less than 100,000 tons a year.”

It is urged that this does not require of McKell the delivery of any definite quantity of coal beyond the 100,000 tons a year. In taking up this inquiry we should approach it in the spirit of the maxim above referred to, that when the language of contracting parties is susceptible of differing constructions, and one of them will make it valid and will effectuate the intention of the parties, and another construction will not, the former should be adopted, especially should this be so where the parties have proceeded in the execution of the contract upon that construction. The court may do more mischief than justice if it carries the parties back and plants them upon a construction which the court might think the better one. Broom, in his Legal Maxims, at page 521, translates this maxim thus:

“A liberal construction should be put upon written instruments, so as to uphold them if possible, and carry into effect the intention of the parties.”

He then proceeds to say:

“The two rules of most general application in construing a written instrument are (1) that it shall, if possible, be so interpreted ut magis valeat quam pereat; and (2) that such a meaning shall be given to it as may carry out and effectuate to the fullest extent the intention of the parties.”

Guided by this rule, we observe that it is hardly to be supposed that Mr. Ingalls intended that every time a delivery should be made it should be preceded by a new contract to deliver it. The essential point was that the contract was to cover all the coal the plaintiff would in fact deliver, and that the true meaning of the parties was to include all the coal which the plaintiff would be willing to deliver, and that this meaning should prevail over the literal interpretation of the word “agree.” Let it be observed that the proposition of Mr. Ingalls, when accepted, bound the parties, the one to furnish and the other to take, at the price stated, at least 100,000 tons a year. It extended an election to McKell to furnish as much more of the coal as he would agree to furnish. This option was not one which was expected to be acted upon at once for the whole period of the contract, as it might be if the coal was on hand and ready for immediate delivery, but was a continuing option which was intended to be operative as the execution of the contract progressed. That the parties understood this to be so is manifest from their conduct. The Railway Company at no time required of McKell any definite statement of

the additional amount he would agree to furnish, and never refused to take coal upon the ground that there had been no agreement defining the additional quantity of coal he would furnish, and the tender of the coal was treated as an election to furnish it. This stipulation giving him an election rested upon a valuable consideration, received when the contract was made. The price was fixed. The time was concurrent with the performance of the contract. The fact that the agreement upon this branch of the contract was unilateral and bound only the railway to take the additional coal while it did not bind McKell to furnish any beyond the specified amount does not defeat its binding obligation. A contract which is bilateral in its stipulations when made frequently becomes unilateral upon the performance of the stipulations of one of the parties which were the consideration for the stipulations of the other. It was the purchase of a privilege which McKell might exercise as the performance of the contract progressed. It is manifest from the letter of Mr. Ingalls of March 31, 1892, that he contemplated (and for that matter desired) that McKell would exercise it; for, while he stipulated for a minimum, no intended maximum was mentioned. For an illustration, let us suppose a man agrees to buy of another 10,000 bushels of grain in his storehouse containing a much larger quantity at a certain price per bushel, and in the contract of sale and as part thereof he agrees that the vendor shall have the right to deliver him as much more of the same grain in the storehouse, or the whole of it, at the same price, as the vendor would elect to deliver. Could it be doubted that the vendor would have the right to include as much more as he should elect? In such case, the subject-matter being ready for delivery, the election must be made within a reasonable time. The only difference between that case and this is that here the right of election continued with the performance of the contract and was to be exercised concurrently therewith. It is of the essence of an option given for a consideration that only one of the parties is bound. The other has purchased a privilege to extend the contract to as much more as he will, subject to the limitation that it shall not extend to other property than that with which the contract is dealing. In Wheeler v. New Brunswick & C. R. Co., 115 U. S. 29, 5 Sup. Ct. 1061, 1160, 29 L. Ed. 341, one of the terms of the contract was an agreement of the buyer that he would accept from the vendor any amount of old rails between 200 tons and 600 tons. The Circuit Court held that this gave an option to the vendor to deliver any amount between those two quantities. As to this the Supreme Court by Mr. Justice Miller said:

"We concur with the Circuit Court in holding that when Wheeler & Co. say 'we have bought of you (the railroad company) from two (2) to six hundred tons for delivery in New York or New Haven between August 1st and October 1st' that they agreed to accept any amount of old rails between those limits. The company was selling old rails. It knew that by August it would have a thousand tons. It did not know how much more they would have by October 1. It intended to secure the sale of what it might have between two hundred and six hundred tons."

As we have said, when a contract contains several mutual stipulations, each stipulation on the one side is a consideration, in part, and

of itself, sufficient to support the several stipulations on the other side. Hence the agreement of McKell to cede the right of way, to establish the plant, and to grant the right of way for such extensions as the company might require were a sufficient consideration to support the several stipulations of the Railway Company; and one of these was to take at the price stated not merely 100,000 tons a year of the product of the plaintiff's mines, but so much more of it as the plaintiff might elect to deliver. We repeat, it was a continuous option, for which the plaintiff paid.

When the object of the contract is perpetual in its nature, its intended duration must be deemed to correspond, as in several of the cases cited in the original opinion. It was to such cases that the Lord Chancellor Cairns had reference in his opinion delivered in the House of Lords in the Llanelly Railway & Dock Co. Case in *L. R. 7 H. L.*, when he said at page 560 that such an agreement "must in its nature be an agreement which should have a continuing operation unless some power is given on the face of it to the parties to terminate the agreement." Lord Selborne made a similar observation in his opinion in that case at page 567. In such cases the court will hold that the contract was not determinable. But the contract is not void on that account. However, this contract did contain a necessary limitation resulting from the nature of its subject.

It was pressed upon us that the contract was void as against public policy, in that it required the Railway Company to build and maintain the spur railroad which out of regard for its public duty it had a discretion to maintain or not, and such cases as *Texas, etc., Ry. Co. v. Marshall*, 136 U. S. 407, 10 Sup. Ct. 846, 34 L. Ed. 385, and *Jones v. Newport News Co.*, 65 Fed. 736, 13 C. C. A. 95, are appealed to. But that doctrine has no application here. It rests upon the ground that the public has an interest to be protected, and that the service to the public will be interfered with by the performance of the contract. But here the public had no concern with anything the Railway Company agreed to do. Its lines for traffic in the carriage of freight and passengers were in no wise endangered. The building and operating the spur were but the means to an end—that is to say, the transportation of the coal from the place of delivery to its main line—and that would be its own business which the company must provide for. Much stress is laid upon the decision of this court in the case of *Jones v. Newport News Co.*, just mentioned. But reference to that case will show that, not only was there no contract for the permanent maintenance of the switch, but that its relation to the main line "was one of probable, or possible, danger to the public using the railroad, and to justify its determination for that reason."

Defendant's counsel also rely upon the decision of Judge Taft, then a circuit judge for this circuit, in the case of *Mercantile Trust Co. v. Columbus S. & H. R. Co.* (C. C.) 90 Fed. 148, upon an intervening petition of the owners of mines upon a spur track extending beyond the railroad company's station on a branch of their railroad. The petitioners prayed for an injunction. The company had reserved a discretion to fix a station at the end of the branch, and it had fixed

the terminal station at the place from which the spur extended. But it also laid a track on this spur toward the petitioner's mines and operated it for a time. The receiver of the railroad was threatening to discontinue the spur and take up the track. Having stated these facts, Judge Taft said:

"The question presented is whether a railroad company may discontinue switch or spur tracks built by it for the purpose of bringing business to its road when the contract under which the spur was built contains no express obligation to continue its operation for a definite time or forever."

"The contract," said he, "does not contain any express stipulation by the railroad company that it will keep and operate its spur track for any definite time." And the petition was denied. The contract referred to by the learned judge was not a contract with any private party, but was one with the public, predicated upon a resolution of the stockholders, made under the provision of a statute, to build a branch railroad to a point near to a place designated by the resolution; and the company exercised its discretion by fixing the terminus at the station from which the spur was extended. If the spur had been built under a contract made with a private party for a valuable consideration, no public interest being affected, an entirely different case would have been presented. A railroad company has no discretion to violate its private contracts unless some public duty forbids their performance. There are many cases in which it has been held that the court will not control the discretion of a railroad company where its exercise is necessary to the proper discharge of a public duty. The case of Texas, etc., Railway Co. v. Marshall, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, is a leading authority in the federal courts upon this subject and has often been cited in state, as well as federal, decisions. But it would be an unwholesome abuse of that doctrine to allow a railroad company to use it as a shield for defense against its liabilities on a purely private contract, the performance of which can be enforced without in any way disabling it from performing its public obligations. In such a case the rules governing private contracts have full force. If it were not so, railroad companies would find themselves confronted daily with obstacles which would be insurmountable. The public would hesitate to deal with so irresponsible a party.

A decision that such a contract as this would be void for such a reason would be in absurd contrast with the judgments in the two English railroad cases above referred to and in the two cases decided by the Supreme Court in *Franklin Telegraph Co. v. Harrison*, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776, and the still earlier case of *Joy v. St. Louis*, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843, in all of which the contract involved much more intimate physical relation with the railroad and therefore imposing more restraint than was contemplated by this contract of the railway company, which was really none at all.

A kindred defense here made is that the contract was illegal because the Railway Company was buying this coal for the purpose of selling it. We referred to this subject in our former opinion. But it

seems fitting that some further observations should be made concerning it. If we were to assume that the Railway Company bought this coal for the purpose of speculating with some of it, still this would not invalidate the contract, if McKell had no further relation to it after he had delivered the coal and the company had a lawful and proper use for it. Whether the company should use or sell it was a matter for the company's subsequent determination. His sale of the coal was a perfectly lawful transaction. A further disposition of it by the vendee might be ultra vires, but the plaintiff would be no party to it. However, there seems scant ground, considering the company's own requirements, for its confession of an unlawful purpose in securing the coal.

We find no sufficient reason for a different conclusion from that reached on the former hearing. The result is that the judgment then given will not be disturbed.

KNAPPEN, Circuit Judge, concurs in the conclusion that the judgment of the Circuit Court should be reversed and a new trial ordered.

CARSTENS PACKING CO. v. SWINNEY.

(Circuit Court of Appeals, Ninth Circuit. February 20, 1911.)

No. 1,876.

1. MASTER AND SERVANT (§ 270*)—ACTION FOR INJURY TO SERVANT—EVIDENCE—STATUTORY DUTY TO GUARD DANGEROUS MACHINERY AND APPLIANCES.

In an action by an employé against a packing company to recover for an injury received by falling into an unguarded vat of glue, based on Rem. & Bal. Code Wash. §§ 6587, 6594, which require the operators of factories, mills, etc., to maintain reasonable safeguards for all vats which it is practicable to guard and which can be effectively guarded with due regard to their ordinary use, and make owners violating such requirements liable to employés who sustain injuries by reason thereof, the reasonable practicability of safeguarding the vat where the injury occurred was an issue in the case, and evidence that it was so safeguarded by defendant after the injury was competent and admissible, where it was properly limited to such issue by the instructions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 918; Dec. Dig. § 270.*]

2. MASTER AND SERVANT (§ 289*)—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action by an employé against his employer to recover for an injury received when he was in a dangerous place but one where he was required to go in the discharge of his duty, the facts that he was there, that he knew of the danger, and was injured, did not require the court to hold as matter of law that he was chargeable with contributory negligence; but, in the absence of evidence of any specific act of negligence on his part, that question was properly submitted to the jury under instructions defining his duty to exercise care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1182; Dec. Dig. § 289.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. MASTER AND SERVANT (§ 204*)—ASSUMED RISKS—FAILURE OF MASTER TO COMPLY WITH STATUTOY REQUIREMENT TO SAFEGUARD MACHINERY.

Under Rem. & Bal. Code Wash. §§ 6587, 6594, which requires the operators of mills, factories, and workshops where machinery is used to provide reasonable safeguards for machinery, vats, etc., where it is practicable to guard it, and make them liable for injuries to employés who sustain injuries by reason of the violation of such requirement, an employé does not assume the risks of the employment which arise out of the failure of the employer to comply with such statute, nor is he charged with assumption of such risks because of his failure to notify the employer of the unguarded condition of the machinery where it had never been guarded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

In Error to the Circuit Court of the United States for the Western Division of the Western District of Washington.

Action at law by G. C. Swinney against the Carstens Packing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in the court below, plaintiff in error here, is a corporation owning and operating a packing house near the city of Tacoma, in the state of Washington, producing meat, glue, and other articles for the market. On the top floor of one of its buildings in its packing house are located glue works, consisting in part of glue tanks, where glue is boiled and prepared. The tanks extend about three feet above the floor of the room where they are located, and there are four such tanks arranged in a row. These tanks are filled with glue stock carried from an elevator by wheelbarrows running over a platform at the back of the tanks. In the process of filling the tanks, the platform becomes slippery at times from the glue stock falling upon it from the wheelbarrows. In the production of glue the tanks are heated to a boiling point, and during the boiling process the glue and glue material used for the production of glue fill the tanks nearly to the top. At the time of the plaintiff's injury these tanks had never been covered.

In the performance of his duties the plaintiff was required to go upon and along the platform for the purpose of oiling the shafting and other bearings in that locality. At the time of the accident, the plaintiff, in the performance of his duty, had proceeded along the platform and had oiled the bearings of the shafting and elevator, and, while in the act of turning around and away from his position of oiling the latter bearing, he stepped upon a plank which had been left upon the platform. This plank slipped under him and carried him into one of the tanks which at that time contained about 30 inches of boiling liquid glue. The heated glue so scalded his right leg as to require its amputation.

The statutes of Washington, providing for protection and health of employés in factories, mills, etc., has the following provisions:

"Section 1. Any person, firm, corporation or association operating a factory, mill or workshop where machinery is used shall provide and maintain in use * * * reasonable safeguards for all vats, * * * which it is practicable to guard and which can be effectively guarded with due regard to the ordinary use of such machinery and appliances, and the dangers to employés therefrom, and with which the employés of any such factory, mill or workshop are liable to come in contact while in the performance of their duties." Remington & Ballinger's Ann. Code & Statutes, § 6587.

"Sec. 8. Any person, firm, corporation or association who violates or omits to comply with any of the foregoing requirements or provisions of this chapter, and such violation or omission shall be the proximate cause of any injury to any employé, shall be liable in damages to any employé who sustains injuries by reason thereof." Remington & Ballinger's Ann. Code and Statutes, § 6594.

In his complaint the plaintiff alleged that the defendant owned and operated the packing house and charged that it carelessly and negligently failed

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to provide and maintain the safeguards for the vats as required by the statute.

The defendant in his answer admitted the ownership of the buildings and its packing house, and of the arrangement of the glue tanks and their operation; but denied the other allegations of the complaint; admitted the injury to the plaintiff; but charged him with wanton recklessness and carelessness in the performance of the work in which he was engaged, and alleged that he assumed all the risks incident to the work.

On the trial of the case the jury rendered a verdict in favor of the plaintiff in the sum of \$7,500. The defendant brings the case here upon writ of error.

O. G. Ellis, John D. Fletcher, and R. E. Evans, for plaintiff in error.

Govnor Teats, Hugo Metzler, and Leo Teats, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). It is assigned as error that the court admitted testimony on the part of the plaintiff, over the objection of the defendant, to the effect that subsequent to plaintiff's injury the defendant had covered the vats, including the one into which plaintiff fell.

The statute of Washington providing for the protection and health of employés in factories, mills, etc., requires reasonable safeguards for all vats which it is practicable to guard, and which can effectively be guarded with due regard to the ordinary uses of such machinery and appliances. Whether these vats could be reasonably safeguarded against the dangers they presented to employés by reason of being open and uncovered was, under the provisions of the statute, an issue in the case. The plaintiff, to prove that they could be so safeguarded, introduced testimony that they had been covered since the accident. This was the best testimony that could be produced upon that issue and was clearly admissible. The objection that the testimony was prejudicial to the defendant, intending to prove an admission on the part of the defendant of a previous neglect of duty, cannot be sustained in a case of this character. The testimony was not introduced for that purpose, and the court expressly instructed the jury that it was not to be so considered. The instruction given by the court was as follows:

"The court has permitted evidence to the effect that covers for, since the accident to the plaintiff, have been placed over the vats. This evidence has been admitted only for the purpose of bearing upon the question of whether at the time of the injury it was practicable to guard the vats, and whether they could be effectively guarded with due regard to the ordinary use of such machinery and appliances. The evidence was admitted only for that purpose. It should not be considered by you as being in any way an admission, or as tending to prove negligence on the part of the defendant; but it bears upon one of the facts which the plaintiff has to establish as a part of his case, namely, whether it was practicable to guard these vats, and whether they could be effectively guarded."

This instruction was in accordance with the rule established in the state of Washington. *Erickson v. McNeeley & Co.*, 41 Wash. 509, 520, 84 Pac. 3; *Thomson v. Issaquah Shingle Co.*, 43 Wash. 253, 257, 86 Pac. 588; *Gustafson v. West Lumber Co.*, 51 Wash. 25, 28, 97 Pac. 1094.

The case of Columbia & Puget Sound R. Co. v. Hawthorne, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405, cited by the defendant as authority for the rule that such evidence was inadmissible, is, we think, an authority for its admission. That case arose in the territory of Washington and long before the passage of the act by the state providing for the protection of employés in factories, mills, etc. The Supreme Court held, it is true, that, in an action for injuries caused by a machine alleged to have been negligently constructed, a subsequent alteration or repair by the defendant is not competent evidence of negligence in its original construction. But the court pointed out a distinction where the question was whether the defendant or some one else had a duty to perform with respect to the machinery or structure causing the injury. And this distinction is stated by the court in referring to the case of Readman v. Conway, 126 Mass. 374. In that case the plaintiff was injured by a defect in a platform in front of a building on land owned by the defendants, but occupied by tenants. The question was whether by the terms of the leases the landlords were to keep in repair the whole platform, or whether each tenant was to keep in repair the part in front of his establishment. The Massachusetts court admitted testimony over the objection of the defendant showing that after plaintiff's injury defendants made general repairs of the platform. It was held by the Massachusetts court that the acts of the defendants were in the nature of admissions that it was their duty to keep the platform in repair, and therefore competent. In other words, the evidence tended to point out the party whose duty it was to keep the platform in repair; and the Supreme Court of the United States held that this decision had no bearing upon the rule excluding evidence of negligence as shown by alterations and repairs subsequent to the injury.

In the present case evidence that the defendant covered the vats subsequent to the injury to plaintiff tended to show that the vats could be reasonably safeguarded by being covered, and that they could be so protected with due regard to the ordinary uses of such vats. The evidence tended to point out the duty of the defendant with respect to these vats. If a subsequent act is admissible to point out the party who is charged with a duty, where that question is an issue of fact, it seems to us that it is equally admissible to point out the specific duty with which the party is charged when that question is an issue of fact and the evidence is limited to that issue.

It is assigned as error that the court denied motions and refused instructions based upon the defense that the evidence established the fact that plaintiff had been guilty of contributory negligence, without which the injury complained of would not have been sustained. It is contended that the question of contributory negligence, under the evidence in the case, was not a question of fact for the jury, but one of law for the court. The trial court treated the question as a mixed question of law and fact; the first question being the standard of care required of the plaintiff. This was a question of law and was so determined by the court. The court instructed the jury as a matter of law that the plaintiff was required in the performance of his duties to exercise the care of a reasonably prudent person in conducting and

exposing himself to danger; that, the greater the danger of the situation, the greater the precaution and vigilance required; that it was his duty to use his senses, to use his eyes, so as to save himself from injury; that he had no right to go into a dangerous place, and shut his eyes and ignore the conditions; he was bound to take notice of those things which are open, visible, and apparent; and if a dangerous condition existed which was open and apparent to him, and he voluntarily placed himself in a position of great danger, when in the exercise of ordinary care he might have gone about his work in another way from a different position—a comparatively safe way—then he could not recover because he was guilty of contributory negligence.

The second question was one of fact, and was whether the plaintiff's conduct measured up to this standard of care and prudence. This was a question of fact for the jury to determine in view of all the surrounding circumstances. The question has been raised in some cases of this kind whether the defense of contributory negligence is admissible where failure of the defendant to comply with the requirements of the statute is the proximate cause of the injury to plaintiff. *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657. But, as that question is not directly involved in this case, we will pass it by. What question of fact was the jury required to determine in this case? What act or omission on the part of the plaintiff is chargeable against him as contributory negligence? It was not the presence of the loose board on the platform onto which he stepped, nor the existence of the uncovered vat into which he was carried by the slipping board. There is no evidence tending in any degree to show that he contributed to the existence or condition of either of these proximate causes. There was also evidence tending to show that the platform was slippery, and that it was made slippery by glue stock falling upon it; but there was no evidence that the plaintiff was in any way responsible for that condition of the platform. What, then, was the charge of contributory negligence against the plaintiff? It is that he had been employed as an oiler at the place where he was injured for about three weeks, that he knew the platform was slippery, and that the place was dangerous. Upon this evidence it is contended that the plaintiff failed to use such a degree of care in passing over the platform as was required of him under the known dangerous conditions, and that the court should have so determined as a matter of law. As the plaintiff was in the discharge of his duty in placing himself in this perilous condition—a duty the performance of which was known to and sanctioned by the defendant—the fact that he was in such position had no tendency to prove that he was negligent or careless. *Snow v. Housatonic Railroad*, 90 Mass. 441, 450, 85 Am. Dec. 720. In that case the plaintiff was an employé of a railroad company and was engaged in performing the duties of a switchman. The proximate cause of the injury to the plaintiff was a hole in one of the planks laid down between the rails of the defendant's railroad where it crossed the highway, which had existed for more than two months to the knowledge of the plaintiff. Into this hole the plaintiff stepped while in the performance of his duties as a switchman, and was injured by the moving cars. It was held that, although the plaintiff continued in the employment of the company after he knew of the defect and

the danger it presented to him, the court could not rule, as a matter of law, that the plaintiff was careless; but the question should be submitted as a question of fact for the determination of the jury.

In the case of *Gardner v. Mich. Cent. R. R.*, 150 U. S. 349, 360, 14 Sup. Ct. 140, 143, 37 L. Ed. 1107, the Supreme Court of the United States refers to this Massachusetts case and approved and applied the doctrine there declared, with this comment:

"The Supreme Judicial Court of Massachusetts held that the defendant was not relieved of its liability to the plaintiff by reason of any relation which subsisted between him and it at the time of the accident arising out of the employment in which he was engaged, because, among other reasons, it did not appear that the defect in the road was the result of any such negligence in the servant as to excuse the defendant, but was caused by a want of repair in the superstructure between the tracks of the defendant's road, which defendant was bound to keep in a suitable and safe condition so that plaintiff could pass over it without incurring the risk of injury. The liability was rested on the implied obligation of the master, under his contract with those whom he employs, to use due care in supplying and maintaining suitable instrumentalities for the performance of the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he intrusts the duty."

The court said further:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

In the case of *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 257, 258, 29 Sup. Ct. 619, 53 L. Ed. 984, this doctrine was applied to a situation where the plaintiff was the foreman of a force of bricklayers engaged in the construction of a large brick building, which the defendant as principal contractor was erecting. At the time of plaintiff's injury, he and his men were engaged in laying the brickwork on the wall of the building. At the same time defendant's men were engaged in laying concrete upon the top of the roof. The material for this work was being hoisted to the roof by means of an engine operating a derrick with a rope and bucket attachment. The bucket was raised to a point a little higher than the top of the building, and then pulled inward onto the roof by means of a guy rope, attached to a boom carrying the bucket. When the bucket was emptied, it was swung out from the wall by means of an energetic push. While this work was in progress, the plaintiff, superintending the erection of a scaffolding for the men to work upon in the further construction of the wall, was standing upon a plank near the wall when the bucket was swung outward by a push from the men operating it, and the plaintiff was struck by the heavy bucket attached to the rope from the end of the boom, and was knocked off the plank and, falling a considerable distance to the ground, was severely injured. It was contended by the defendant that the injury to plaintiff was caused by his fellow servants, and that the defendant was therefore exempt from liability. It was further contended by the defendant that the plaintiff was guilty of contributory negligence on

evidence that the derrick was in plain view of the plaintiff upon the roof; that he had fairly admitted in his testimony that he knew that the men had rested the bucket on the roof, and that, of course, they would be soon sending it back; that he apparently became absorbed in the particular work in which he was engaged, and entirely oblivious of his surroundings; that he went along the wall to a point directly in front of the derrick and in the path of the bucket, turned his back upon the men, and gave his entire attention to what the people were doing, utterly unmindful of his own situation and safety.

With respect to the defense that the injury to the plaintiff was caused by fellow servants, the Supreme Court held that:

"If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff, the master would be liable, notwithstanding the concurring negligence of those performing the work."

The court held further that there was enough in the case to require its submission to the jury upon the question of fact involved in the charge of contributory negligence on the part of the plaintiff.

We think the evidence of contributory negligence in all these cases, particularly in the last one, was as strong if not stronger than the case before the court, and that, under the rule which these cases establish, the trial court was right in submitting the case to the jury upon the question of contributory negligence.

It is next contended that, as the dangerous conditions in the place where plaintiff was employed were open and apparent, he assumed the risk of injury under such conditions. This question was carefully considered and determined by this court in the case of *Welsh v. Barber Asphalt Co.*, 167 Fed. 465, 93 C. C. A. 101. In that case the Legislature of the state of Oregon had adopted substantially the act of the state of Washington providing that factories, mills, and workshops where machinery was used should provide reasonable safeguards for machinery when it was practicable to guard the same. In that case the plaintiff's intestate was killed in operating a defective clutch in connection with an unprotected set screw. The trial court had admitted the defense that the deceased had assumed the risk of the employment in which he was engaged, and the jury returned a verdict for the defendant. This court reversed the judgment, holding that the purpose of the statute was to deprive the master of the defense of assumption of risk when an injury occurred as a result of the violation of its provisions. We can add nothing to what was said upon that subject in that case. The court instructed the jury in the present case that, when plaintiff entered the employ of the defendant, he did not assume that risk of the employment which arose out of the failure of the defendant to comply with the provisions of the act. This instruction was correct as declared by this court in the case referred to.

It is objected that the plaintiff is deprived of his right to claim that under the statute the defendant was charged with the risk attending the maintenance of the unguarded vats for the reason that the plaintiff did not notify defendant of its failure and neglect in this respect as provided in the statute. The failure of the defendant to guard the vats was not a temporary failure. The vats had never been covered.

It was an entire failure from the date of construction and not because of lack of notice from the plaintiff. This objection cannot be sustained. The failure of the plaintiff to give defendant notice of the unguarded condition of the vats under such circumstances does not prevent a recovery since the object of the notice was simply to secure an inspection by the Commissioner of Labor. *McIntosh v. Sawmill Phoenix*, 49 Wash. 152, 94 Pac. 930; *Campbell v. Wheelihan-Weidauer Co.*, 45 Wash. 675, 89 Pac. 161.

It follows that the judgment of the Circuit Court must be affirmed, and it is so ordered.

THE FLORENCE.

THE CAPTAIN BENNETT.

(Circuit Court of Appeals, Third Circuit. March 7, 1911.)

No. 1,404.

COLLISION (§ 91*)—STEAM VESSELS MEETING IN NARROW CHANNEL—VIOLATION OF RULE.

The steam barge Florence, passing down the Delaware from Philadelphia at night, came into collision with the steamship Bennett, coming up. The vessels saw each other's lights when a mile and a half or more apart. The Florence was following the New Castle range, but was somewhat to the right or westward of it, while the Bennett was on the Finn's Point range. The two ranges converge so as to require a change of course of some three points to pass from one to the other at intersection, and the collision occurred near the intersection. The Florence admittedly gave a signal of two blasts, indicating her intention to cross ahead of the Bennett, and starboarded her helm, but her signal was not heard nor answered by the Bennett until immediately before collision, and she then gave a signal of one blast and kept her course and speed. *Held*, that the narrow channel rule (Act June 7, 1897, c. 4, art. 25, 30 Stat. 101 [U. S. Comp. St. 1901, p. 2883]) applied and required the Florence to keep to the right side of the channel and pass port to port and that she was in fault for attempting to cross; that the Bennett was not in fault, having the right to assume that the Florence would remain on her side of the channel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 91.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Cross-suits in admiralty for collision between the steam barge Florence and the steamship Captain Bennett. Decree against both vessels, and both appeal. Reversed on the Bennett's appeal, and decree directed against the Florence alone.

For opinion below, see 171 Fed. 199.

Henry R. Edmunds and Wallace, Butler & Brown (Frederick M. Brown, of counsel), for The Captain Bennett.

John F. Lewis and F. C. Adler, for The Barge Florence.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

LANNING, Circuit Judge. The steam barge Florence and the steamship Captain Bennett collided in the Delaware river below Philadelphia on the evening of April 10, 1906. A libel for damages was filed by the owners of each of the vessels against the other vessel. The district court, by its final decree, adjudged both vessels at fault, and directed the joint damages and costs, amounting to \$12,653.22, to be equally divided between them. Both vessels have appealed.

The night was clear. The Florence was going down the river, in a south-south-easterly direction, in the portion of the river's channel marked by the Newcastle range lights, which were back of her. The Bennett was going up the river, in a north-north-easterly direction, in the portion of the river's channel marked by the Finn's Point range lights, which were ahead of her. On reaching the intersection of the two lines of range lights, a vessel on one of the ranges would need to alter her course but about three points of the compass to get on the other range. At the moment of the collision, the navigation of the Florence was, and at least for two hours previously had been, in charge of the master, Blocksom, who was also at the wheel in the pilot house. Russell was acting as the lookout. No other member of the crew was upon the deck or in a position to see the Bennett before the Florence blew her danger signals. Russell was not called as a witness, and, although Blocksom says he endeavored to find him, his evidence shows that he made no proper effort to secure Russell's testimony. Blocksom is the only witness testifying for the Florence who claims to have seen the Bennett before the Florence blew her danger signals, and he was acting as navigator, pilot, and helmsman. The Bennett was manned in part by Chambers, who was a pilot taken on at the Delaware Breakwater, Wick the helmsman, Nelson the lookout, and Garmann the second mate, all of whom were on duty at the time of and before the collision, and all of whom testify to conditions preceding the collision.

The two vessels were approaching each other on converging lines. The Bennett was drawing about 17 feet of water and the Florence about $7\frac{1}{2}$ feet. The navigable channel was not wide, but it was considerably wider for the Florence than for the Bennett. Blocksom says that, when he first saw the Bennett, the Florence was as far on her starboard side of the channel marked by the Newcastle range lights as it was prudent for her to go, and that, though the Bennett had not yet reached the Newcastle range, he saw both of the Bennett's side lights. If that statement be true, and if the Florence was far above the intersection of the two lines of range lights as her witnesses claim, the Bennett, while in the Finn's Point range, was headed to cut across the shoals before reaching the intersection, and was taking a course which Blocksom deemed unsafe even for the Florence. The pilot of the Bennett held a first-class pilot license, and had piloted many vessels larger than the Bennett up and down the Delaware river. He knew the channels and the range lights. Not only is Blocksom's statement that the Bennett showed both of her side lights to the Florence contradicted by the witnesses for the Bennett, but, as the learned district judge in his opinion (171 Fed. 199) said, it is intrinsically incredible. The collision cannot be accounted for on that theory.

Counsel for the Florence has by an elaborate argument endeavored to show that the collision occurred on the westerly side of the channel marked by the Newcastle range lights and above the intersection of the two lines of range lights. Fixing the point of the collision there, he argues that the Bennett disregarded the rules of the road and was solely at fault. But the collision could not have occurred there unless the Bennett before reaching the intersection cut across the shoals from the Finn's Point range to the Newcastle range, or unless she had at the intersection, or, after turning it, passed into the westerly side of the Newcastle range, and proceeded up the river on that side. The first of these theories we have rejected. As to the second of them, the evidence is contradictory. Blocksom says that the collision occurred "just above the buoy on the lower end of the Pea Patch Shoals." According to the government chart that is about a mile above the intersection. Desmaris, the pilot of the Florence, who, however, was in bed up to the time when he heard the distress signals, says it occurred about half a mile below Ft. Delaware and above the light at Salem creek. That was a mile or more above the intersection. Cook, one of the crew of the Florence, who was also in bed until awakened by the danger signals, says the collision occurred "just below the Pea Patch Shoal buoy." The buoy by the chart appears to be nearly a mile above the intersection. Lewis, the pilot of the tug Brady, who was going down on the Newcastle range, and who a few minutes after the collision picked up the Florence and towed her to the flats a mile or more below the intersection, says that, when he reached the Florence, she was "about quarter of a mile below Pea Patch buoy" and "above the intersection of Finn's Point range with the Newcastle range." Hazel, the master of the Brady, says that the Brady was running the Newcastle range when she picked up the Florence "just a little above" the intersection of the two ranges. Blocksom and Cook also say the Florence was on the westerly side of the line of the Newcastle lights, and Lewis says that the Brady "was running on Newcastle range a little to the westward" when she picked up the Florence.

Chambers, the Bennett's pilot, says that, with the aid of his glasses, he first observed the green or starboard side light of the Florence about two points off his port bow, when he was on the Finn's Point range, and when the Florence was about three miles away; that at that time he was slightly on the westerly side of the line of the Finn's Point lights; that he then ported his wheel and brought the Bennett up on the range and steadied her there; that the Florence continued to show to the Bennett her green light and made no change at any time before the collision; that he continued to keep his course and speed; that he is "quite sure" the collision occurred below the intersection; that his view of the Newcastle range lights was obstructed by Ft. Delaware until he came very near to the intersection, and that he could not see them at any time before the collision, although just after the collision, while the Bennett was aground as the result of the collision, the Newcastle range lights were visible. Nelson, the Bennett's lookout, says he saw the green side light of the Florence, and that he did not at any time see her red side light. Wick, who was at the Bennett's wheel, says he saw the green light of the Florence about two or

three points off the port bow of the Bennett; that, though he was constantly watching, he did not at any time see the red light of the Florence; that, after the Bennett had blown one blast of her whistle as a signal to the Florence that the Bennett intended to pass port to port, the Florence continued to show her green light; that the Bennett then gave a second signal of one blast which was followed by a cross-signal of two blasts from the Florence and the collision. Garmann, the Bennett's second mate, who was on the lower bridge, says he saw the green light of the Florence a couple of points off the Bennett's port bow when the Florence was two or three miles away, and that previous to the collision the Florence did not show her red light. Olsen, the Bennett's master, who was writing in the chart room, says that, after hearing the Bennett give a second signal of one blast, he jumped up and went out on the deck, heard the Florence give two blasts, and saw her two side lights off the Bennett's bow about a second or two before the collision, that the Bennett was on the Finn's Point range, and that the collision, with the hard-porting of the Bennett's wheel at that moment, threw the Bennett off the range, and forced her aground. Nelson also says the Bennett was "just about on the ranges" with "one light above the other." Wick says "we were on the ranges," and that the range lights were "in line with each other." Garmann says the Bennett was on the range and kept on it until the time of the collision, and that for four or five minutes before he saw the Florence the two range lights appeared one above the other. Olsen says that, when he came out of the chart room, he saw the Finn's Point range lights "one on top of the other, a little down to the westward, if anything, I should say." Later he said "the high light was a little to the eastward of the lower light, and we had them a little to the westward." Chambers admits that previous to sighting the Florence he had the ranges "slightly open to the westward," but that he then got on the ranges, and steadied the Bennett there. These are all of the witnesses who testified for the Bennett. On their testimony it is impossible to find that after the Florence was first sighted the Bennett remained on the westwardly side of the Finn's Point range lights. We cannot agree, therefore, with the conclusion of the learned district judge that the Bennett "was certainly to the westward in the channel, and was therefore not in her proper position." We do agree with his statement that "the decided weight of the evidence tends to the conclusion that the point of contact was close to the intersection and certainly was before either vessel had turned to follow the new range."

Our conclusions as to the essential facts are that up to the moment of the collision the Bennett had not left the Finn's Point range; that, though when the Bennett first sighted the Florence the former was slightly on the westwardly side of the line of the Finn's Point range lights, she immediately ported her helm and took her position on the line of the lights and remained there until the collision; that the Florence up to the time of the collision had not left the Newcastle range; that the Florence had continuously showed her green or starboard side light to the Bennett; that the Florence had continuously had the Bennett on her own starboard side; that the weight of the testimony completely overbalances Blocksom's uncorroborated statement that the

Bennett at any time showed both of her side lights to the Florence; that when the Brady, which was sailing the Newcastle range, came to the relief of the Florence, she found the Florence at or near the intersection without turning into the Finn's Point range, and that the collision occurred at or very nearly at the intersection of the two ranges. These conclusions, we believe, are supported by the clear weight of the evidence.

What, then, was the rule of the road applicable to the movements of the two vessels? Certain pilot rules are referred to in the opinion of the District Court. Congress, however, has established rules, and, if any of them is clearly applicable to the case, we need not invoke the aid of any pilot rule. The congressional act of June 7, 1897 (chapter 4, 30 Stat. 96 [U. S. Comp. St. 1901, p. 2875]), has prescribed what are known as the "head and head, starboard hand, narrow channel, and overtaking rules." In the present case the head and head and the overtaking rules are clearly inapplicable. The Bennett contends that the starboard hand rule should be applied. That rule is founded on articles 19, 21, 22, and 23 of the act, which are as follows:

"Art. 19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

"Art. 21. Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed.

"Art. 22. Every vessel which is directed by these rules to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

"Art. 23. Every steam vessel which is directed by these rules to keep out of the way of another vessel shall, on approaching her, if necessary, slacken her speed or stop or reverse." U. S. Comp. St. 1901, p. 2883.

The argument of the Bennett is that, as she was on the starboard side of the Florence, she properly kept her course and speed, and that the Florence was at fault in not slackening her speed, or stopping or reversing her engine. The argument of the Florence seems to be to the effect that the narrow channel rule was applicable. That rule, which is defined by article 25 of the act, is as follows:

"In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel."

It is immaterial which of the two rules be applied in this case. If the purpose of the Florence was to pass beyond the line of the Finn's Point lights before turning into the Finn's Point range, her intended course was across the course of the Bennett, and in that event it was her duty, under the starboard hand rule, to keep out of the way of the Bennett, and to cross that line under the Bennett's stern. If, on the other hand, it was not her purpose to cross the line of the Finn's Point lights, it was her duty to turn into the Finn's Point range so as to pass the Bennett port to port; that is, to observe the narrow channel rule. There is nothing in the record indicating that it was not safe or practicable for the Florence and the Bennett each to keep on her right hand side of the channel. Finding, as we do, that the Bennett was not where the Florence places her, but that she was on the line of the Finn's Point lights, each vessel knew that there was

a bend in the channel between them. Each knew that the other's course should follow the bend. In *The Victory* and *The Plymothean*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519, Chief Justice Fuller said:

"Indeed, the rule applicable when two vessels 'are crossing so as to involve risk of collision' that 'the vessel which has the other on her starboard side shall keep out of the way' is ordinarily inapplicable to vessels coming around bends in channels, which may at times bring one vessel on the starboard of the other. It has often been held as a general rule of navigation that vessels approaching each other in narrow channels, or where their courses diverge as much as one and one-half or two points, are bound to keep to port and pass to the right, whatever the occasional effect of the sinuosities of the channel."

Referring to the starboard hand rule, the Chief Justice also quotes from *The Pekin*, L. R. (1897) App. Cas. 532, as follows:

"The crossing referred to in article 22 is 'crossing so as to involve risk of collision' and it is obvious that, while two vessels in certain positions and at certain distances in regard to each other in the open sea may be crossing so as to involve risk of collision, it would be completely mistaken to take the same view of two vessels in the same positions and distances in the reaches of a winding river. The reason, of course, is that the vessels must follow, and must be known to intend to follow, the curves of the river bank. But vessels may no doubt be crossing vessels within article 22 in a river. It depends on their presumable courses. If at any time two vessels, not end on, are seen, keeping the courses to be expected with regard to them respectively, to be likely to arrive at the same point at or nearly at the same moment, they are vessels crossing so as to involve risk of collision; but they are not so crossing if the course which is reasonably to be attributed to either vessel would keep her clear of the other. The question, therefore, always turns on the reasonable inference to be drawn as to a vessel's future course from her position at a particular moment, and this greatly depends on the nature of the locality where she is at that moment."

The *Florence* by the testimony of all her witnesses until she sighted the *Bennett* was on her starboard side of the channel. That was her proper side. The *Bennett* was justified in believing that she would remain on that side. Had she done so, the vessels would have passed port to port and, we are satisfied, in perfect safety. By her own testimony, however, it appears that the *Florence* gave a signal of two blasts (which the *Bennett* denies she gave until it was too late to avoid the collision), immediately starboarded her helm, and attempted to cross the bow of the *Bennett*. As said in *The Pekin*, circumstances may arise in which it is not improper for vessels to cross courses in narrow channels. In such cases the starboard hand rule is applicable. *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, was such a case. This was not. The *Bennett* was not on the *Florence*'s side of the channel, and there is nothing to show that she knew or could have known that she was crossing the *Florence*'s intended course. The narrow channel rule was as clearly applicable here, we think, as it was in *Screw Collier Co. v. Webster*, L. R. (1910) App. Cas. 165, where the House of Lords applied it to two vessels which collided in the Firth of Forth, and where Lord Gorell said:

"I think it is perfectly clear that the collision occurred in a narrow channel, and that it occurred on the north side of that channel, and then, when one finds that the *Prudhoe Castle*, the downcoming vessel, was on her wrong

side of the channel at the time of the collision under a starboard helm, it is very difficult to see how the primary blame of this collision should have been other than on the part of that vessel. Turning to the other ship—the Ruby—she would in her ordinary course come around the island with the lighthouse of which we have heard, and, following that course, would naturally get, if she followed it in the ordinary and proper way, to about the spot where this collision happened. In those circumstances it seems to me extremely difficult to impute any blame to her; and I agree with what the learned Lord President has said that she ought to be exonerated entirely."

The Florence was crossing the narrow channel with a starboard helm. We have above stated that we find upon the testimony in the case that the Bennett was not on the Florence's side. She was on the line of the Finn's Point lights. True, her proper position, under the narrow channel rule, was on her right-hand side of that line, and not directly on the line. Nevertheless, there was ample space for the movements of the Florence in her own starboard side of the channel. Had she not starboarded her helm, and attempted to cross ahead of the Bennett, there would have been no collision. The position of the Bennett directly on the line of the Finn's Point lights was not the proximate cause, or a contributing cause, of the collision. Had the Florence, on approaching the bend, ported her helm, as she should have done, all would have been well. The Bennett had no reason to suppose that the Florence would attempt to leave her proper side of the channel. In making the attempt she assumed all the risks.

The decree of the District Court is reversed, with costs against the Florence in this court. The record will be remanded with instructions to enter a new decree adjudging the Florence solely at fault, dismissing the libel against the Bennett, with costs, sustaining the libel against the Florence, and awarding against the Florence the damages sustained by the Bennett, with costs.

DARIUS COLE TRANSP. CO. v. WHITE STAR LINE.

(Circuit Court of Appeals, Sixth Circuit. March 7, 1911.)

No. 2,048.

1. MONOPOLIES (§ 12*)—FEDERAL ANTI-TRUST ACT—CONSTRUCTION AND SCOPE.

The sale of a business and the good will pertaining to it, and an agreement, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as a part of the sale of the business, and not as a device to control commerce, is not within the federal anti-trust law of July 2, 1890 (chapter 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), but such act renders unlawful every contract combination or conspiracy which directly or necessarily operates in restraint of trade between the states without regard to the form which the transaction takes.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. § 12.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. MONOPOLIES (§ 16*) — FEDERAL ANTI-TRUST ACT — ILLEGAL CONTRACTS — LEASE OF VESSEL.

Libelant and respondent were both owners of steamers running regularly between Detroit and Toledo, and for a number of years had operated under a pooling arrangement which gave them a monopoly. At the expiration of such arrangement, libelant sold one of its boats and leased the other to respondent for a term of three years to be run between such two points, and at the same time transferred its good will, and agreed not to engage in competition during the term. The rental reserved was more than the steamer could have earned independently. *Held*, on the evidence, that the dominant purpose of the parties was to enable respondent to maintain its monopoly of the business, and that the lease was void as in violation of Sherman Anti-Trust Law July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), and rent could not be recovered thereon.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. § 16.*]

Severens, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Suit in admiralty by the Darius Cole Transportation Company against the White Star Line. Decree for respondent, and libelant appeals. Affirmed.

F. C. Harvey (J. J. Speed, of counsel), for appellant.

Gray & Gray, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

KNAPPEN, Circuit Judge. This is an appeal from a decree dismissing the libel filed by appellant for the recovery of two installments of rent upon a lease of the steamer Idlewild; the decree being based upon the ground that the contract of lease was void as being in restraint of trade under the Sherman anti-trust law (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). The lease was made March 8, 1900, for a term of three years, at an annual rental of \$13,000, with a provision for the substitution (without additional rental), during a portion of the season, of the steamer Arundell, owned by appellant, and then engaged during a short season in navigating Lake Ontario, and with further provision for the use of the Arundell by appellee (in connection with the Idlewild) for another portion of the season, at the option of appellant at an added rental. The Idlewild was to be run "as a passenger and packet freight steamboat between Port Huron and Detroit, Michigan, and Toledo, Ohio, and upon any portion of said route," and in connection with the lessee's "other steamers in the passenger and packet freight business on the river and lakes between Port Huron, Michigan, and Toledo, Ohio." By the eleventh paragraph of the charter the lessor "agrees to surrender to the party of the second part all of the good will of the 'river business,' so-called, that may be controlled by it, and to that end agrees not to enter into competition with the party of the second part upon the routes herein named, and not to operate any of its vessels or any vessel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

whatsoever on the said routes between Detroit and Port Huron or between Detroit and Toledo during the period of the said three years."

[1] It is well settled that the sale of a business, and the surrender of the good will pertaining to that business, and an agreement thereunder, within reasonable limitations as to time and territory, not to enter into competition with the purchaser, when made as part of the sale of the business, and not as a device to control commerce, is not within the federal anti-trust law. *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 329, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Bement v. National Harrow Co.*, 186 U. S. 70, 92, 22 Sup. Ct. 747, 46 L. Ed. 1058; *Cincinnati Packet Co. v. Bay*, 200 U. S. 179, 185, 26 Sup. Ct. 208, 50 L. Ed. 428; *Fisheries Co. v. Lennen (C. C.)* 116 Fed. 217; *Davis v. A. Booth & Co. (6th Circuit)* 131 Fed. 31, 65 C. C. A. 269.

On the other hand, it is equally well settled that the federal anti-trust law forbids every contract, combination, or conspiracy which directly or necessarily operates in restraint of trade between the states without regard to the form which the transaction takes. *Northern Securities Co. v. United States*, 193 U. S. 197, 331, 24 Sup. Ct. 436, 48 L. Ed. 299; *Chesapeake & Ohio Fuel Co. v. United States*, 115 Fed. 610, 619, 620, 53 C. C. A. 256, 265, 266; *Clark v. Needham*, 125 Mich. 84, 85, 87, 83 N. W. 1027, 51 L. R. A. 785, 84 Am. St. Rep. 559. See, also, cases cited in *Bigelow v. Calumet & Hecla Min. Co. (C. C.)* 155 Fed. 869, 874.

[2] The determination of this case must therefore turn upon the answer to the question whether the restraint imposed was merely incidental to the lease, or whether, on the other hand, the lease was a device to control interstate commerce; in other words, upon the dominant purpose of the parties in making the lease. This is a question of fact, to be determined from all the circumstances of the case. The question as presented here is in some respects novel, and is not entirely easy of solution. The oral evidence was taken in open court, and consisted of the testimony of the representatives of the respective parties who, on behalf of their principals, negotiated the lease in question. Upon a careful consideration of this testimony, in connection with the documentary evidence, and giving due consideration to the opportunity possessed by the trial judge to determine the weight to be given the testimony of the witnesses, we are disposed to agree with the conclusion reached by the court below, that the agreement violates the federal anti-trust law. Among the important considerations which lead to this conclusion are these:

For 12 years previous to the making of the lease in question a monopoly of river and lake transportation between the points named in the charter party in question had been maintained under a pooling arrangement between the owners of the respective lines of boats, including the parties to this litigation, with the exception of one year, during which there was a division of territory. During the years 1897, 1898, and 1899 there were four companies in the pool. By the time this pooling arrangement expired, two of the four parties had disposed of their interests to the other two, who became the parties to the 1900

arrangement in question, the libelant having made a sale on credit of one of its boats and the respondent having acquired a third boat. The arrangement of 1897 to 1899 was held by the Supreme Court of Michigan, in a suit brought by appellee here against the remaining parties to the agreement, for contribution on account of a recovery for personal injuries, to be an unlawful combination under the federal anti-trust law. *White Star Line v. Star Line of Steamers et al.*, 141 Mich. 604, 105 N. W. 135, 113 Am. St. Rep. 551. It is conceded here that the agreement of 1897 to 1899 was in violation of that law, and it is apparent that the object of the arrangement for the entire period between 1888 and 1899 was a monopoly of the traffic in question. We cannot regard this fact as immaterial in arriving at a determination of the dominant purpose of the parties in making the lease. In our opinion the previous relations of the parties, while not necessarily controlling, furnish a valuable sidelight upon the purpose of the agreement here in question. The case before us must be determined upon its own peculiar facts. The district judge seems to have reached the conclusion that the object of the appellee in chartering the *Idlewild* was to eliminate appellant's competition, and that in making the charter he "aimed at the same control of the traffic which he had before," and that the appellant entered into the contract with the knowledge of its purpose and effect as restraining competition. The charter for the years 1900 to 1902, which is before us, produced the result accomplished by the arrangements between 1888 and 1899 and was intended to do so. The district judge found as a fact that the rentals paid for the use of the *Idlewild* were greatly in excess of the earnings of that steamer. We think the testimony sustains that conclusion. While there is some conflict of testimony, we think it a reasonable deduction that the annual rental fixed was practically an average of the annual earnings of the *Idlewild* during the 12 years' existence of the pooling arrangement, and that this amount was about \$4,000 greater per year than the *Idlewild* was able to earn, except as her share of the earnings under a practically complete monopoly of this traffic. Indeed, the appellee's manager testified:

"From an earning standpoint, in the hands of anybody, she (the *Idlewild*) perhaps was worth only \$9,000, but in our hands and to do away with opposition, she was worth \$13,000 to us."

It is urged that the *Idlewild* could not have competed with the appellant's three boats, and that the former must therefore, had this lease not been made, have remained out of commission. But we are not satisfied that such is the case. Indeed, as we understand the record, appellant's manager conceded that he might have used the *Idlewild* on the route between Detroit and Toledo; and it is by no means clear that appellant would have experienced any difficulty in supplementing the *Idlewild* with another boat, if necessary to maintain competition. There is also evidence that appellant's manager had, or claimed to have, such competition in mind if the lease in question were not made.

If it was the dominant purpose of both parties, when making the lease, to preserve the monopoly which they had participated in creat-

ing, and in maintaining for a period of years, the contract was, in our judgment, none the less invalid, from the fact that the lessor, instead of receiving for the use of the boat a share of the profits of a pool, obtained as annual rental an amount which experience in the pool showed was the average annual earnings assigned to the boat in question—an amount materially larger than the boat could have itself earned while operated under the lease.

This must be so unless we are prepared to hold that a combination made for the purpose of maintaining a monopoly is made lawful by the fact that the rental of one of the boats used in the combination was fixed in amount. Can it make any difference with the result that the lessor did not propose the insertion of stipulations against competition, if he knew that the object of the lessee was to effect a continuance of the monopoly which had been maintained by the participation of the parties up to that time, and that such would be its effect, and approved of such result, knowing that it, as lessor, was receiving a rental which could only be paid because of the securing of such monopoly?

In view of the circumstances which have been just stated, did the form the transaction took make it any less a contract in restraint of trade? Should not in such case the dominant purpose of both parties be held to be to restrain commerce?

In *United States v. Trans-Missouri Freight Ass'n* and in *United States v. Joint Traffic Ass'n*, *supra*, is found language sustaining the inference that a lease and sale stand upon the same basis. It must be conceded that there is no necessary difference between rules pertaining to sales and leases. It seems obvious, however, that a lessor may have a greater interest in creating and maintaining a monopoly than a vendor from the fact that on the termination of the lease the lessor, as the owner of boats suitable for the traffic in question, would be interested in the existence of as little competition as possible. The fact that, as we understand the record, appellant did engage in the river and lake traffic in question, upon the expiration of the charter under consideration, lends color to the view that it was to appellant's interest to maintain the same arrangement in which it had participated during the years previous to the charter in question. The fact that the parties did not renew their arrangement on the expiration of this charter is not significant, for by the time it had expired the parties were in litigation, first, in the suit in the state court referred to, and, second, by the institution of the present suit for rental under the charter in question here—in which cases the reciprocal defenses were made that the respective agreements were in contravention of the federal statutes. It is to be noted, as of some pertinency, that by the fifth paragraph of the lease appellee specifically agreed that the leased boat should be operated in connection with his other steamers over the same routes which had been so controlled by the parties for many years preceding.

The theory on which stipulations against competition in connection with bona fide sales have been held not to violate the federal anti-trust law is that such restraint is no greater than required for the protection of the legitimate interests of the vendee, and that such restraint is therefore merely incidental to the main purpose, to wit, the sale and purchase. See *United States v. Trans-Missouri Freight Ass'n*; *United*

States v. Joint Traffic Ass'n; Bement v. National Harrow Co.; Cincinnati Packet Co. v. Bay; Davis v. A. Booth & Co., heretofore cited.

On the other hand, if the restraint imposed is greater than necessary to afford a fair protection to the legitimate interests of a vendee or lessee, the contract is rendered void. Shawnee Compress Co. v. Anderson, 209 U. S. 423, 425, 28 Sup. Ct. 572, 52 L. Ed. 865. The same test has been recognized by this court in several cases under the common law, including Hitchcock v. Anthony, 83 Fed. 779, 28 C. C. A. 80; American Strawboard Co. v. Haldeman Paper Co., 83 Fed. 619, 27 C. C. A. 634; Knapp v. S. Jarvis Adams Co., 135 Fed. 1008, 70 C. C. A. 536; Prame v. Ferrell, 166 Fed. 702, 92 C. C. A. 374.

Can this test apply, that is to say, can the lessee be said to have legitimate interests to protect, when his dominant purpose in taking the lease, and which is approved by the lessor, is to continue a monopoly which both have participated in creating and maintaining? We are constrained to the opinion that the district judge did not err in holding the agreement unlawful.

It is urged that, even if the agreement in relation to the interstate commerce route between Detroit and Toledo is void, the remainder of the contract may be enforced as valid. There is in our judgment no force in this contention. The contract is entire and indivisible. The only use which respondent had of the Idlewild was under the contract, and that being void, and no basis existing for an apportioning of earnings under the interstate route from those earned wholly within the state, and thus no means of separating the legal from the illegal provision, it follows that no recovery can be had.

SEVERENS, Circuit Judge (dissenting). In my opinion the judgment proposed by the majority of the court is erroneous; and, as the subject is one of much interest to the business public, and my conviction is so positive that the decision is not in accordance with the settled interpretation of the Sherman act, I think it my duty to record my dissent and state the reasons for it.

I assume as a postulate that the act is not intended to prohibit that class of contracts so long sanctioned, whereby the owner of property or business, for a valuable consideration, conveys it, or some valuable interest in it, to another, and at the same time and for the same consideration agrees not to do anything which shall tend to diminish the value of the subject-matter of his conveyance, whether it be of a business or of some specific real or personal property.

A lease of a vessel for employment on a certain specified route on which the owner has hitherto employed it is a proper contract in which such a stipulation may be made. The contract which these parties made is not obnoxious to the provisions of the act referred to. It is not affected by the circumstance that these parties had before that time been in a combination with other parties which was, and had been adjudged to be, illegal. As to any new agreement, they had the same capacity and privilege as other people to make contracts concerning their property and business. Whether such new contract offends the law depends upon its stipulations. If they are not unlawful and their due performance is not unduly prejudicial to the

public, they cannot be impeached by suspicion or even proof that the parties intended something wrong so long as that proof does not go to any act or fact extraneous to the contract. Intentions do not count in business transactions unless they are carried into effect by a contract.

Judge Andrews in the course of an elaborate opinion upon this subject, delivered in the case of Diamond Match Co. v. Roeber, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464, said:

"We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties."

And this defendant is not claiming that there was any stipulation outside the contract which made it other than what it purports to be. On the contrary, the defendant plants its defense upon the contract itself and in its answer to the libel sets it up as a valid defense. There is no suggestion of any extraneous stipulation which by its association with the contract would make it unlawful. It is true the answer sets up the previous unlawful combination, and how it was denounced by the Supreme Court of the state. And then the defendant attempts to carry the taint of that transaction over into the new contract and so infect it with the same illegality. Upon what legal inference or logic this result is accomplished is not apparent. In the court below witnesses were called and testified about what seems to me to be irrelevant and immaterial subjects; and stress is laid upon the circumstance that the district judge saw the witnesses and heard them testify. But I cannot help thinking, with all due respect to the opinion of my associates, that the oral testimony adduced at the hearing in the court below was of no legal significance, both because there was no pleading which raised any issue beyond that which the reference to the contract itself and the earlier combination presented, but because the testimony referred to does not tend to show that anything more than the due performance of the contract was at any time agreed to be done, or ever was done.

Turning again to the instrument itself, the only point raised in the argument made to show that the parties agreed to do something which would be in violation of the Sherman act is that the sum agreed to be paid for the use of the vessel considerably exceeded the fair rental value of the use. This is supposed to give ground for suspicion. But what evil object the suspicion rests upon is not so "bodied forth" as to be discernible. Besides, it is the ordinary and expected thing in such cases that the vendee will pay more than the value of the principal subject of the contract, and that some part of the consideration goes for the ancillary stipulation. The defendant in its answer to the libel very properly puts the matter thus:

"That the rental price agreed to be paid for the steamers Idlewild and Arundell was largely in excess of their real rental value, and that the same was agreed to be paid in consideration of the undertaking of the libellant not to enter into competition with the defendant upon said route during the period of said contract."

Just what the Sherman act means by the term "monopolizing" is not yet settled, and it may be that it will have to be done by the processes of inclusion and exclusion. But it already seems safe enough to say that it does not include such a result as a man may attain by his own endeavor and without the suppression of competition other than such as inures to him through the ancillary stipulations of a lawful contract, such as these. There is no forbidden monopolizing in this, nor any undue restraint of trade. There was here no agreement to bring other parties into a combination, or to induce them not to enter into competition. There was no stipulation that the lessor should have any interest in the proceeds of the business which it was expected would be carried on by the lessee; nor was there any sort of combination in the enterprise. If the lessor had sold the vessel outright, and had stipulated not to compete in the business in which she was to be employed, it would have been the common case in which such ancillary stipulations have been adjudged to be lawful. Here the vessel was leased for a term of years, and the restraint which the lessor put upon itself was for the same period. All the vessels on the Great Lakes which then were or might be built and be capable of such service were as free as ever to ply the business of carriers of passengers and freight between these ports.

The defendant naively avows in its answer and makes oath that at the time when it made this contract it was advised and believed that it was valid and binding. And upon such a pledge of its sincerity we may properly assume that during the years when it was using the vessel it held to the same faith. Otherwise it would have abandoned the contract and restored the vessel to its owner. It was not until pay day arrived that it was able to see things in what it now thinks is the proper light. I do not mean to say that it is not permissible in law for a party to alter his position in this way and in circumstances where the law permits it on grounds of public policy, but the conditions are recited to indicate the duty of the court to put such a construction upon the contract and give it such effect as will make it valid and obligatory if such construction is fairly possible.

In my opinion the public interest was not impaired in any way which would render the contract obnoxious to the prohibitions of the Sherman act; and I cannot help thinking that a decision to the contrary would be opposed to the settled law, and if followed would render the making of any of this kind of contracts practically impossible, and must think that the public interest would be better served by compelling the defendant to perform its agreement.

WATERMAN V. CANAL-LOUISIANA BANK & TRUST CO. et al.^t

(Circuit Court of Appeals, Fifth Circuit. March 14, 1911.)

No. 2,077.

1. WILLS (\$ 487*)—CONSTRUCTION—EXTRINSIC EVIDENCE.

In the construction of a will, the court is bound to ascertain the intention of the testator from the terms used in the will, without the aid of extrinsic evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1026-1032; Dec. Dig. § 487.*]

2. WILLS (\$ 777*)—CONSTRUCTION—"CONJOINT LEGACY"—LAPSED LEGACY.

Civ. Code La. art. 1707, provides that accretion shall take place for the benefit of legatees in case a legacy is to several conjointly, and that the legacy shall be reputed to be made conjointly when it is made by one and the same disposition, without the testator having assigned the part of each co-legatee in the thing bequeathed, and article 1709 declares that except in the cases provided by such article, and by article 1708 (inapplicable), every portion of the succession remaining undisposable of shall devolve on the testator's legitimate heirs. Testator bequeathed pecuniary legacies to a number of legatees, and then bequeathed different amounts to six charitable institutions, among which was a bequest to the "Home for Insane," and then provided that the residue should be divided between the beneficiaries of the charitable bequests pro rata in proportion to the amount of the special legacies made to them. *Held*, that the residuary bequest was conjoint within article 1707, so that, on the failure of the legacy to the Home for Insane because of uncertainty, such legacy, together with the legatee's interest in the residue, passed to the other charitable legatees, and not to testatrix's heirs at law.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 777.*]

3. COURTS (\$ 366*)—FEDERAL COURTS—STATE STATUTES—CONSTRUCTION—DECISIONS OF STATE COURT.

The construction of articles of the Louisiana Civil Code by the Supreme Court of that state is controlling on the federal courts, and becomes in effect a part of the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954-957, 960-968; Dec. Dig. § 366.*]

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Bill by Frances E. Waterman against the Canal-Louisiana Bank & Trust Company, as executor of the estate of Caroline Stannard Tilton, deceased, and others, to construe the will. From an adverse decree, complainant appeals. Affirmed.

This is a bill by Frances E. Waterman, wife of Charles A. Crane, a citizen of Illinois, against the Canal-Louisiana Bank & Trust Company, executor of the will of Caroline Stannard Tilton, deceased, and others, all citizens of Louisiana. The complainant sues as an heir at law of the testatrix. The suit involves the construction of Mrs. Tilton's will. Omitting the codicils, which are sufficiently described in the opinion, the will is as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied April 13, 1911.

"So help me God, Amen.

"New Orleans, January 1st, 1908.

"I, Caroline Stannard Tilton, being of sound mind and good bodily health, do by these presents make and publish this my last will and testament, revoking all others.

To my nephews, Robert and Frederick Waterman, each.....	\$3,000 00
To my nephew, Frederick Tilton Davis.....	1,000 00
To the four children of Mrs. Charles Crane of Chicago, Illinois, each	1,000 00
To my god-child, Ethelyn Lallande.....	1,000 00
To my cousin, Nina Kirby-Smith Buck, of Indianapolis.....	3,000 00
To the two children of my nephew, Edward N. Waterman, each	1,000 00
To my friend, Mrs. Charles Conrad, of New Orleans.....	3,000 00
To my friend, Charles Conrad Krumbhaar.....	1,000 00
To my friend, Gustave T. Beauregard's Memorial Statue.....	1,000 00
To my niece, Mamie Anderson Willard.....	5,000 00
To my friend, Juanita Lallande.....	1,000 00
To my friend, Pauline Toby.....	1,000 00
To my cousin, Virginia Kirby-Smith, of Mexico.....	3,000 00
To my god-child, Caroline Tilton Kirby-Smith, of Mexico.....	1,000 00
To my god-child, Frances Kirby-Smith Wade, of Los Angeles...	1,000 00
To my friend, Mrs. Alphonse Le Doux.....	1,000 00
To my friend, Mrs. Annie Bousin, of Paris, France.....	3,000 00
To my cousin, David Bareley Kirby, of New York.....	3,000 00
To my grand-nephew, Frederick Tilton Willard.....	3,000 00
which I wish my executors to invest in some desirable security, to be registered in his name, to be used to defray his expenses of tuition to prepare him for the scholarship at the Tulane University, which his father, Charles Willard, holds for him, and which was presented to him for said Tilton Willard, by the administrators of Tulane University.	
To my cousin, Carry Kirby-Smith, formerly of Sewanee, I give	1,000 00
I give and bequeath to the Board of Commissioners of Audubon Park, of New Orleans, the sum of.....	3,000 00
to be expended by them in beautifying that portion of the Park that fronts upon the property of the Tulane University.	
To the memorial to be erected to Gen. Beauregard.....	1,000 00
To the Charity Hospital of New Orleans.....	2,000 00
To the St. Anna's Asylum.....	2,000 00
To the Protestant Episcopal Orphan Asylum, Jackson Ave., N. O.....	2,000 00
To the Home for Incurables.....	2,000 00
To the Home for Insane.....	3,000 00
To the Christian Woman's Exchange.....	1,000 00

"After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions; the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively.

"Should any of the beneficiaries under the will object to the probate thereof, or in any way directly or indirectly contest, or aid in contesting the same, or any of the provisions thereof, or distribution of my estate thereunder, then and in that event, I annul any bequest heretofore made to such beneficiary, who shall be absolutely barred and cut off from any share in my estate.

"I hereby appoint and designate the Canal-Louisiana Bank & Trust Company as my executors, with full seizin to carry out my wishes.

"I have no heirs, neither as ascendant or descendant.

"Signed this day of our Lord, January 1st, 1908.

"Caroline Stannard Tilton.

"New Orleans, La."

It is alleged in the bill that Mrs. Tilton failed to identify with any degree of certainty which "Home for Insane" she intended as the object of her bounty, and to whom she specially bequeathed the \$3,000, together with the pro rata part of the residue. It is therefore averred that this legacy of \$3,000 and the part of the residue bequeathed to the "Home for Insane" became caducous and lapsed because of the inability of the legatee to take. It is averred that such proportionate share in the residue, together with the special legacy, bequeathed to the "Home for Insane," exceeds the sum of \$90,000.

There was a demurrer to the bill for want of jurisdiction in the Circuit Court, but that question was finally settled in favor of the jurisdiction by the Supreme Court. Waterman v. Canal-Louisiana Bank & Trust Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80. After the question of jurisdiction was decided, the case was tried in the Circuit Court on the following ground of demurrer:

"That the said bill is without equity because it appears on the face of the will annexed to said bill that the legacy to the Charity Hospital, the St. Anna's Asylum, the Protestant Episcopal Orphan Asylum, the Home for Incurables, the Home for Insane, and the Christian Woman's Exchange is a conjoint universal legacy, and if the legacies to the Home for Insane have lapsed, as averred, the same belong to the other conjoint universal legatees."

The Circuit Court sustained the demurrer and dismissed the bill. The complainant appealed, and assigns the decree dismissing the bill as error.

E. Howard McCaleb, for appellant.

Geo. H. Terriberry, H. G. Dupre, Geo. C. Walshe, Chas. E. Fenner, Edgar H. Farrar, H. G. Dufour, Wm. C. Dufour, Victor Leovy, Walter Guion, S. McC. Lawrason, and J. McConnell, for appellees.

Before PARDEE, MCCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The bill alleges, and the demurrer admits, the caducity of the legacy to the "Home for Insane." The lapsed legacy is the subject of controversy. The question to be decided is whether it devolves upon Mrs. Tilton's heirs at law, or whether accretion takes place for the benefit of her colegatees. The answer must be found in the language of the will and in the local law.

[1] In the construction of wills, the rule everywhere controls that the courts must ascertain, if they can, and enforce, the intention of the testator. "The intention is the polar star by which the courts must be guided." This rule is recognized alike by the common law (Finlay v. King, 3 Pet. 346, 7 L. Ed. 701) and, with emphasis, in jurisdictions where the civil law prevails (City v. Hardie, 43 La. Ann. 251, 9 South. 12). But with exceptions with which we have no concern in this case extrinsic evidence would not be considered, for the will must speak for itself. Mackie v. Story, 93 U. S. 589, 23 L. Ed. 986. The rule, to seek the intention but to hold to the words, is found in the statute:

"In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament." Louisiana Civ. Code, art. 1712.

The court should examine and consider the whole instrument in search of the intention. While there should be no departure from the proper signification of the terms of the part construed, other parts,

in fact, the whole scheme, may shed light on the intention. When the part to be construed is susceptible to two constructions producing radically different results, the courts naturally and properly adopt the one which conforms to the intention shown by the whole will. This search for intention is found in the opinions of the Louisiana Supreme Court in the cases construing wills like the one we are considering, and in applying the articles of the Civil Code that are to be applied here. In *Parkinson v. McDonough*, 4 Martin (N. S. La.) 246, the court said:

"In cases of doubtful or equivocal expressions in testaments, when disputes arise on matters to which they relate, it is a primary duty of courts of justice to ascertain with all possible precision the intention of the testator, and, if it be consistent with law, to give it effect. * * *

"If the interpretation contended for by the appellants be tolerated by law, it will afford the means of giving effect to the intention of the testator in the present case."

And in *Lebeau v. Trudeau*, 10 La. Ann. 164, 165, the court said:

"To say that by the failure of the legacy as to any one of these eight beneficiaries thus jointly constituted his universal legatees any other person than they should profit is to fly in the face of the testator's clear and unequivocal intention, and surely such a result should not be permitted, unless there be some insuperable provision of law to override that intention."

If there should be doubt of the proper construction of the words and phrases of the parts of Mrs. Tilton's will upon which this suit depends, it is clear that we would be following precedent to ascertain, if we can, her intention from the whole will, and to give the controverted part, if it is susceptible to it, such construction as will comply with that intention, and to avoid, unless driven to it by the plain words of the controlling part, such construction as would defeat that intention.

Before making a close scrutiny of the portion of the will which is controlling, it is well to take a general view of the whole instrument. That course may aid in arriving at a proper construction of the parts in question. The will indicates that the testatrix owned a large estate, and asserts that she had no heirs ascendant or descendant. Her next of kin entitled to inherit her estate, had she died intestate, were nephews and nieces. The first 20 items are gifts to nephews, nieces, cousins, a godchild, and friends, each gift being a fixed sum of from \$1,000 to \$5,000. The next two items are a gift of \$3,000, to be used in beautifying the park that fronts upon the property of the Tulane University, and \$1,000 to the memorial to be erected to Gen. Beauregard. Passing for the present six gifts to charities of from \$1,000 to \$3,000 each, and the residuary clause on which the controversy centers, we look at the three codicils to the will, and find that they contain gifts of described articles to kindred and friends, and specified sums of from \$50 to \$200 to named servants, and a gift of \$20,000 to be used in building a Protestant Episcopal church. And the Canal-Louisiana Bank & Trust Company is made executor, "with full seizin to carry out" her wishes.

We copy below the six charitable bequests and the residuary clause on which the controversy mainly depends:

To the Charity Hospital of New Orleans.....	\$2,000 00
To the St. Anna's Asylum.....	2,000 00
To the Protestant Episcopal Orphan Asylum, Jackson Ave., N. O.....	2,000 00
To the Home for Incurables.....	2,000 00
To the Home for Insane.....	3,000 00
To the Christian Woman's Exchange.....	1,000 00

"After satisfaction of all the foregoing special legacies and bequests, and after payment of all costs and expenses in settlement of my estate, if I have remaining any besides undisposed of, I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions; the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively."

Excepting the residuary clause, each legacy is of a specified article or a specified sum. Legacies of \$1,000 each are left to the complainant's four children; and in one of the codicils a small gift is made to the complainant. In every gift of money the sums are fixed, and there is nothing to indicate an intention to increase the sums under any circumstances. It seems to have been her plain intention to be more liberal in her donations to the church and the charities than to her kindred and friends, the other legatees, for the gifts to the former are larger. And the will limits and fixes the maximum amount that each legatee is to receive, except the beneficiaries of the six charitable bequests, who are to receive fixed sums, and also the residue. It may be said that the will shows a scheme to dispose of the whole estate, to give fixed sums and specified articles to named kindred and friends, and larger fixed sums to public institutions, and specified sums to six named charitable institutions, which are also to receive any residue of the estate that may remain.

A decree granting the relief prayed for would clearly be in conflict with this general scheme and the intention shown by it. But it is true that most weight must be given to the words of the clause making the bequest in question.

[2] The residuary clause which we have copied above embraces the entire residue of the estate after the payment of the special legacies, and, if the six beneficiaries of the charitable bequests were able and willing to take the bequests of such residue, there would be no ground for this litigation. The clause clearly disposes of the entire residue. But the bill alleges, and the demurrer admits, that there is no such institution or corporation in existence as the "Home for Insane," and that, therefore, the legacy of \$3,000 to said "Home for Insane" and the pro rata of the residue, estimated at \$90,000, have lapsed, the said legatee being nonexistent and incapable of receiving the legacy. Civ. Code La. art. 1703. The contention of the complainant is that this lapsed legacy devolves upon the legitimate heirs of the decedent. The defendants contend that, assuming it to be true that the legacy has lapsed, accretion takes place for the benefit of the five other charitable institutions which are referred to in the residuary clause. The following are the articles of the Civil Code which are controlling:

"Art. 1707. Accretion to Legatees in Conjoint Legacy—Accretion shall take place for the benefit of the legatees, in case of the legacy being made to several conjointly.

"The legacy shall be reputed to be made conjointly when it is made by one and the same disposition without the testator's having assigned the part of such colegatee in the thing bequeathed."

"Art. 1708. Id. Conjoint Legacy.—It shall also be reputed to be made conjointly when a thing, not susceptible of being divided without deterioration, has been given by the same act to several persons, even separately.

"Art. 1709. Accretion to Heirs.—Except in the cases prescribed in the two preceding articles, every portion of the succession remaining undisposed of, either because the testator has not bequeathed either to a legatee or to an instituted heir, or because the heir or the legatee has not been able, or has not been willing to accept it, shall devolve upon the legitimate heirs."

The gist of the residuary bequest is in these words:

"I will and direct that such residue shall be divided between the beneficiaries of the charitable bequests heretofore made to various institutions; the division to be made pro rata, and in proportion to the amount of the special legacies already made them respectively."

If the legacy created by these words is *conjoint*, then the complainant has no rights, for, under article 1707, accretion takes place for the benefit of the other legatees—the five other beneficiaries of the charitable bequest. But, if it is not a case of a legacy being made to several *conjointly*, it would then be governed by article 1709, and the lapsed legacy would devolve upon Mrs. Tilton's heirs. Article 1708, relating to a thing not susceptible of being divided, is not applicable, and will need no further consideration. Unless, therefore, the legacy created by the residuary clause is conjoint, within the meaning of article 1707, accretion does not occur, and the right of the complainant would accrue under article 1709. Two questions are suggested by the language of the former article: (1) Is the legacy made by one and the same disposition; and (2) is it made without the testatrix having assigned the part of each colegatee in the bequest.

Looking at the language of the residuary clause, not for the purpose of solving questions of syntax or parsing, but solely to get the meaning of the clause, we find a single gift of the residue of the estate to six previously named charitable institutions. The residue is bequeathed as an entirety. It is not a bequest of two-twelfths to one legatee and three-twelfths to another, and so on, separately. All the named legatees are called to partake, in proportions ascertainable by the will, of the whole residue. As to such residue they are made universal legatees. A legacy of the residue is held to be a universal legacy. Succession of Burnside, 35 La. Ann. 708; Compton v. Prescott, 12 Rob. (La.) 56, 66. Accretion is founded on the theory that the bequest is given in its entirety to every one of the named legatees, and hence, when one of the legatees is unable to take, this fact leaves the title to the whole intact in the others. Succession of Hunter, 45 La. Ann. 262, 266, 12 South. 312. Here, as we have said, the bequest is of the entire residue to the named legatees. We also find a direction for a pro rata division of such residue among such named institutions in proportion to the amount of the special legacies already made to them. But that does not prevent the bequest from being conjoint.

In Parkinson v. McDonough, 4 Martin (N. S. La.) 246, decided in 1826, the court construed the articles we have quoted. The bequest was in these words:

"I will and bequeath to the orphan children of my old friend Godfrey Duher, and which are now under my charge, and are named Mary, Nancy, James and Eliza, one share, or one-eighth part of all my property, to be equally divided among them."

In that case, taking the clause as a whole, we find a bequest of one-eighth part of the testator's estate to four persons, to be equally divided among them. In the case at bar, the bequest is of the residue, with direction to divide, not equally, but pro rata. In the Parkinson Case, the court held that the legacy was conjoint, and, one of the co-legatees having died, it was held that accretion took place in favor of the other co-legatees. The court said:

"The testator in the present case bequeaths to four persons one-eighth part of his estate, to be divided equally among them. Is this a legacy made without assigning to each colegatee his part in the thing bequeathed? The thing bequeathed is one-eighth part of the testator's succession, which he gives to be equally divided between four persons, to whom the bequest is made conjointly, according to the first member of the sentence; but, according to the second, they are to partake of it in equal portions. * * *

"The distinction between a bequest of a thing to many in equal portions, and one wherein a testator gives a legacy to two or more individuals, to be divided in equal portions, appears at first view extremely subtle and refined. The difference in phraseology in those two modes of bequeathing is so slight as not readily to convey to the mind any difference in ideas, and can only produce this effect by separating the members of the sentence in the latter phrase; in truth, to create two distinct sentences, each complete in itself with regard to sense and meaning; the one relating to the disposition of the will, the other to its execution. We might hesitate much in adopting this method of construction, were it not sanctioned by the authorities cited in behalf of the appellants. The doctrine contended for is fully supported by the Commentary of Toullier on the 1044th article of Code Napoléon, which we have already shown to be precisely similar to that of our own Code on the same subject."

In Lebeau v. Trudeau, 10 La. Ann. 164, decided in 1855, the bequest was as follows:

"After my debts are paid, my property shall be divided, in equal portions, among the persons hereinafter named, that is to say, [here follow the names of the eight legatees]. I have hereinbefore mentioned the names of the persons to whom I bequeath all my property."

One of the eight legatees having died, in holding that accretion in favor of the other legatees took place, the court said:

"Now, here, the legacy is made by one and the same disposition. Is it made without the testator's having assigned the part of each colegatee in the thing bequeathed? I think it is.

"The assigning of the parts of each colegatee,' means something more than is comprehended in the language of this will, which, according to my understanding of it, simply directs their participation of his whole estate in equal portions. I apprehend the terms used in the Code contemplate an express specification and assignment of the respective portions of the legatees, calling each to his particular part. But in the present case there is not that specific and distinct assignment of the parts, which, in my judgment, is necessary to constitute a distinct legacy to each of a distinct portion of the deceased's fortune. He appears to me, on the contrary, to have called them conjointly to partake equally in the totality of his estate, and has mentioned the equality of their portions for the purpose of regulating the distribution of that totality."

In Mackie v. Story, 93 U. S. 589, 23 L. Ed. 986, decided in 1876, the court had before it for construction the same articles of the Civil Code. In that case the words of the will were:

"I will and bequeath to Henry C. Story and Benjamin S. Story all properties I die possessed of, to be divided equally between them."

The court quoted the Parkinson and the Lebeau Cases, and held, one of the legatees having died before the testator, that accretion took place, and that the surviving legatee, and not the heirs at law, took the whole of the estate bequeathed. The court pointed out that the article of the Louisiana Civil Code in question exactly followed the Code Napoléon, and that a bequest in similar words had been held to be a conjoint legacy, under the French Code, as construed by the Court of Cassation. This case—Mackie v. Story—is cited approvingly, not on this point, however, by the Louisiana Supreme Court in 1907. Succession of Quinlan, 118 La. 602, 605, 43 South. 249.

If the legacy is conjoint in the Parkinson Case, the Lebeau Case, and the Mackie Case, we can see no reason why it is not to be held conjoint in the case at bar. In the first case, there was a bequest to four named persons, to be equally divided among them; in the second case there was a bequest that "my property shall be divided in equal portions" among eight named persons; and in the third case there was a bequest of all the testator's property to two persons, to be equally divided between them. In each case the bequest shows the part of the legacy that is to be received by each person named, but still it was held to be conjoint. In the case at bar the bequest of the residue is to six named beneficiaries. The gift embraces the entire residue—whatever is left after paying the special legacies. It could not be known exactly what sum would be left, but whatever is left is bequeathed. If there had been a direction for "equal division" among the six named beneficiaries, there would have been more similarity in words in this case to the other cases. The direction here is for a pro rata division based on the previously described legacies, which clearly fixes, not the amount to be received by each institution, but the proportion that each was to receive. There is no difference in principle, whether the share is fixed at one-half, one-fourth, one-eighth, or three-twelfths, or at any proportion ascertainable from the words of the bequest.

[3] The construction which the Supreme Court of Louisiana has placed on these articles of the Civil Code should be controlling in the federal courts. Such construction becomes, in effect, a part of the statute, to be enforced by this court as it would be enforced by the Louisiana courts had the complainant selected that forum. We have been governed by the Louisiana law alone in reaching our conclusion. It is interesting to note, however, that at common law, construing the residuary bequest as one to the several charitable institutions *as a class*, the inability of one of them to take would leave the entire legacy to be divided among the others. Note, 94 Am. Dec. 156, 157, quoting 2 Redfield on Wills, 168, and other authorities.

We find nothing in the opinion in Succession of Hunter, *supra*, that conflicts with the cases that we have cited as controlling. On the contrary, that opinion shows that the construction placed on Hunter's will

relieved the court from considering the pivotal question in this case.

We are of opinion that the court ruled correctly in holding that the legacy was conjoint.

Affirmed.

In re FORBES.†

(Circuit Court of Appeals, Ninth Circuit. March 9, 1911.)

No. 1,845.

1. HOMESTEAD (§ 66*)—EXEMPTION—STATUTES.

Under Arizona Territorial Act March 21, 1907 (Laws 1907, c. 79) § 1, providing that a homestead shall consist of a dwelling house in which the claimant resides and the land on which the same is situated or land that the claimant shall designate, providing it is in one compact body not to exceed \$2,500 in value, a homestead exemption may be a dwelling house and the land on which it is situated or real property in a compact body, provided the exemption in either case does not exceed \$2,500 in value.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 93, 96, 97; Dec. Dig. § 66.*]

2. ATTACHMENT (§ 184*)—LIEN—MERGER.

Where an attachment was levied on land which the debtor subsequently selected as a homestead, the attachment lien was merged in the judgment obtained by the attaching creditor.

[Ed. Note.—For other cases, see Attachment, Dec. Dig. § 184.*]

3. BANKRUPTCY (§ 198*)—ATTACHMENT—EXEMPT PROPERTY—VACATION.

Bankruptcy Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), provides that the trustee of the bankrupt's estate shall be vested by operation of law with the bankrupt's title as of the date he was adjudged a bankrupt, except as to exempt property. Section 67f provides that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the bankruptcy petition against him shall be void in case he is adjudged a bankrupt, and the lien be deemed wholly discharged, unless the court shall order the lien preserved for the benefit of the estate, etc. Held, that section 67f was applicable to liens acquired through legal proceedings against the bankrupt within four months prior to the filing of the bankruptcy petition without reference to whether the lien was acquired on exempt or nonexempt property, so that an attachment on property of the bankrupt subsequently exempted to him as a homestead was dissolved by bankruptcy proceedings, though the property did not pass to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 198.*]

In the matter of bankruptcy proceedings of S. J. Forbes. One Julie H. Pitt demanded that the proceeds of a sale of property on which she had levied an attachment, but which was claimed by the bankrupt as a homestead, be set apart to her. Referee's order denying the application and distributing the money among the creditors pro rata having been set aside and the money awarded to petitioner, the bankrupt files a petition for revision. Petition granted. Determination reversed.

S. J. Forbes on July 1, 1904, executed and delivered his promissory note to Julie H. Pitt for the sum of \$2,000. On February 4, 1908, the note being due and unpaid, Julie H. Pitt, as plaintiff, brought suit thereon against S. J. Forbes in the district court of the territory of Arizona in and for the coun-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 22, 1911.

ty of Graham. The plaintiff on the same day caused a writ of attachment to issue against the property of the defendant, and by levy made by the sheriff under the attachment certain property belonging to the defendant was attached including lot 43 of San Francisco town site, at Clifton, Ariz. The sheriff held possession of this property until May 12, 1908, when he surrendered the same to F. W. Herzke, who on that day had been appointed trustee in bankruptcy of the estate of S. J. Forbes. It appears from the findings of facts that on March 8, 1908, a petition in involuntary bankruptcy had been filed in the district court of the territory praying that Forbes be adjudged a bankrupt on the ground of insolvency. On April 4, 1908, Forbes was adjudged a bankrupt on the ground alleged in the petition, and on May 12, 1908, as before stated, F. W. Herzke was appointed trustee in bankruptcy, and took possession of the estate of the bankrupt, and thereafter, under an order of the referee in bankruptcy, sold lot 43 for \$4,100. The total value of the estate converted into money was \$9,131.54. On February 7, 1908, or three days after the levy of the attachment on lot 43 in the suit of Pitt v. Forbes, the latter filed a homestead declaration upon lot 43, alleging that he was the head of a family, and that he and his family resided at the town of Clifton, county of Graham, in the territory of Arizona; that he designated lot 43 and claimed the same as his homestead under the laws of the territory. This declaration was filed for record in the recorder's office for the county of Graham on February 14, 1908. It was declared in the homestead declaration that the value of the lot was \$2,500. On May 14, 1908, Julie H. Pitt made proof of her claim against the bankrupt on a judgment obtained against him on March 4, 1908, but did not in her proof state that she claimed an attachment lien on any of the property of the bankrupt. In the verified schedule of resources and liabilities filed by the bankrupt in the bankruptcy court on May 27, 1908, the bankrupt claimed an exemption in lot 43 under the laws of the territory, and on June 17, 1908, the trustee set apart to the bankrupt an exemption of \$2,500 in said lot, if the lot could be sold for that amount. On February 9, 1909, Julie H. Pitt filed with the referee a petition stating that on December 21, 1908, she had obtained judgment by default against the bankrupt for the sum of \$2,240.66, interest, and costs; that this judgment directed a sale of the lot to satisfy the judgment; that the trustee had disregarded her attachment lien and had sold said property, and was holding in his possession \$2,500 set aside to the bankrupt as exempt. The petition demanded that the money be paid to the petitioner in satisfaction of her judgment lien. On March 25, 1909, the referee made an order distributing this money among the creditors pro rata, and thereupon this order was taken for review to the judge of the district court, and the court thereafter awarded the same to Julie H. Pitt in satisfaction of her judgment lien, and the same was thereupon paid to her by order of the court in the bankruptcy proceedings. The bankrupt brings the matter into this court upon a petition for revision of the proceedings in matter of law.

L. Kearney, for petitioner.

J. E. Barry, for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). The bankrupt claims an exemption right in lot No. 43 in the sum of \$2,500.

The provisions of the bankruptcy act (Act July 1, 1898, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3421]) applicable to this case are: Clause 11 of section 2, vesting courts of bankruptcy with jurisdiction "to determine all claims of bankrupts to their exemption." Section 47, cl. 11, makes it the duty of trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." Section 6 provides:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

Section 1 of the act (page 545) provides that the word "state" shall be construed as including the territories.

The law of the territory of Arizona in force at the time of the filing of the petition in bankruptcy was the "Act to regulate homesteads and exemptions," approved March 21, 1907, to take effect May 1, 1907. Laws of Arizona, pp. 149-154, c. 79.

Sections 1, 2, and 13 of this act provide as follows:

"Section 1. Every person who is at the head of a family and whose family resides within this territory, may hold as a homestead, exempt from attachment, execution and forced sale, real property to be selected by him or her, which said homestead shall be in one compact body, not to exceed in value the sum of two thousand five hundred (\$2,500.00) dollars, and shall consist of the dwelling house in which the claimant resides and the land on which the same is situated or of land that the claimant shall designate, provided the same is in one compact body.

"Sec. 2. Any person wishing to avail himself or herself of the provisions of the foregoing section shall make out under oath his or her claim in writing, showing that he or she is the head of a family, and also particularly describing the land claimed and stating the value thereof; and shall file the same for record in a book to be kept for that purpose in the office of the county recorder in the county where the land lies."

"Sec. 13. Nothing contained in this title shall be so construed as to impair, or in any way affect, any mortgage or lien that may have attached to land before such land was claimed as a homestead."

When the bankrupt filed his homestead declaration with the county recorder on February 7, 1908, the lot claimed as a homestead was under attachment in the suit of Pitt v. Forbes. Under section 13 of the territorial act of March 21, 1907, the declaration did not impair or in any way affect the attachment lien; that is to say, the homestead continued to be subject to this lien notwithstanding the declaration.

But, turning now to the bankruptcy act, we find that by the provisions of 67f:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and his property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate. * * * Provided, that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

It does not appear from the record that the attachment lien in this case was saved or preserved by any of the exemptions contained in the statute.

Section 1 of the territorial act of March 21, 1907, provides that the homestead "shall consist of a dwelling house in which the claimant

resides, and the land on which the same is situated; or of land that the claimant shall designate, providing the same is in one compact body." The exemption in favor of the bankrupt may therefore be a dwelling house and the land on which it is situated, or real property providing it is in one compact body, and the value of the exemption in either case is not to exceed \$2,500. The claimant of the homestead in this case did designate as his homestead lot 43 of the San Francisco town site, and this lot appears to be in one compact body. The trustee set it apart as required by clause 11 of section 47 of the bankruptcy act, and reported the fact to the court, together with the estimated value thereof; and this report was confirmed by the court. The attachment lien for \$2,025.25, debt and costs \$17.50, making a total lien of \$2,042.75, covered all the bankrupt's property, and was merged in a judgment for \$2,240.66. The value of the bankrupt's homestead exemption was under the territorial statute \$2,500. The value of lot 43 as fixed by the sale was \$4,100. The total estate converted into money was \$9,131.54.

It is contended by the respondent that by section 70a of the bankruptcy act the title to the exempt property did not pass to the trustee, and that the lien of attachment was therefore not dissolved by section 67f. Section 70a provides in substance that the trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt. But the provision of section 67f is not limited in the annulment of liens to property that passes to the trustee. It is general and sweeping, and applies to liens acquired through legal proceedings against the bankrupt during the four-months period prior to his filing his petition in bankruptcy. Collier on Bankruptcy (8th Ed.) p. 161. There is some conflict in the authorities upon this question, but we think the interpretation placed upon the statute by Judge Jones in the case of *In re Tune* (D. C.) 115 Fed. 906, 910, is correct. His discussion of that question is so full and satisfactory that we append his opinion on that point in full:

"The question then arises, Was the attachment lien dissolved by the adjudication? It is urged that a court of bankruptcy cannot concern itself with liens upon exempt property or their enforcement. It cannot be denied that it ought to view with concern an attempt to create a lien upon exempt property pending discharge. It is its duty to see that legal remedies for collection of debts, from which discharge may absolve, shall not be allowed to create liens upon property set apart to the bankrupt, so as to nullify the policy of the law, by subjecting the exempt property to debts from which the discharge intended to free it. It is insisted that, as the raft of logs was exempt property, the provisions of the bankrupt act annulling attachments and liens cannot affect the levy in this case, as those provisions were made for the benefit of creditors who cannot share in the exempt property, and no disposition the debtor may make or suffer to be made can amount to a preference. All enlightened governments endeavor to guard against the distressing consequences resulting from the inexorable collection of debt, the enforcement of which shapes in so many ways the condition and destiny of the debtor, by granting liberal exemptions, and providing for periodic discharge from debt. To accomplish these results, the bankrupt law not only relieves the debtor from all debts, with a few exceptions, but to all intents and purposes makes the bankrupt a creditor with a lien, so to speak, and prefers him to creditors to the extent of his exemptions in distributing his assets. This cardinal purpose dominates the whole law. When the statute

deals with the dissolution and annulment of attachments, judgments, etc., it is careful to specify the exception, and the only exception in which the bankrupt's exempt property shall not be affected by the changed legal status imparted to the rest of his estate by the dissolution of attachments and liens; and that is the case of conveyances made to hinder, delay, and defraud creditors. The subdivision in which this is provided is preceded by one relating to the same general subject, in which no such exception is made; and it is followed by another section which is peremptory and sweeping in its language that 'all liens shall be deemed null and void, and the property affected shall be wholly discharged and released and shall pass to the trustees as a part of the estate of the bankrupt.' If the statute did not intend to except exempt property from the effect of its policy in declaring all liens void, save in the particular instance mentioned, why use such sweeping and peremptory language as necessarily to include all the bankrupt's property in all other sections specifying what shall pass to the trustee? This studied difference in the language of the different subdivisions of the same section, which deals with liens and the effect of their dissolution or annulment, cannot be ignored in ascertaining the legislative intent. It is significant of a purpose not to exclude exempt property, save in the one specified instance, from the benefit of the annulment of liens, and to pass it to the trustee for the benefit of the bankrupt. The main reason for the four-months provision was to prevent the race by creditors to seize the estate of the insolvent when it is found that he is in failing circumstances, and to prevent the preferences which would follow if liens and attachments were allowed during that period. This purpose would be wholly defeated if liens could be created upon the exempt property. Some creditors would unquestionably be preferred. Some would receive satisfaction in whole, some in part, and some nothing. All this, in the face of the policy of the statute to preserve the exempt property, and to require all creditors who had not acquired liens older than four months, or which are protected, to share equally in the bankrupt's estate."

The rule stated in *Lockwood v. Exchange Bank*, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, is that the title to the property of a bankrupt which is generally exempted by the law of the state in which the bankrupt resides remains in the bankrupt and does not pass to the trustee, but this was said with respect to an exemption covering all the property of the bankrupt, and cannot be applied to an exemption of a homestead or real estate of a specified value less than the actual value, where the trustee is directed by the statute to determine the claim of the bankrupt to the exemption and report its estimated value to the court. We think that, under the bankruptcy act, the homestead exemption in this case to the value of \$2,500 continued in the bankrupt; that respondent's attachment lien was dissolved and bankruptcy proceedings were necessary to determine the value of the property that the excess might be preserved for the benefit of the creditors.

The order of the District Court directing the trustee to pay to Julie H. Pitt, the attaching creditor, the sum of \$2,500, the remainder in the hands of the trustee as the proceeds of the sale of the property attached, is reversed, with costs in favor of the petitioner, and the cause is remanded to further proceedings herein not inconsistent with this opinion.

In re ZOTTI.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 86.

BANKRUPTCY (§ 117*)—BANK DEPOSIT—PAYMENT OF CHECKS—LIABILITY TO TRUSTEE.

Where a bank paid checks drawn by a depositor in ignorance of the filing, late the day before, of an involuntary petition in bankruptcy against the depositor, and the receiver, who qualified on the day of the payment of the checks, made no demand for the depositor's funds until after the checks were honored, the trustee, subsequently elected, could not recover from the bank the amount paid on the checks, though Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), vested in him, as of the date of the adjudication, the title of the bankrupt to the property which, prior to the filing of the petition, the bankrupt could have transferred.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 117.*]

Petition to Review Order of the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings against Frank Zotti, trading as Frank Zotti & Co. There was an order of the District Court (178 Fed. 304), reversing a referee's order directing the European-American Bank in New York to pay to the trustee the amount of checks, and Jesse Watson, as trustee, files a petition for review. Affirmed.

Rosenthal & Heermance (C. J. Heermance, of counsel), for petitioner.

Rollins & Rollins (Alfred A. Wheat and Beno B. Gattell, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. July 14, 1908, at about 4 p. m., a petition in involuntary bankruptcy was filed against Frank Zotti. July 15th Jesse Watson qualified as receiver. On the same day the European-American Bank of this city, without any actual notice of the filing of the petition, paid out of Zotti's deposit account, amounting to \$6,046.68, checks to the amount of \$2,190.70, of which a check for \$2,000 was certified at 8:45 a. m. The receiver, having been subsequently elected trustee, made demand on the bank for the whole of Zotti's deposit, but the bank refused to pay over more than the balance remaining after deducting the checks paid as aforesaid to the amount of \$2,190.70. In summary proceedings the referee ordered the bank to pay over this amount, with interest and costs, within five days, on the ground that the petition was a caveat attachment and injunction, of which the bank must be held to have had constructive notice, and any payment by it thereafter was invalid as against the trustee, and certified the following question:

"Is a bank, which has on deposit moneys belonging to one against whom a petition in bankruptcy has been filed, liable to the trustee in bankruptcy, subsequently appointed, for money which is paid out after the time of such

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

filling, but without actual or personal notice of such filing, and on checks drawn by the depositor and delivered to the payee previous to such filing?"

Upon petition to review the District Judge, without passing upon the reasons relied upon by the referee, reversed his order, saying, among other things:

"Here the bank has not meddled with the bankrupt's assets at all. The property was, as I have said, a chose in action, to which it was an incident that the obligor should honor sight drafts. It did honor such a draft innocently, as all sides concede, and in so doing it availed itself of the conditions of the very obligation under which the trustee now sues. Of course, the trustee is subject to the same conditions when he sues as the bankrupt is under. One of these conditions is the right of the debtor bank to treat as a valid extinguishment pro tanto any payment made upon check."

Section 70a of the bankruptcy act of 1898 (30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3451]) provides that the title of the bankrupt shall vest in the trustee, as of the date of adjudication, *inter alia*, to (5) property which prior to the filing of the petition he could have transferred, etc. This latter language is intended to define the property which passes, *viz.*, such as the bankrupt owned at the time the petition was filed. The indebtedness of the bank to Zotti was property which he could have transferred. Until the adjudication the title to it remained in him, and if no receiver had been appointed we can conceive no ground on which the trustee's present claim could be rested. As the court did appoint a receiver, it is to be presumed, in the absence of specific directions, that he was to hold as custodian, without title, for the purpose of preservation, and not for the purpose of distribution. The alleged bankrupt might never be adjudicated. The receiver did not demand Zotti's funds until after the bank had honored Zotti's checks, as it was bound to do without any notice of the filing of the petition. Payments after notice would no doubt be in contempt of the order appointing the receiver, but to require it to pay that sum over again to the trustee under the circumstances of this case would be in the highest degree inequitable.

The trustee founds his right entirely upon a remark of Chief Justice Fuller in Mueller v. Nugent, 184 U. S. 1, at page 14, 22 Sup. Ct. 269, 275, 46 L. Ed. 405:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403 [25 L. Ed. 866]), and, on adjudication, title to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court."

Mr. Justice Peckham said in York Mfg. Co. v. Cassell, 201 U. S. 344, 353, 26 Sup. Ct. 481, 484, 50 L. Ed. 782:

"The remark made in Mueller v. Nugent, 184 U. S. 1 [22 Sup. Ct. 269, 46 L. Ed. 405], 'that the filing of the petition (in bankruptcy) is a caveat to all the world, and in effect an attachment and injunction,' was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy as between himself and the bankrupt, under such facts as are above stated. The dispute in the Mueller Case was whether the court in bankruptcy had power to compel, in a summary way, the surrender of money or other property of the bankrupt in the possession

of the bankrupt, or of some one for him, without resorting to a suit for that purpose."

Whatever else the remark may mean, it cannot mean, in contradiction of the express provision of the act, that the title of the bankrupt shall vest in the trustee as of the time of filing the petition. The act of 1867 did so provide. Rev. Stat. U. S. § 5044. In the Matter of Mertens, 15 Am. Bankr. Rep. 362, 368, 144 Fed. 818, 75 C. C. A. 548, Judge Wallace, speaking for this court, said:

"By the present act, the title of the trustee is vested in the estate of the bankrupt 'as of the date he was adjudged a bankrupt.' We are of opinion that until the date of the adjudication a lienor or pledgee is at liberty to perfect any title which the nature of the lien permits. Under the act of 1867, no lien could be acquired after the filing of the petition in bankruptcy, because the title of the assignee vested as of the commencement of the proceeding in bankruptcy. Now the trustee takes the property of the bankrupt in the condition in which he finds it at the date of the adjudication, unless it has been encumbered fraudulently or in contravention of some of the provisions of the act. Under the former act there were many decisions that a lien previously acquired could not be enforced subsequent to the commencement of the proceeding, except with the permission of the bankruptcy court. The Supreme Court, however, refused to sanction these decisions, and held that the lienor was entitled to perfect his title and enforce his rights as though no proceeding had been commenced. *Eyster v. Gaff*, 91 U. S. 521 [23 L. Ed. 403]; *Jerome v. McCarter*, 94 U. S. 734 [24 L. Ed. 136]. The change in the present act, by which the trustee's title is that only which exists at the date of the adjudication, removes any uncertainty which arose under the act of 1867. It was intended, we think, to permit all legitimate business transactions between a debtor and those dealing with him to be carried out and consummated as freely until he has been adjudicated a bankrupt as though no proceeding were pending. In many cases the proceeding against an alleged bankrupt is unfounded, and for this and other reasons never culminates in an adjudication. While the filing of a petition in bankruptcy is a caveat to all the world, the notice ought not to have the effect of paralyzing all business dealings with the debtor, or to prevent lienors or pledgees from enforcing their contracts. This is its practical effect if the rights and remedies of all concerned are in suspense until it can be ascertained whether an adjudication is or is not to follow the commencement of the proceeding."

Of course, the trustee can after adjudication, and the receiver before, compel the surrender of assets in the possession of the bankrupt or of the alleged bankrupt or of any one for him. As to such persons the filing of the petition may be a caveat attachment and injunction. *Mueller v. Nugent*, *supra*, was just such a case. The bankrupt had presented to his son the proceeds of substantially all his property immediately before the petition was filed. In summary proceedings before the referee to make the son surrender these moneys he merely denied jurisdiction on the ground that he had received them before the petition was filed. After this objection was decided against him by the referee and by the District Judge on petition to review, he asked leave to amend by alleging that he had not received the moneys as agent of or bailee for his father, which was denied. Chief Justice Fuller said:

"The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to com-

pel the surrender of the property to the trustee in bankruptcy duly appointed. In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt, or his agent, to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the Circuit Court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

We think this language was never intended to be applied to a bank which has honestly paid checks of a depositor without notice that any petition in bankruptcy has been filed against him and who may never be adjudicated a bankrupt at all. On the other hand, it would apply if the bank had refused to pay moneys which it had received prior to the filing of the petition and still had, or moneys which it had collusively transferred. It was because the act of 1867 threw doubt upon the validity of honest transactions between the filing of the petition and adjudication that the words "as of the date he was adjudicated a bankrupt" were inserted in the act of 1898. Collier on Bankruptcy (8th Ed.) p. 807.

The order is affirmed with costs.

THE RUTH.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1911.)

No. 1,881.

1. COLLISION (§ 67*)—NAVIGATION RULES—CONSTRUCTION—"UNDER WAY."

A steam vessel lying with her nose against the bank of a stream, and holding her position against the current by the movement of her wheel, is a vessel "under way" within the navigation rules, and not entitled to the rights of an anchored vessel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 67.*

For other definitions, see Words and Phrases, vol. 8, p. 7161.]

2. COLLISION (§ 94*)—LIABILITY OF VESSEL FOR TORTS—VIOLATION OF RULES OF NAVIGATION.

The steamer Ruth was following the steamer Oregon up the Willamette river, and was close behind when they reached the Clackamas rapids. The Oregon was unable to ascend the rapids by her own power, and, after going as far as possible, sent men ashore to make fast a steel line for the purpose of pulling her up by means of a capstan. She was unable to hold her position, and began to drift down with the current, dragging the line, which libelant, one of her crew, was directed to pull in and coil on the deck. As soon as she began to drift, she gave danger signals to the Ruth, which had entered the rapids, pushed against the bank and was holding herself there by her wheel. She paid no attention to the signals, but as the Oregon drifted by started ahead and her wheel picked up the line, which caught libelant, severing both his feet. Held, that the Ruth was in fault in failing as an overtaking vessel to drop

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

down and keep out of the way when signaled; there being evident danger of fouling the Oregon's line.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 94.*]

3. COLLISION (§ 113*)—ACTION AGAINST VESSEL FOR TORT—CONTRIBUTORY NEGLIGENCE.

A deck hand engaged in the duty of coiling a cable, dragging in the water and being hauled in by other hands, is not required to watch the movements of other vessels, but has the right to assume that they will be properly navigated and with due regard to his safety, and, where he is injured by the negligence of another vessel in picking the cable up with her wheel, he cannot be charged with contributory negligence because he was unprepared for such event.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 113.*]

4. ADMIRALTY (§ 50*)—BRINGING IN NEW PARTIES—DISCRETION OF COURT.

Conceding that a court of admiralty had power to grant the petition of a libeled vessel for process to bring in another vessel under admiralty rule 59, not filed until after hearing and decision of the cause, it was within its discretion to deny such petition.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 50.*]

Appeal from the District Court of the United States for the District of Oregon.

Suit in admiralty by Virgil K. Poland, by Edward N. Deady, his guardian ad litem, against the steamer Ruth, the Oregon Railroad & Navigation Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

See, also, 178 Fed. 749.

On the morning of October 15, 1907, the river steamers Oregon and Ruth were on their way up the Willamette river from Portland to Oregon City and beyond. The appellee was a deck hand on the Oregon. Both vessels reached the Clackamas rapids at about the same time; the Oregon being a few boat lengths in advance. The water was unusually low, and a current variously estimated at from six to ten miles an hour set strongly against the west bank of the river. Neither vessel was able to proceed over the rapids by its own power, and both were required to make their way by the aid of a line put out and fastened to a "dead man" on the west shore of the river, and the use of a capstan. The Oregon steamed up as far as she could go, and put a portion of her crew ashore on the west bank with a steel cable for the purpose of attaching the same to a "dead man." About the same time the Ruth, which was within about two boat lengths of the Oregon, pushed her nose into the west bank, holding herself there by the movement of her wheel. She also put part of her crew ashore with a line to be attached to the "dead man" as soon as the Oregon had passed over the rapids. The Oregon, using her whole power, was unable to hold her position against the current until her line could be attached, and she commenced to drift downstream toward the Ruth. She gave orders to haul in the line, and she sounded danger signals as a warning to the Ruth that she was drifting. She continued to drift; the appellee and other members of the crew drawing in her line as fast as they could and coiling it on deck. The danger signals were repeated. The Ruth held her position, and continued the movement of her wheel. The Oregon drifted alongside the Ruth, and her captain had some conversation with the captain of the Ruth; the former suggesting that the latter move downstream. The captain of the Ruth answered that he could not do so because his boat was crowded into the bank. The Oregon then dropped down, touching the Ruth on her port side. Shortly after the bow of the Oregon passed the stern of the Ruth, the wheel of the latter picked up the line of the Oregon which was still in the water, rapidly wound it up, and caught the appellee, who was hauling it on the deck of the Oregon, producing the injuries which are the cause of the suit. The court below said: "There is some conflict in the testimony as to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

whether the Ruth was moving upstream at the time the line was picked up, or whether it was done by the wheel while the boat was stationary. The great weight of evidence in my opinion is to the effect that, as soon as she was clear of the Oregon, the Ruth, which was the more powerful boat, immediately steamed up at full speed in order to get ahead of and over the rapids before the other boat, and thus picked up the line." The evidence, while conflicting in some particulars, showed without conflict the following facts: That the Ruth was held against the west bank of the river solely by the movement of her wheel; that while the master of the Oregon was attempting to warp his vessel over the rapids the master of the Ruth went below to direct the splicing and putting out of his cable, and that there was no one in the pilot house of the Ruth; that, as the Oregon was being forced down the stream toward the Ruth in spite of the use of all her steam power, her captain gave the danger signal immediately, and on the failure of the Ruth to answer repeated the signals, his boat all the time drifting downstream, and the current carrying it towards the west shore, and that the master of the Oregon called to the mate of the Ruth to get his boat out of the way. The captain of the Ruth admitted that he heard the signals, and that he made no effort to get out of the way of the Oregon, and gave as an excuse therefor that he supposed the signals were intended as a bluff to induce him to get out of the way.

W. W. Cotton, A. C. Spencer, Wallace McCamant, and Zera Snow, for appellant.

Newton McCoy and H. B. Nicholas, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Rule 24 of the rules for harbors, rivers, and inland waters provides:

"Notwithstanding anything contained in these rules, every vessel overtaking another shall keep out of the way of the overtaken vessel."

And further declares:

"And no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear."

The rules also provide that a vessel is under way within their meaning "when she is not at anchor or made fast to the shore or aground." Act June 7, 1897, c. 4, 30 Stat. 96 (U. S. Comp. St. 1901, p. 2883).

It is contended that the Ruth was entitled to all the rights of a vessel at anchor, and that, although she had not her anchor out and was not made fast to the shore nor aground, she was nevertheless a vessel at rest as fully as if she had been at anchor. It has been held that a vessel which has stopped her machinery and lies practically motionless without steerage way has to a large extent the right of a vessel at rest in regard to other passing vessels. The Col. John F. Gaynor, 130 Fed. 856, 65 C. C. A. 340; Britain S. S. Co. v. J. B. King Transportation Co., 131 Fed. 62, 65 C. C. A. 300. But the Ruth had not stopped her machinery. She was under control, and had steerage way, and there was nothing to prevent her dropping downstream on receiving the signals of the Oregon. The fact that her nose was rammed against the shore while her wheel was turning at the rate of 30 revolutions to the minute brought her no more at rest or at anchor than she would have been had her stem been pointed

against the current and she had been held in position by the revolutions of her wheel. Clearly the first fault of the Ruth was in not dropping downstream at the approach of the Oregon. Her second was in starting up before the cable of the Oregon passed her wheel. That she did so start is found by the trial court, and, although the evidence upon that point of the case is conflicting, we find upon a careful review of it no reason to question the finding of the trial court. The Oregon having failed to make the passage of the rapids was carried down the stream by the current, which was running from six to ten miles an hour, and which carried her at a speed of two miles an hour, notwithstanding all her efforts to maintain her position. The Ruth was holding her nose against the bank at a point in the rapids where the whole volume of the river ran in a channel not more than 75 or 100 feet wide, and her stern stood out in the river from one-half to two-thirds of the distance across the stream from the west bank while the current set strongly toward that bank. By stopping the revolution of her wheel, she could have drifted downstream with the current, and it was her duty to do so, and to keep out of the way of the Oregon. In the exercise of ordinary care, she should have known that the Oregon's cable was in the water and was being carried by the current toward the west bank, and that it might become entangled in the wheel of the Ruth if she held her position or proceeded upstream. The testimony of the captain of the Ruth that the reason why he gave no heed to the signals of the Oregon was that he supposed they were intended as a bluff to induce him to get out of the way indicates that his purpose was to hold his position and get ahead of the Oregon. Upon all the evidence, we find no error in the conclusion reached by the trial court that the Ruth was liable for the injury to the appellee.

A more serious question is found in the contention that the appellee was guilty of such contributory negligence as to bar his right of recovery. The Oregon's cable was put off her starboard bow. The appellee was engaged in retrieving it and coiling it on the deck in a coil which was made wide owing to the kinks in the cable. He was standing between the coil and the starboard side of the vessel. It is argued that he assumed the risk of the cable being caught on the bottom of the river or by the wheel of the Ruth, a risk which he might have avoided had he stood on the port side of the bow and coiled from that point, and it is said that the Oregon's negligence also contributed to the injury, in that her cable was not taken up by a reel, and that the vessel had no mate on board to supervise the work. It is not apparent, however, that the appellee or any reasonably prudent person occupying his position should have apprehended danger from the action of the other vessel. A deck hand so employed necessarily directs his attention to the work which he has in hand. He has little opportunity to observe the movement of a neighboring vessel, and he has the right to assume that such a vessel will be navigated in accordance with the rules of navigation and with due regard for his safety. The possibility of the steel cable becoming caught in the bottom of the river was too remote to be considered, and there was

no evidence that such a thing had ever occurred. The evidence was that the cable of the Oregonia was being taken in and coiled in the method which had been in use for years on that and other boats. The appellee testified that he was coiling the cable and the other deck hands were pulling it in, and that the coiling of the cable took all his time and attention; that he could not keep track either of his own boat or of the Ruth, and at the same time coil the cable; that the other deck hands were pulling it in; and that he had to keep coiling it up to keep it from getting tangled. He further testified that he did not know at the time where the Ruth was or how close she was to the Oregonia. In view of the evidence, we are not convinced that the appellee did or omitted to do anything showing such contributory negligence as to defeat his right to recover damages for the injuries which he sustained.

Error is assigned to the denial of the appellant's petition for process against the Oregonia to bring it into the cause under the fifty-ninth admiralty rule, a stipulation for costs having been filed with the petition. The rule permits such an application, in a suit for damage by collision, to bring in another vessel, upon suitable allegations showing fault or negligence of that vessel contributing to the collision, but it provides that the petition shall be presented before or at the time of answering the libel "or within such further time as the court may allow." In the present case, the petition was presented after the final submission of the cause upon the testimony, and after the announcement of the decision of the court, but before the entry of the decree. We need not pause to inquire whether the court below had the power to entertain the petition at that time. Admiralty rule 59 has been liberally construed and applied in consonance with its purpose and the equitable spirit of the admiralty practice. The Barnstable, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954; Dailey v. City of New York (D. C.) 119 Fed. 1005. But if, indeed, the trial court had the power, in the exercise of its discretion, to entertain the petition at the time when it was presented, it is very clear that there was no abuse of discretion in denying the petition under the circumstances disclosed in the record and especially in view of the evidence in the case, the whole of which was then before the court.

The decree is affirmed.

In re BALLANTINE.

CHASE v. WORTH et al.

(Circuit Court of Appeals, Third Circuit. February 7, 1911.)

No. 1,400 (No. 215.)

BANKRUPTCY (§ 188*)—EQUITABLE ASSIGNMENT.

A legatee under certain wills assigned his interest to a finance company as security for his notes for \$50,000. Certain French creditors having attached his interest in the estates, the finance company wrote their attorney, with the approval of the assignor, promising that, after payment of its debt and certain costs and expenses, it would pay their claims

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"from the money coming into our hands on account of" the assignor, and the attachment was thereupon released. The assignor was afterward adjudged bankrupt. *Held*, that the assignment to the finance company was not absolute, but was a mortgage only, which gave the company no right to receive any more of the fund than was necessary to pay its own claims, which was all it did in fact receive from the trustee in bankruptcy who sold the bankrupt's interest in the estates; that the company's promise therefore did not operate as an equitable assignment of any part of the fund, nor give the French creditors any preferred right to payment therefrom over other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In the matter of George A. Ballantine, bankrupt. From an order (179 Fed. 548) of the District Court giving preference to the claims of Worth and others, creditors, Charles A. Chase, trustee, appeals. Reversed.

Reynolds D. Brown, for appellant.

Samuel W. Cooper, for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. The petition of the appellees for leave to reargue this case has been fully considered and our conclusion is that a reargument is unnecessary. We shall dispose of the case in this opinion, substituting it for our former one.

The contest is between the trustee of George A. Ballantine, bankrupt, and certain creditors residing in Paris, France. The question is whether those creditors who are the appellees are preferred over the general creditors. This question is to be solved by determining whether certain letters of February 1, 1907, should be construed as an equitable assignment by Ballantine in favor of the appellees. The District Court so declared, and accordingly reversed the referee's finding.

Ballantine had a large interest in the estates of his father and grandfather. George G. Frelinghuysen is the trustee of both estates. On December 30, 1902, Ballantine, by two assignments, one to the New York Finance Company and the other to the New York Finance Company as trustee, assigned his interest in these estates to secure the payment of two promissory notes given by him, one for \$40,000 and the other for \$10,000. Each of these assignments expressly declared that if Ballantine should pay the note in it described, or any note or notes given in renewal thereof, then the assignment should be null and void, and that the estates thereby created should cease and determine. Each of them was therefore an assignment by way of mortgage; and the maxim "once a mortgage always a mortgage" is applicable. Each of them was in equity but a security for a specific debt.

After the assignments had been delivered, Ballantine and the New York Finance Company instituted against other interested parties in the Circuit Court of the United States for the District of New Jersey

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a suit for the construction of the will of Ballantine's father. The claim of the complainants was that Ballantine's interest in his father's estate entitled him to an immediate payment of the principal, or at least to a part thereof. In January, 1907, while that suit was pending, Ballantine's interest in the two estates was attached by the appellees. On February 1, 1907, pursuant to an understanding previously had between Alfred W. Varian, who was the attorney of the appellees, the New York Finance Company and Ballantine, the following letters were written:

"February 1st, 1907.

"Alfred W. Varian, Esq., 44 Pine Street, New York.

"Dear Sir: Confirming understanding between our Mr. Depue and you with reference to certain claims represented by you against George A. Ballantine, we beg to state that after the payment of amounts due by George A. Ballantine to New York Finance Company and to New York Finance Company as trustee and also the payment of any other actual liens which may exist upon said George A. Ballantine's interest in the estates of Peter Ballantine, deceased, and Peter H. Ballantine, deceased; and after the payment of actual disbursements, expenses and counsel fees in re suit brought for the construction of the wills of said decedents, we will pay to you as counsel for the claimants mentioned below and from the money coming into our hands for account of said George A. Ballantine, the full amount of said claims as follows:

"Worth, with interest from 1899, 8615 francs. La Ferriere, with interest from 1904, 14,598.50 francs. Guillot and Cie, with interest from 1905, 1117.35 francs.

"Yours Very Truly,

New York Finance Company,

"Arthur W. Depue, President.

"I have read the above letter and hereby authorize the New York Finance Company to carry out the provisions therein contained which I hereby approve.

George A. Ballantine,"

"New York, February 1, 1907.

"Alfred W. Varian, Esq., 44 Pine Street, New York.

"Dear Sir: Out of any funds coming through our hands applicable to the payment of the debts of George A. Ballantine, and apart from prior equities now existing, we will see that your clients are paid in accordance with the above authorization.

"Very Truly Yours,

New York Finance Company,

"Arthur W. Depue, President."

The attachment was thereupon withdrawn. Subsequently, on March 1, 1907, the Circuit Court decided against the contention of the complainants in the suit above mentioned, and on March 26, 1908, this court affirmed the Circuit Court (Ballantine v. Ballantine, 152 Fed. 775, and 160 Fed. 927). In March, 1909, Ballantine went into bankruptcy. Ballantine's life interest in his father's estate and his interest in his grandfather's estate were thereafter sold for the sum of \$128,000, of which something over \$25,000 is now in the hands of the trustee in bankruptcy, the residue having been paid to the New York Finance Company, in satisfaction of its notes for \$40,000 and \$10,000, and to other preferred creditors. It is upon the fund now in the hands of the trustee in bankruptcy that the appellees insist they have a preferred claim by way of equitable assignment.

It will be observed that the New York Finance Company's promise in its first letter to Mr. Varian, the attorney of the appellees, made while the equity suit was pending and evidently in the hope that it would be decided in favor of the complainants, was not an uncondi-

tional one. It was a promise to pay the amount of the claims of the appellees "from any money coming into our hands for account of said George A. Ballantine." Ballantine appended to the letter containing the promise an authorization to the New York Finance Company "to carry out the provisions therein contained." And to that authorization the New York Finance Company added a second letter to Mr. Varian saying that:

"Out of any funds coming through our hands applicable to the payment of the debts of George A. Ballantine, and apart from prior equities now existing, we will see that your clients are paid in accordance with the above authorization."

The trustee of the estates of Ballantine's father and grandfather was not a party to these transactions. Indeed, he seems to have known nothing of them until November 25, 1907, when Mr. Varian wrote him a letter advising him of the withdrawal of the attachment proceedings, requesting him not to pay anything to Ballantine or to the New York Finance Company until some adjustment should be made of the claims of the appellees, and, without giving definite information concerning the amounts of the claims, saying merely that "these claims are in behalf of Guillot & Co., Worth and La Ferriere, all of Paris, and aggregate upwards of \$10,000." The fund was in the hands of the trustee of the Ballantine estates. The promise—a conditional one—was made by the New York Finance Company.

It is earnestly contended by the appellees' counsel that, as the entire interest of Ballantine in the two estates was assigned to the New York Finance Company, that company was entitled to collect from the trustee of the Ballantine estates the whole of that interest, and out of the sums received in excess of the amounts secured by the assignments to pay the sums mentioned in the letters of February 1, 1907. If Ballantine had executed a third assignment to the New York Finance Company as trustee for the appellees, similar in form to the other two assignments, the right of the appellees to payment out of the funds now in the possession of the trustee in bankruptcy would have been clear. But no such assignment was executed. What was done, in effect, was this: The New York Finance Company promised Mr. Varian, the attorney of the appellees, that if it should receive from the estates of Ballantine's ancestors more than enough to satisfy the debts due to it individually and as trustee, and to other lienors, if any, and the expenses of the suit then pending, it would out of the excess pay the claims of the appellees. To this conditional promise Ballantine gave his consent. The case has been argued on behalf of the appellees upon the theory that the entire interest of Ballantine in the estates of his father and grandfather was transferred by him to the New York Finance Company by the two assignments of December 30, 1902, in such manner that the letters of February 1, 1907, operated to appropriate a portion of the two estates to the payment of the claims of the appellees. But in this argument the fact is overlooked that in equity the two assignments were mere mortgages to secure specific debts. The interest of the finance company in those estates was measured and limited by the amount of its two notes. The

mortgages were but incidents to the debts. They could not be separated from the debts which they secured so as to have an independent existence. A transfer of them without a transfer of the notes which they secured would have been a nullity. When the two notes were paid, the finance company had no legal or equitable right to claim more. Such, we understand to be the rule in New Jersey, where the estates of Ballantine's ancestors were located, and in New York, where the letters of February 1, 1907, were delivered. *Magie v. Reynolds*, 51 N. J. Eq. 113, 26 Atl. 150; *Merritt v. Bartholick*, 36 N. Y. 44; *Kortright v. Cady*, 21 N. Y. 343, 78 Am. Dec. 145; *Sexton v. Breese*, 135 N. Y. 387, 32 N. E. 133. While equity disregards mere form and will construe as an equitable assignment any writing or series of writings which plainly appropriates a particular fund to be created in futuro, and will enforce such assignment after the fund comes into existence, if it never does come into existence, there is nothing to which the agreement or writing can attach or against which it can be enforced. And that is the difficulty here. The finance company by the letters of February 1, 1907, expressly declared that its payment of the claims of the appellees should depend upon a contingency. Its promise was to pay, subject to prior payments to itself and others, "from the money coming into our hands for account of George A. Ballantine." Ballantine agreed to that contingent promise, and to nothing more. The case differs therefore from the cases to which we have been referred in which appropriations out of expectancies which have subsequently come into existence have been upheld as equitable assignments. Here Ballantine had a vested life interest in the two estates over and above all that had been assigned by him to the finance company and others. He assigned no part of that remaining interest to the appellees. He simply authorized the finance company, if at any future time it should receive money on his account in excess of what he owed to it and certain other parties, to pay out of that excess the claims of the appellees.

The New York Finance Company never received any moneys for Ballantine's account in excess of the sums due to it. The letters of February 1, 1907, show no intention of vesting in the appellees an equitable property of any kind before the funds should reach the possession of the finance company. Whether if the funds had reached its possession the appellees would have had an equitable claim against those funds is a question not now before us. The fact is that the appellees withdrew their attachment because it was thought to embarrass, in some way, the litigation then pending over the construction of the will of Ballantine's father, and they accepted, in lieu of the attachment, the finance company's conditional promise above mentioned.

We are satisfied that the present case is not one of equitable assignment, and that the petition for leave to reargue the case should be denied. The decree of the District Court will therefore be reversed, and that of the referee disallowing the claims of the appellees as preferred claims will be affirmed. The appellant is entitled to costs.

HOLMAN v. GANS S. S. LINE.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 215.

- 1. SHIPPING (§§ 45, 47*)—CHARTER PARTY—OBLIGATION OF SHIOPWNER.**
In the absence of any provision on the subject in a charter party, the shipowner must load and unload cargo at his own expense.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 177-183; Dec. Dig. §§ 45, 47.*]
- 2. SHIPPING (§ 181*)—CHARTER PARTY—CONSTRUCTION—LAY DAYS.**
Under a charter party stipulating that lay days shall count according to the custom of port, and that 20 running days, Sundays and holidays excepted, shall be allowed for loading and discharging, the holiday time, as fixed by the statute of port of loading, making Saturday afternoon a holiday, will not be included in the running days.
[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 181.*]
- 3. SHIPPING (§ 172*)—CHARTER PARTY—CONSTRUCTION—CUSTOM.**
An agreement of an owner in a charter party to load cargo according to custom of port is not governed by the custom of port as to time of loading, where the charter party allows a specified number of running lay days, Sundays and holidays, even if used, excluded, for loading.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 569; Dec. Dig. 172.*]
- 4. SHIPPING (§ 181*)—CHARTER PARTY—RIGHTS OF PARTIES.**
A charter party provided for loading or discharging according to custom of port, and allowed 20 running days, Sundays and holidays excepted, for loading and discharging. A statement of the lay days used in loading was submitted to the master by the charterer, which concluded with the words, "November 14, steamer cleared; does not count according to custom of port." The master signed the statement, adding, "Written under protest, on account of Saturday being counted a half day." He testified that all he knew about the custom as to clearance day was derived from the agents of the charterer. *Held*, that the failure to protest as to the date of clearance did not conclude the owner's contract rights.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589-592; Dec. Dig. § 181.*]
- 5. SHIPPING (§ 177*)—CONTRACTS—CONSTRUCTION.**
Under a charter party providing for lay days to begin running at the port of loading on the day following the receipt of the captain's written notice of readiness, accompanied by a surveyor's certificate, but containing no provision as to notice at the port of discharge, the charterer's contention that it was not required to unload until the day following the receipt of notice of readiness, which could not be given on a holiday, was not sustainable.
[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 177.*]
- 6. SHIPPING (§ 181*)—CONTRACTS—STATUTES—EFFECT.**
A charter party providing for the allowance of a designated number of running days, Sundays and holidays excepted, for loading and discharging, is not affected by a statute of the country of the port of discharge, which provides that lay days begin to run from second weekday morning after notice has been given on a Sunday or holiday.
[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 181.*]

Appeal from the District Court of the United States for the Southern District of New York.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Libel by R. H. Holman against the Gans Steamship Line. From a decree for libelant, defendant appeals. Affirmed.

Wheeler, Cortis & Haight (Charles S. Haight and John W. Griffin, of counsel), for appellant.

John M. Woolsey and J. Parker Kirlin, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. This cause arose out of a voyage charter of the steamer Birchtor. The libelant, who is the owner, claimed to recover of the charterer 4 $\frac{3}{4}$ days' demurrage, and also the amount of 1 day's dispatch money wrongfully deducted from the hire. The relevant parts of the charter party are:

"(1) That the said steamship being tight, staunch, and strong and in every way fitted for the voyage, * * * New Orleans or Galveston, as ordered at St. Lucia, and there load (orders to be waiting steamer at St. Lucia or lay days to count), according to custom of port, a full and complete cargo of wheat and/or maize, and/or other lawful merchandise, * * * and being so loaded shall therewith proceed, as ordered when signing bills of lading, to one, two, or three safe ports in Denmark, or so near thereunto as she may safely get, and there, always afloat, deliver the cargo as customary, at such wharf, dock, or other safe place as charterer's agents may direct on arrival. * * *

"(7) Charterers to have the privilege of designating wharves or other safe places for loading or discharging. The cargo to be brought to and taken from alongside the steamer at merchants' risk and expense. Steamer to supply steam and winchmen to drive winches and to give use of necessary gear, also to load or discharge at night, on Sundays or holidays, or on day when notice is given if required by charterers, such time not counting; charterers paying all extra expenses and labor incurred, including the overtime of winchmen."

"(9) Charterers are to load, stow, and trim the cargo at their own expense, under the direction of the master, but they shall not be responsible for improper stowage. * * "

"(14) Lay days at port of loading are not to count before the 25th October, 1907, next, unless with charterer's written consent, and to commence on the day following receipt by the charterer's agents of captain's written notice of readiness, accompanied by surveyor's certificate. * * *

"(15) If the steamer be not sooner dispatched, 20 running days, Sundays, and holidays excepted, shall be allowed the charterers for loading and discharging. Should the cargo not be delivered to vessel at loading ports and/or discharged at port of destination within the specified time, for each and every day over and above said lay days charterers are to pay, day by day, the sum of four pence per net register ton per day demurrage; any detention through quarantine to vessel or cargo not to count in lay days. If sooner dispatched, steamer to pay £10 for each day saved."

In this court the dispute is as to three days only, viz.: Whether Saturday, being a half holiday at New Orleans, is to be counted as a whole or as only half a lay day; whether, as the vessel cleared on her last loading day, that day is to be excluded as a lay day in accordance with the custom of the port; whether January 2d at Aarhus was a lay day; and, finally, whether the deduction of one day's dispatch money was justified. The District Judge held with the charterer that the two Saturdays at New Orleans were half lay days, and with the owner that the day of clearance at New Orleans and January 2d at Aarhus were lay days, and that, all the lay days having been used, no dispatch money was earned by the charterer.

[1] First. In the absence of any provision on the subject, the ship-owner must load and unload cargo at his own expense. This charter provided (article 9) that the charterer was to load and unload at its expense, and (article 7) that it might do so at night, on Sunday, or holidays, or a day when notice was given, such time not to count in the lay days.

[2] By statute Saturday in cities in Louisiana having over 15,000 inhabitants from noon to midnight is a holiday, although work may be done on it. The charterer did load all day on the two Saturdays in question, but the District Judge held that it was chargeable only with one day. The shipowner argues that the exception in the charter, being only of holidays, does not apply to half holidays; but we think this construction too narrow. We understand the provision as meaning that holiday time is not to be included. The authorities relied on by the libellant are consistent with this view. In the case of *The Cyprus* (C. C.) 20 Fed. 144, it is to be inferred that the charterers began to deliver cargo December 7th, before the ship was completely ready to receive cargo. As they did this voluntarily, it was held, although lay days were not to begin until the ship was ready, that they were estopped to deny that the lay days began December 7th. The decision proceeds upon the same principle as that in *The Katy* [1895] Prob. Div. 56, that the parties, having agreed to begin unloading on a Saturday at 1 p. m. must be understood as agreeing that the lay days began then, although the charterer was not obliged to receive cargo before Monday. *Uren v. Hagar* (D. C.) 95 Fed. 493, and *Holland Gulf S. S. Co., Ltd., v. Hagar* (D. C.) 124 Fed. 460, in which a Saturday on which work was done was held to be included in lay days, depend upon the statute of Pennsylvania of May 31, 1893 (P. L. 188). It is entitled:

"An act designating the days and half days to be observed as legal holidays and for the payment, acceptance and protesting of bills, notes, drafts, checks and other negotiable paper on such days."

Section 1 provides that the days and half days mentioned—

"shall for all purposes whatever as regards the presenting for payment or acceptance and as regards the protesting and giving notice of the dishonor of bills of exchange, checks, drafts and promissory notes made after the passage of this act be treated and considered as the first day of the week, commonly called Sunday and as public holidays and half holidays."

Section 4 provides:

"That all the days and half days herein designated as legal holidays shall be regarded as secular or business days for all other purposes than those mentioned in this act."

It would seem as if Saturday were a business day, except as regards negotiable paper. At all events, the reasoning of the court in these cases does not apply to the charter under consideration, which provides that, even though holidays be used in loading or discharging, they are not to count as lay days. We think the ruling of the District Judge was right.

[3] Second. The owner agreed to load a cargo "according to custom of port." It was shown that according to the custom of the port

of New Orleans, if the ship be cleared on the last loading day, it is not treated as a lay day. This clause as to custom has been held to apply only to the manner of loading. *Davis v. Wallace*, 3 Cliff. 123, Fed. Cas. No. 3,657; *Carbon Slate Co. v. Ennis*, 114 Fed. 260, 52 C. C. A. 146. The District Judge held that, even conceding it to contemplate also the time of loading, the custom would not apply, on the principle "expressio unius est exclusio alterius," because the charter allowed 20 running lay days, Sundays and holidays only excepted. We concur with him. *The Cyprus*, *supra*; *James v. Brophy*, 71 Fed. 310, 18 C. C. A. 49; *Carbon Slate Co. v. Ennis*, *supra*.

[4] A statement of the lay days used was submitted to the master by the charterer, which concluded with the words:

"November 14, steamer cleared; does not count according to custom of port."

This statement the master signed, adding:

"Written under protest on account of Saturday being counted a half day."

He testified that all he knew about the custom as to clearance day was derived from the agents of the charterer, who told him that they had just fought the question out with the Elder Dempster Line and had won the case. Under the circumstances we do not think his failure to protest as to the day of clearance concluded the owner's contract rights.

[5] Third. The steamer arrived at Aarhus December 31st after midnight, and gave notice of readiness to unload on January 1st, which was a public holiday. The charterer contends that it was not obliged to unload until the second day thereafter, because it was not required to unload until the day following the receipt of notice of readiness, which could not be given on a holiday. There is nothing to this effect in the charter, which only provides for lay days to begin running at the port of loading on the day following the receipt of the captain's written notice of readiness, accompanied by surveyor's certificate. There was no provision as to notice at the ports of discharge.

[6] The charterer also relies on statutes of Denmark which provide that:

"Lay days begin to run * * * from second weekday morning after notice has been given * * * on a Sunday or a holiday."

The District Judge rightly held that this statute is not to be understood as varying the contract of the parties, which was for running—that is, consecutive—lay days. But as the libel admits that December 19th was not a lay day, apparently on the theory that one day's notice of readiness to discharge was required, and also that one-fourth of December 24th was not to be treated as a lay day, the decree of the court below is affirmed, with interest and costs.

HENDERSON et al. v. DENIOUS.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1911.)

No. 3,018.

JUDGMENT (§ 721*)—PRIOR DETERMINATION—CONCLUSIONS—RES JUDICATA.

A bankrupt having paid certain funds to defendants who were attorneys in Arkansas, the trustee filed petition for re-examination of the transaction in the bankruptcy court in Colorado where the bankruptcy proceedings were pending, and, no appearance having been entered, an order was made by the referee requiring defendants to pay over the major portion of such fund. Defendants appealed from such order denying the court's jurisdiction, and this question, having been certified to the United States Supreme Court, was decided against them, after which the trustee brought suit against defendants to recover the money pursuant to such order. *Held*, that such former proceedings were conclusive both as to the jurisdiction of the Colorado bankruptcy court and as to the merits of defendants' liability re-examined therein, and hence, in the action to recover the funds, defendants were not authorized to plead in defense that the funds were not the property of the bankrupt, but had been paid to defendants by him as agent for another.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1252; Dec. Dig. § 721.*]

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Action by Wilbur F. Denious, trustee in bankruptcy of the estate of Roger H. Williams, against Jethro P. Henderson and another. Judgment for plaintiff, and defendants bring error. Affirmed.

T. M. Mehaffy, H. M. Armistead, and W. P. Smith, for plaintiffs in error.

W. H. Martin and H. W. Currey, for defendant in error.

Before VAN DEVANTER, Circuit Judge, and CARLAND and POLLOCK, District Judges.

POLLOCK, District Judge. This case is an echo from the operations of the widely known Boatright gang of fake foot racers. The facts, in so far as material to decision of the controversy presented, may be briefly summarized as follows:

Roger H. Williams, a citizen and resident of the state of Colorado, one of the Boatright gang, on December 5, 1902, in the state of Arkansas, delivered to plaintiffs in error (for sake of brevity, hereinafter designated as "Henderson & Wood") the sum of \$9,795 in cash and certificates of deposit in bank. On January 8, 1903, creditors of said Williams instituted a proceeding in bankruptcy against him in the bankruptcy court of the state of Colorado, in which proceeding, in due course of time, an adjudication of bankruptcy was entered, and defendant in error (hereinafter designated as the "trustee") was duly appointed and qualified as trustee of said estate in bankruptcy.

Thereafter the trustee filed before the referee in the bankruptcy court of Colorado a petition alleging the payment of said sum of money to Henderson & Wood; that the payment was made by the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bankrupt in contemplation of the filing of a petition in bankruptcy against him; that it was in payment of legal services thereafter to be rendered by said Henderson & Wood to the bankrupt; the institution of the bankruptcy proceeding; the order of adjudication and the selection and qualification of the plaintiff as trustee in bankruptcy, and praying the transaction between the bankrupt and Henderson & Wood be re-examined as provided by section 60d of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3446]). Twenty days' notice of the filing of this petition and the date set for the hearing thereof in the bankruptcy court in the nature of a notice to show cause was given Henderson & Wood in the state of Arkansas. Thereafter, and on the 1st day of August, 1905, Henderson & Wood having failed to appear in response to said notice and show cause why said transaction should not be re-examined, the referee on the petition of the trustee proceeded to a re-examination of said transaction and made and caused to be entered the following order:

"In the District Court of the United States for the District of Colorado.

"In re R. H. Williams, Bankrupt.

"At a court bankruptcy, held at the office of George M. Irvin, one of the referees in bankruptcy, at the city of Colorado Springs, in El Paso county and state of Colorado, the first day of August, A. D. 1905.

"The matter of the application and petition of Wilbur F. Denious, trustee in bankruptcy of R. H. Williams, bankrupt, to have the court re-examine the transaction by which R. H. Williams, bankrupt, in contemplation of the filing of a petition in bankruptcy against him on or about the 5th day of December, A. D. 1902, and within four months from the date of the filing of the petition in bankruptcy herein transferred to J. B. Wood and Jethro P. Henderson, attorneys at law, the sum of five thousand dollars in cash, and one certificate of deposit for the sum of three thousand dollars issued by the Security Bank of Hot Springs, Arkansas, to the said bankrupt and one certificate of deposit for one thousand seven hundred and ninety-five dollars issued by the Arkansas National Bank of Hot Springs, Arkansas, to the bankrupt, for professional services as attorneys at law to be rendered to the said R. H. Williams under the provisions of section 60d of the bankruptcy law of 1898, coming on for hearing; and it appearing to the court from the evidence that a copy of this application, together with a copy of the order to show cause issued thereon returnable on the 20th day of June, A. D. 1905, was duly served on the said J. B. Wood and Jethro P. Henderson on the 26th day of May, 1905; and the said J. B. Wood and J. P. Henderson not having appeared on the said 20th day of June, 1905, herein or shown to this court any cause why this court should not proceed to re-examine the said transaction; and it further appearing to the court that the matter of the said hearing has been duly continued from the said 20th day of June until the 1st day of August, 1905, and that due notice of such continuation has been served upon the said James B. Wood and Jethro P. Henderson, and that the said J. B. Wood and Jethro P. Henderson are fully advised that this hearing was duly had on this day, and the said J. B. Wood and Jethro P. Henderson not having shown cause against the said application and the court having heard the evidence on the part of the said trustee in support of the said application and the arguments of counsel thereon, and the court being fully advised as to all matters of facts and law arising thereon, the court doth find and adjudge that the said R. H. Williams, in contemplation of the filing of a petition in bankruptcy against him, did on the 5th day of December, 1902, transfer to the said J. B. Wood and Jethro P. Henderson, attorneys at law, for services to be rendered, the sum of five thousand dollars, lawful money of the United States, and one certificate of deposit for the sum of three thousand dollars issued by the Security Bank of Hot Springs, Arkansas, to the said R. H. Williams, and one certificate of de-

posit issued by the Arkansas National Bank of Hot Springs, Arkansas, to R. H. Williams, for the sum of one thousand seven hundred and ninety-five dollars, the said two certificates of deposit having since been collected by the said J. B. Wood and Jethro P. Henderson. And the court doth find on re-examination of the said transaction that the sum of eight hundred dollars is reasonable compensation for the services rendered the said bankrupt under the terms of the transaction by which the said money and property was transferred to the said J. B. Wood and Jethro P. Henderson, and doth find and adjudge that the said transaction is valid to that extent only which the court determines and adjudges to be the reasonable value for said services.

"It is therefore ordered, adjudged, and decreed that the said transaction is void, except as to the said sum of eight hundred dollars, so adjudged to be the reasonable value of said services, and that the trustee herein proceed to recover the excess, to wit, the sum of eight thousand nine hundred and ninety-five dollars from the said J. B. Wood and Jethro P. Henderson.

"Geo. M. Irvin, Referee."

After the making and entry of this order, Henderson & Wood appeared before the referee and challenged the jurisdiction of the bankruptcy court to make said order against them and caused the question of the jurisdiction and power of the referee in this respect to be certified to the District Court of Colorado for review. Thereafter that court reviewed the question presented and on the 7th day of November, 1905, caused to be made and entered the following order, by its judgment approving and confirming the order theretofore made by the referee, as follows:

"In the Matter of R. H. Williams, in Bankruptcy, No. 836.

"This matter having heretofore come on to be heard upon the certificate of the referee, upon the question of his jurisdiction to enter an order fixing the reasonable compensation of James B. Wood and Jethro P. Henderson; attorneys at law, for legal services to be rendered to the bankrupt, and having been argued by counsel, William L. Dayton, Esq., appearing as solicitor for Wilbur F. Denious, trustee, and Geo. L. Nye, Esq., appearing as solicitor for Wood & Henderson, and having been taken under advisement, and thereupon on consideration thereof, it is ordered by the court that the ruling and order of the referee be and the same is hereby in all things approved and confirmed."

Thereupon Henderson & Wood appealed to this court to obtain a review and reversal of the judgment of the District Court of Colorado. The question of the jurisdiction and power of the bankruptcy court of Colorado to make a re-examination of the transaction which occurred between the bankrupt and Henderson & Wood in the state of Arkansas as against citizens and residents of the state of Arkansas, on the notice given, was certified to the Supreme Court and by that court answered in favor of the jurisdiction of the court. Thereupon the judgment of the District Court of Colorado was affirmed by this court in the following order:

"In re James B. Wood and Jethro P. Henderson, Petitioners.

"On Petition for Review.

"This matter came on to be heard on the petition for review and the exhibits thereto, consisting of a transcript and certain papers and proceedings in the District Court of the United States for the District of Colorado, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the order and decree of the District Court of the United

States for the District of Colorado, entered on the 8th day of December, A. D. 1905, in the matter of R. H. Williams, bankrupt, in bankruptcy, which said order and decree approved and confirmed the order and finding of the referee in said matter, entered on the 2d day of August, A. D. 1905, adjudging and fixing the compensation of Wood & Henderson as the attorneys of the said bankrupt, be, and the same is hereby, in all respects approved and confirmed, on the authority of the mandate of the Supreme Court of the United States in this cause, in response to certain questions certified to it, and that a certified copy of this decree be forthwith transmitted to the said District Court.

"It is further ordered, adjudged, and decreed by this court that the petition for review be, and the same is hereby, dismissed at the costs of the petitioners and that the respondent, Wilbur F. Denious, as trustee of the estate of R. H. Williams, bankrupt, have and recover against the petitioners, James B. Wood and Jethro P. Henderson, the sum of twenty dollars for his costs in this behalf expended and have execution therefor. October 1, 1908."

Thereafter this action was brought by the trustee based on the order of the referee of the bankruptcy court of Colorado, as approved and confirmed by the District Court and this court, to recover the amount in the hands of Henderson & Wood, as found in said order, in excess of a reasonable fee for the legal services by them performed for the bankrupt. On the trial of the case below the plaintiff offered, and there was received in evidence, the order of the court adjudging Williams a bankrupt, the order appointing the trustee in bankruptcy, the order of the referee made on re-examination of the transaction between the bankrupt and Henderson & Wood, and the judgment of the District Court affirming said order. To the order of the referee, and that of the court confirming it, objection was made based on the ground the petition on which the orders were based was not offered in evidence. And by way of defense to the action Henderson & Wood made the following offers of proof: That the sum of money paid to them by the bankrupt was paid as an agreed fee for defending Williams and nine others in certain criminal proceedings instituted against them in the state and federal courts of Arkansas. That the money by them received from the bankrupt was not his property, but was the property of one Robert Boatright. That the money received by them was not received for services to be rendered Williams in contemplation of bankruptcy. That at the time the transaction occurred Williams was not in bankruptcy, and they had no knowledge whatever of his financial condition and relied on his statement that the money belonged to Boatright. That they did defend in said criminal cases, and in the event of conviction prosecuted proceedings to the Supreme Court of the state. That a portion of said criminal cases were still pending. That the bankrupt never advised with them concerning any proceeding in bankruptcy against him. That they at no time represented Williams in his bankruptcy proceeding. That they defended the proceeding instituted against them by the trustee in the bankruptcy court of Colorado to obtain a re-examination of the transaction between the bankrupt and themselves only by resisting the jurisdiction of the court. That they were citizens of the state of Arkansas at the time the proceeding in the bankruptcy court was instituted against them by the trustee. That they were not served with any process except a notice by mail, from the referee in bankruptcy

for the District of Colorado, of the proceedings there instituted against them, and of the day and place of hearing. All of which offers were excluded by the trial court and a verdict was directed in favor of the trustee for the amount of money delivered by the bankrupt to Henderson & Wood, less the sum of eight hundred dollars in accordance with the prayer of the petition.

Many assignments of error based on these rulings of the trial court are presented.

[1] From the facts stated, it is apparent the question of the jurisdiction of the bankruptcy court of Colorado over the subject-matter of the re-examination of the transaction between the bankrupt and Henderson & Wood is finally and conclusively settled. It is further determined by the decision of the Supreme Court the bankruptcy court of Colorado was the only court under the provisions of the bankruptcy law having jurisdiction and power to re-examine the transaction. *In re Henderson & Wood*, 210 U. S. 246, 28 Sup. Ct. 621, 52 L. Ed. 1046. Therefore the only question arising on this state of the record is the effect which shall be given the order of the referee re-examining the transaction and the judgment of the bankruptcy court of Colorado confirming the same.

The contention of Henderson & Wood, as plaintiffs in error, in this respect, is twofold: (1) The order of the referee and that of the District Court confirming it were inadmissible in evidence unless the petition on which such orders were based was also offered in evidence in their support as a proper foundation therefor; (2) the trial court erred in rejecting the offers of proof made by them on the trial, for that, if said offers had been received it would have been shown thereby the jurisdictional facts requisite under section 60 of the bankruptcy act to support the proceedings before the referee on which the orders were based did not in fact exist; therefore, the orders are void and of no force and effect.

As these contentions form the basis for all the assignments of error presented and discussed, and go to the nature of the proceeding in which the order of the referee, confirmed by the court, was made, and the effect to be given such order and judgment in this case, they may be considered together.

As has been seen, the parties to this controversy are identical with those in which the order of the referee was made. The attack here attempted to be made on that order is purely collateral in its nature. The jurisdiction of the court in which the order was entered over both the subject-matter of the proceeding and the persons of the defendants therein is conclusively settled and established by the former proceedings and is the law of this case. Not only so, but it is further conclusively settled as the law of this case, the bankruptcy court of Colorado, in which the order and judgment forming the basis of this controversy was entered, was the only court possessing jurisdiction to re-examine the transaction between the bankrupt and Henderson & Wood. *In re Henderson & Wood*, 210 U. S., 28 Sup. Ct., 52 L. Ed., *supra*.

While it appears from the record presented Henderson & Wood defended in the former proceeding in the bankruptcy court of Colo-

rado alone on the ground of want of jurisdiction, yet all the issues concluded by the order and judgment now presented against them were tendered therein, were, as shown by the order, litigated, and inhere in the judgment and order of the bankruptcy court, including the sufficiency of the petition or application presented to the court on which they were based, the nature of the transaction between the parties re-examined therein, the ownership of the money involved in the transaction, and all and every other question of jurisdiction, fact, or law now sought to be relitigated by way of defense to this action.

It is also conclusively settled by authority the federal court of bankruptcy of Colorado in which the order and judgment were entered was not only the court of exclusive original jurisdiction for the purpose of re-examination of the transaction between the bankrupt therein and Henderson & Wood, but, further, that it is a court of general jurisdiction in matters of bankruptcy, such as was therein involved, and its judgments, decrees, and orders in this case possess all the attributes of finality and estoppel accorded domestic judgments emanating from courts of general original jurisdiction. *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Owings v. Hull*, 9 Pet. 607, 9 L. Ed. 246; *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; *National Society v. Spiro*, 94 Fed. 750, 37 C. C. A. 388; *Edelstein v. U. S.*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236; *In re First National Bank of Belle Fourche et al.*, 152 Fed. 64, 81 C. C. A. 260.

It follows in the reception and rejection of evidence, as shown by the record, no error was committed, and the judgment is accordingly affirmed.

THE PLYMOUTH.

(Circuit Court of Appeals, Third Circuit. March 7, 1911.)

No. 17 (1,386).

1. NEGLIGENCE (§ 83*)—CONTRIBUTORY NEGLIGENCE—INJURY AVOIDABLE NOTWITHSTANDING.

A plaintiff may recover for an injury caused by the negligence of defendant, even though his own negligence contributed thereto, where defendant, knowing of such negligence, might by the exercise of reasonable care have avoided the consequences of it, and prevented the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.*]

2. COLLISION (§ 58*)—CARE REQUIRED OF TUG WITH LONG TOW.

A tug with a very long tow is held to a high degree of care, to avoid danger of collision with other vessels.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 68–71; Dec. Dig. § 58.*]

3. COLLISION (§ 61*)—STEAM VESSELS WITH TOWS MEETING—FAILURE TO ALLOW ROOM FOR PASSING.

The steamship Williamsport, while passing northward through Pollock Rip Slue, off the Massachusetts coast, at night with a barge in tow, both loaded with coal, came into collision with the second of three light barges

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in tow of the tug Plymouth, coming south. The Williamsport had just passed another meeting tow starboard to starboard, and as she approached the Plymouth was as far as she could safely go to the west side of the channel, while the Plymouth was further eastward, and they passed starboard to starboard without signals; but the Plymouth's tow, which was more than half a mile long, was carried by the tide to the westward, causing the collision. *Held* that, conceding the Williamsport to have been on the wrong side of the channel, such fact was not a proximate cause of the collision, which was due solely to the fault of the Plymouth in failing to allow sufficient room, which she might readily have done.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.*]

Collision with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Cross-libels in admiralty for collision against the steam tug Plymouth, the Central Railroad of New Jersey, claimant, and against the steamship Williamsport, the Philadelphia & Reading Railway Company, claimant. Decree against the Plymouth, and her claimant appeals. Affirmed.

See, also, 167 Fed. 184.

John F. Lewis, James J. Macklin, and Francis C. Adler, for appellant.

James F. Campbell, for appellee.

Before BUFFINGTON and LANNING, Circuit Judges, and CROSS, District Judge.

LANNING, Circuit Judge. By the decree of the District Court the Plymouth was held liable for the collision, in the Pollock Rip Slue, between the steamship Williamsport, and one of the three barges which the Plymouth had in tow. "The Slue," said Judge Putnam, in *The H. F. Dimock*, 77 Fed. 226, 23 C. C. A. 123, "is a well-known thoroughfare on the coast of Massachusetts, so much used that very few on our shores are more thronged. It is a dangerous and difficult channel to navigate, because of the swift tide, the direction of which is constantly changing, and of dangerous shoals on either hand."

The Williamsport, with the barge Paxinos in tow, both loaded with coal, was passing easterly from Shovelful Lightship to Pollock Rip Lightship, which is at the southern end, and just west of the middle of the channel, of the Slue. The tug Piedmont, with three barges in tow, all empty, was passing southerly through the Slue, as was the Plymouth, also with three barges in tow, all empty. The tide was from the northeast to the southwest, the speed of the Williamsport, against the tide, perhaps $2\frac{1}{2}$ knots an hour over the bottom, and that of the Plymouth, with the tide, about $7\frac{1}{2}$ knots an hour over the bottom. The Piedmont and her tow were somewhat further east in the Slue than were the Plymouth and her tow, and the last barge in the Piedmont's tow was perhaps a quarter of a mile in advance of the Plymouth. The time was shortly after midnight. It was a dark night, but lights were clearly seen.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

The Williamsport turned northerly into the Slue before reaching the Pollock Rip Lightship, thereby passing into the westerly or her port side of the Slue. She and the Piedmont were then about head and head; the Piedmont displaying to her both of her side lights. The Piedmont thereupon gave the Williamsport a signal of two blasts of her whistle, to which the Williamsport responded with two blasts. Each vessel then starboarded its helm, and the Piedmont passed outside of the Pollock Rip Lightship before turning westerly toward Shovelful Lightship, while the Williamsport, with both of the side lights of the approaching Plymouth in view, passed over to the extreme westerly side of the Slue and steadied herself there in a position where she and the Plymouth were green light to green light, or starboard to starboard. Less than a mile north of the Pollock Rip Lightship, where the width of the Slue was about three-fourths of a mile, the Williamsport passed the Plymouth and the first of her three barges starboard to starboard. She collided with the second of the barges, and soon after sank.

The Plymouth insists that the narrow channel rule is applicable to the Slue, and that the collision was due, first, to the fact that the Williamsport was on the wrong side, and, second, to the fact that, after the Williamsport had safely passed the Plymouth and her first barge, the Williamsport sheered to the east and struck the second barge. The Williamsport, on the other hand, contends that no signals were passed between her and the Plymouth, that the Plymouth therefore impliedly accepted the position of green to green, that the tide was running strongly from northeast to southwest, that the Plymouth's tow, more than a half mile long, was carried out of alignment by the tide, that the Williamsport was as near the westerly edge of the Slue as it was prudent for her to be, and that the collision was solely due to the fact that the Plymouth negligently failed to starboard her helm and pass further over toward the middle of the Slue, which, as above stated, at that part of it was three-fourths of a mile wide. The District Court adopted the contention of the Williamsport.

[1] We do not think the District Court erred. It may be assumed, for the purposes of this case, that the Williamsport should have observed the narrow channel rule, and made her turn into the Slue outside of the Pollock Rip Lightship, and passed northerly on the easterly side of the Piedmont and the Plymouth. But, though she did not do so, the Plymouth could not with impunity recklessly endanger the safety of the Williamsport. The old common-law rule that a plaintiff cannot recover damages for the negligence of the defendant, where, by exercising ordinary care, the plaintiff could have avoided the consequences of the defendant's negligence, has now been materially qualified. In *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, the following instruction to the jury was approved:

"There is another qualification of this rule of negligence, which it is proper I should mention. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover if he himself be shown to have been guilty of contributory negligence which may have had something to do in causing the accident, yet the contributory

negligence on his part would not exonerate the defendant, and disentitle the plaintiff from recovering, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence."

To the same effect are *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; *Turnbull v. New Orleans & C. R. Co.*, 120 Fed. 783, 57 C. C. A. 151; *Herr v. St. Louis & S. F. R. Co.*, 174 Fed. 938, 98 C. C. A. 550.

In *Klutt v. Phila. & R. Ry. Co.*, 142 Fed. 394, 73 C. C. A. 494, where Klutt was rowing across the Delaware river, and was run down by the defendant's tug, this court said:

"But, even, upon the assumption that Klutt was guilty of negligence in crossing in front of the approaching tug and tow, it does not follow that the defendant is exempt from liability to the plaintiff. It is a settled principle of law that although a plaintiff, who sues for an injury inflicted by the defendant, might by the observance of proper care have avoided exposing himself to the injury, yet this will not prevent him recovering damages from the defendant if the latter discovered, or by the exercise of ordinary care might have discovered, the exposed situation of the plaintiff in time, by the exercise of ordinary care and diligence, to have averted the effect of the plaintiff's negligence and avoided the injury which happened."

But we do not base our decision on the supposition of contributory negligence of the Williamsport. Contributory negligence of a plaintiff, like the negligence of a defendant, must have a proximate and not a remote, a direct and not an indirect, relation to the injury complained of. In the case before us, no signals passed between the Williamsport and the Plymouth. The Williamsport had passed to the extreme westerly side of the Slue and taken a position toward the Plymouth of green to green. The Plymouth, as her own officers testify, as well as the Williamsport, considered the position a safe one. They expected to pass starboard to starboard. There was no misunderstanding between them at any time. The absence of danger or any other signals between them, and the testimony of the men on both vessels, is conclusive proof on that point.

[2] The Plymouth had a long tow of three barges, each with a hawser 1,000 feet or more in length. Her tow was certainly more than a half mile long, and Capt. Hand, of the Plymouth, himself says it was nearly a mile long. The Williamsport knew, by the three white lights of the Plymouth (article 3 of Inland Rules), that the latter's tow was more than 600 feet in length; but she could not know its actual length. It was therefore the duty of the crew of the Plymouth to navigate that vessel, especially in such a place as the Slue, with extreme care. *The Gladiator*, 79 Fed. 445, 25 C. C. A. 32; *The Mount Hope*, 84 Fed. 910, 29 C. C. A. 365; *The Samuel Dillaway*, 98 Fed. 138, 38 C. C. A. 675; *The Gertrude*, 118 Fed. 130, 55 C. C. A. 80. These cases were all decided by the Circuit Court of Appeals of the First Circuit, and that court has consistently enforced the rule that tugs with long and hazardous tows shall be held to a very high degree of care. The Circuit Court of Appeals of the Second Circuit enforces the same rule. *The Bee*, 138 Fed. 304, 70 C. C. A. 593. It is a salutary rule. Commerce and a due regard for human lives demand its observance.

[3] Assuming that the narrow channel rule is applicable to the Slue, the violation of it, in the circumstances above given, was not the proximate cause of the collision. That cause was either the sheering of the Williamsport to her starboard after passing the Plymouth and her first barge, or the sheering of the Plymouth's second barge to her starboard by reason of the tide or bad navigation, or both. We incline, with the District Court, to the latter view. The testimony on the point is conflicting. But the learned District Judge very satisfactorily summed up the facts in the following language:

"The Plymouth's theory is that the Williamsport suddenly sheered to starboard after passing the first barge, and that this sheer was the sole cause of the disaster. To my mind the theory is not credible. It requires the court to believe that a heavily loaded vessel, towing a heavily loaded barge, and moving slowly against the tide, would suddenly sheer a considerable distance while moving less than 1,000 feet. I say while moving less than 1,000 feet, because, of course, the Plymouth's barges were also moving to meet her with comparative rapidity, and the second barge must therefore have inflicted the blow before the Williamsport had gone more than 500 or 600 feet at the most beyond the point where she passed barge No. 10 (the first barge). It seems to me much easier to believe, and it accords quite as well with the testimony, that an empty barge, going at a higher speed and acted upon by a westerly tide, should inevitably tend still further in that direction, and might easily get out of line in the darkness without her deviation being accurately observed. This, of itself, would account for the collision. If she sheered, also, the explanation is even more satisfactory. I think, therefore, that the Plymouth was solely at fault, because she failed to give the Williamsport sufficient room to execute the maneuver of passing starboard to starboard, to which the Plymouth herself agreed. There is no doubt in my mind that there was plenty of space and depth for the Plymouth to have gone sufficiently to the eastward to have allowed the Williamsport to pass with safety; and the fact that she did not do so is, I think, to be attributed to a disinclination to take the necessary trouble, and to a willingness that the Williamsport should encounter the risk of the shoal. I do not mean that she deliberately and willfully crowded the Williamsport to the point where the collision occurred; but I do mean that, as she had ample notice that the tows were to pass starboard to starboard, and as she could easily have given more room to the approaching vessel to execute the maneuver in safety, she was at fault for not doing her part to afford the proper margin. She was bound to take account of the facts that her barges were light, and that the tide was setting strongly to the westward. These reasons only made it more imperative that she should do all that lay in her power to diminish the risk to which the Williamsport was undoubtedly exposed, even under the most favorable circumstances. To say the least, the Plymouth was negligent, and it may also be that she only made way grudgingly, instead of co-operating willingly toward the success of the maneuver to which she was herself committed."

Our judgment is that the decree of the District Court should be affirmed, with costs.

GERING et al. v. LEYDA.

(Circuit Court of Appeals, Eighth Circuit. March 31, 1911.)

No. 3,418.

1. BANKRUPTCY (§ 302*)—RECOVERY OF PREFERENCE—PETITION—SUFFICIENCY.

A petition by a trustee in bankruptcy to recover a preference, which alleges that at the time of the transfer the bankrupt was hopelessly insolvent, and his indebtedness amounted to over \$24,000, and that the only unexempt property then owned by him was the stock of merchandise conveyed to defendant, sufficiently charges that at the time of the transfer the bankrupt was indebted to general unsecured creditors entitled to share in the preference recovered, and states a good cause of action.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

2. BANKRUPTCY (§ 302*)—RECOVERY OF PREFERENCE—ACTION—PLEADING AND PROOF.

A trustee in bankruptcy suing to recover a preference need not plead and prove that claims against the bankrupt have been filed and allowed, but it is only necessary to plead and prove that the bankrupt is indebted to general creditors who may share in the preference recovered.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 302.*]

3. ESTOPPEL (§ 68*)—EQUITABLE ESTOPPEL—CLAIM IN LEGAL PROCEEDING.

A defendant, in an action by a trustee in bankruptcy to recover a preference, who successfully objected to the proof of indebtedness on the ground that the same was immaterial, is estopped from claiming that evidence of such indebtedness is requisite to sustain the cause of action.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165–169; Dec. Dig. § 68.*]

4. BANKRUPTCY (§ 303*)—RECOVERY OF PREFERENCE—EVIDENCE—SUFFICIENCY.

In an action by a trustee in bankruptcy to recover a preference, evidence held to justify a finding that the transfer enabled defendant to obtain a greater percentage of his debts than other creditors of the bankrupt of the same class, and that defendant was charged with knowledge of the bankrupt's insolvency, authorizing a recovery.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 303.*]

5. BANKRUPTCY (§ 305*)—RECOVERY OF PREFERENCE—EVIDENCE—ADMISSIBILITY.

Where, in an action by a trustee in bankruptcy to recover a preference resulting from a transfer of the bankrupt's stock of merchandise and open accounts, the parties at the trial stipulated that the reasonable market value of the stock in controversy, on the date of the transfer, was a specified sum, such sum measured the liability of defendant.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 305.*]

6. APPEAL AND ERROR (§ 263*)—INSTRUCTIONS—EXCEPTIONS—REVIEW.

Where no exception was taken to the court's charge, errors thereon are not available on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516–1532; Dec. Dig. § 263.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse a requested charge covered by the charge given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

In Error to the District Court of the United States for the District of Nebraska.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by John M. Leyda, trustee in bankruptcy of Henry Herold, against Henry R. Gering and another. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Matthew Gering (Edmund C. Strode, on the brief), for plaintiffs in error.

Henry H. Wilson (Elmer J. Burkett and Elmer W. Brown, on the brief), for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and DYER, District Judge.

DYER, District Judge. This is a suit brought in the District Court of the United States for the District of Nebraska, by defendant in error as trustee of the estate of Henry Herold, bankrupt, against plaintiffs in error and the First National Bank of Plattsmouth, Neb., seeking to recover an alleged preference under the bankrupt law. This case was tried before a jury. The trial court directed a verdict in favor of the defendant First National Bank of Plattsmouth, Neb., and the jury returned a verdict in favor of the defendant in error and against plaintiffs in error in the sum of \$3,202.24, upon which judgment was rendered. Plaintiffs in error thereupon brought the case to this court by writ of error. The evidence adduced at the trial tended to show the following facts: For some years prior to October, 1906, the bankrupt, Henry Herold, had been conducting a general store at Plattsmouth, Neb., and on December 4, 1906, he was adjudged a bankrupt upon a petition in bankruptcy filed against him by creditors on October 16, 1906, and defendant in error was appointed his trustee in bankruptcy. The plaintiffs in error, Henry R. Gering and Matthew Gering, are brothers, and brothers-in-law of the bankrupt. Prior to 1906, Henry Gering became surety for the bankrupt upon three notes aggregating \$3,100, which were discounted by the bankrupt at the First National Bank of Plattsmouth, Neb.; and in February, 1906, Henry Gering became bankrupt's guarantor in the sum of \$1,200 to Smith, McCord, Townsend Company, of Kansas City, Mo. In August, 1904, Matthew Gering became surety for bankrupt upon a note for \$1,500, which was discounted by bankrupt at the First National Bank of Plattsmouth, Neb. On October 5, 1906, a representative of the Smith, McCord, Townsend Company of Kansas City called upon bankrupt and demanded payment of an indebtedness of about \$870 due his employer, and, failing to obtain payment from bankrupt, requested Henry Gering to pay the indebtedness as guarantor. On October 6, 1906, a conference was held between the bankrupt, Henry Gering, and Matthew Gering, at which bankrupt's business affairs were discussed. At this interview each of the Gerings learned for the first time that the other had become surety for bankrupt's indebtedness. The Gerings testified that at this interview they questioned bankrupt as to his financial condition, and that he told them that in addition to the indebtedness owing to the First National Bank of Plattsmouth, and to the Smith, McCord, Townsend Company, he owed only about \$1,000 to \$1,200; that he owned his stock of goods worth "around \$5,000," and his residence in Plattsmouth, worth from \$5,500

to \$6,000, and incumbered for \$2,500. The bankrupt testified that he told the Gerings that he only owed from \$1,000 to \$1,200 in addition to the notes held by the bank, and that he had been offered \$5,500 for his residence, and that he proposed to accept the offer, and with the proceeds he thought he "could either make a settlement or clean up the balance of the indebtedness." It was thereupon agreed that the bankrupt would give Henry and Matthew Gering a bill of sale for his stock of goods and outstanding accounts, and that the Gerings would pay the indebtedness due the bank upon the notes upon which they were sureties, then amounting to \$4,842.03. In accordance with this arrangement, the key to the store was turned over to Henry Gering on Saturday, October 6, 1906, and a written bill of sale was executed and delivered on the following Monday, October 8, 1906. By this bill of sale the bankrupt conveyed to the Gerings his entire stock of goods and all his outstanding book accounts. The bankrupt had taken no inventory of his stock of goods for several years, and no inventory was taken at the time of the transfer to the Gerings; but the Gerings requested three merchants of Plattsmouth to look at the stock and give their opinion of its value, and these men, after spending about half an hour in making a general inspection of the stock, reported that in their opinion it was worth from \$3,500 to \$4,500. The stock of goods was afterwards sold by the Gerings and the notes held by the bank paid by them. It appeared from the evidence that on October 6, 1906, the bankrupt was insolvent and owed debts greatly in excess of the amount stated by him to the Gerings; that various creditors were then pressing the bankrupt for payment of their claims; that the bankrupt's account at the First National Bank of Plattsmouth had been overdrawn some \$400 for more than a month; that the notes held by the bank and upon which the Gerings were sureties were past due; and that the bank had been urging that the notes be paid. The evidence tended to show that the Gerings made no inquiry into the financial condition of the bankrupt except to ask him what his condition was, and the evidence further tended to show that the bankrupt had in his store at Plattsmouth bills for invoices which showed the amount of his indebtedness to his various creditors.

[1] It is contended in behalf of plaintiffs in error that the trustee's petition failed to state a cause of action entitling him to recover a preference because it is not averred therein that at the time of the commencement of the action the claims of any creditors had been proved and allowed against the estate of the bankrupt. In our opinion it was not necessary for the trustee to allege and prove that claims of creditors had been filed and allowed against the estate of the bankrupt prior to the commencement of the suit. The trustee's petition alleged that at the time of the transfer in question the bankrupt "was hopelessly insolvent, and that his indebtedness amounted to over \$24,000," and that the only unexempt property then owned by him was the stock of merchandise conveyed to plaintiffs in error, and we are of opinion that these allegations sufficiently charged that at the time of the transfer complained of the bankrupt was indebted to general creditors, who were not secured, and who were entitled to share in

the preference recovered. We think the trustee's petition stated a good cause of action, for the recovery of a preference. *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387; *Coder v. McPherson*, 152 Fed. 951, 82 C. C. A. 99; *Wright v. Skinner Mfg. Co.*, 162 Fed. 315, 89 C. C. A. 23; *Tumlin v. Bryan*, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *In re Leech*, 171 Fed. 622, 96 C. C. A. 424.

[2] (1) It is not necessary in such a case for the trustee to plead and prove that claims against the bankrupt have been filed and allowed.

(2) It is necessary for him to plead and prove that the bankrupt is indebted to general creditors who may share in the preference recovered.

(3) The complaint sufficiently alleges that the bankrupt was indebted in an amount very much in excess of the claims secured by the preference so that it is sufficient in this regard.

[3] (4) The defendants below, by objecting to the proof of indebtedness of the bankrupt on the ground that such proof was immaterial and obtaining a ruling sustaining this objection, estopped themselves from claiming that evidence of such indebtedness was requisite to sustain the trustee's cause of action, notwithstanding this ruling, sufficient evidence crept into the case to constitute substantial evidence of indebtedness of the bankrupt to general creditors not secured.

Plaintiffs in error further contend that the evidence is insufficient to sustain the judgment. In support of this contention it is urged that no evidence was submitted which warranted the jury in finding that plaintiffs in error, at the time of the transfer complained of, had reasonable cause to believe that the bankrupt intended, by such transfer, to give them a preference, and that the evidence did not show that the effect of the transfer was to enable plaintiffs in error to obtain a greater percentage of their debts than other creditors of bankrupt of the same class. An attentive consideration of the record has led us to conclude that these objections are not tenable.

[4] The facts known to plaintiffs in error at the time the bankrupt transferred his stock of goods to them were such as to put them on inquiry as to the bankrupt's solvency, and, under the facts and circumstances in evidence, it was for the jury to determine whether plaintiffs in error were to be charged with knowledge of bankrupt's insolvency. *Pittsburg Plate Glass Co. v. Edwards*, 148 Fed. 377, 78 C. C. A. 191; *Coder v. McPherson*, 152 Fed. 951, 82 C. C. A. 99; *Houck v. Christy*, 152 Fed. 612, 81 C. C. A. 602; *McElvain v. Hardesty*, 169 Fed. 32, 94 C. C. A. 399; *First Nat. Bank of Phil. v. Abbott*, 165 Fed. 852, 91 C. C. A. 538; *Clingman v. Miller*, 160 Fed. 326, 87 C. C. A. 278; *In re Knopf (D. C.)* 146 Fed. 109. The evidence submitted in the trial court warranted the jury in concluding that the transfer of the stock of goods and open accounts to plaintiffs in error would enable them to obtain a greater percentage of their debts than other creditors of bankrupt of the same class. The evidence showed that, at the time of the sale of the stock and accounts to plaintiffs in error, the bankrupt was indebted to various other creditors whose claims were unsecured, and the evidence tended to show that, besides the stock of merchandise and accounts, the bankrupt owned no other prop-

erty that was not exempt from execution. If the showing made by the trustee in the trial court as to the extent of the bankrupt's indebtedness to general creditors was not as full as it might have been, the plaintiffs in error are not in a position to complain of the lack of evidence on this subject, for the trustee offered evidence tending to show the indebtedness of the bankrupt at the time of the transfer complained of, and plaintiffs in error objected to the admission of the evidence on the ground that it was immaterial and obtained from the trial court a ruling sustaining their objection. By taking this course the plaintiffs in error estopped themselves from claiming that evidence of the indebtedness of bankrupt to general creditors at the time he transferred his stock of goods to them was necessary to sustain the trustee's cause of action.

[5] It is further contended that the trial court erred in excluding evidence offered by plaintiffs in error tending to show the amount received from the sale of the stock of merchandise, the manner in which it was sold, and the expense incurred in making the sale. We think the trial court was right in excluding this evidence, for it was stipulated by the parties at the trial that the fair and reasonable market value of the stock of merchandise in controversy on the 6th day of October, 1906, was \$3,000; and, if plaintiffs in error were liable, this sum was the measure of their liability. *McElvain v. Hardesty*, 169 Fed. 32, 94 C. C. A. 399.

[6] It is further contended that the trial court erred in its instructions to the jury; but, as no exception was taken by plaintiffs in error to the court's charge, these alleged errors are not available here. *Levi v. Mathews*, 145 Fed. 152, 76 C. C. A. 122; *Yates v. United States*, 90 Fed. 57, 32 C. C. A. 507.

[7] Error is also assigned because of the refusal of the trial court to give certain instructions requested by plaintiffs in error. Upon a careful review of the instructions refused by the trial court, we have reached the conclusion that they were properly refused, either because they erroneously declared the law, or because the propositions involved were covered in the charge given by the court.

In our opinion the judgment of the trial court should be affirmed, and it is so ordered.

WESTERN UNION TELEGRAPH CO. v. TRAPP, Auditor, et al.†

(Circuit Court of Appeals, Eighth Circuit. March 18, 1911.)

No. 3,438.

1. TAXATION (§ 604*)—ILLEGAL EXERCISE OF POWER—REMEDY.

The power of taxation is the power to take from the owner that which is his to help defray the expense of the protection received from the government, and, if the power is illegally exercised, it is an invasion of private right, and, in the absence of specific limitation, the party injured may resort to the courts to vindicate his right against those who attempt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied.

such invasion by any form of action which he could use against any other wrongdoer with respect to the same class of injury.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1228; Dec. Dig. § 604.*]

For other definitions, see Words and Phrases, vol. 8, pp. 6867-6886; vol. 8, p. 7813.]

2. COURTS (§ 259*)—FEDERAL COURTS—STATE STATUTES—APPLICATION.

While the state may curtail the jurisdiction of its courts of equity to interfere by injunction in the collection of taxes alleged to be illegal by providing that no injunction shall issue in such case, such a statute has no application to proceedings in the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 795; Dec. Dig. § 259.*]

State laws as rules of decision in federal courts, see note to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

3. TAXATION (§ 608*)—COLLECTION OF TAX—INJUNCTION—GROUNDS.

A suit to enjoin the collection of a tax will not be entertained by a court of equity on the sole ground that the tax is illegal or excessive, but it must also appear that the circumstances are such as to render the remedies at law inadequate.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1231, 1234; Dec. Dig. § 608.*]

4. COURTS (§ 262*)—FEDERAL COURTS—EQUITY JURISDICTION—LEGAL REMEDIES IN STATE COURT.

Statutory remedies at law furnished by a state in its courts will not oust the equitable jurisdiction of a federal court of equity.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

Jurisdiction of federal courts as affected by state laws, see note to Barling v. Bank of British North America, 1 C. C. A. 513.]

5. COURTS (§ 262*)—FEDERAL COURTS—JURISDICTION—INJUNCTION AGAINST TAXES—MULTIPLICITY OF SUITS.

Where a suit to enjoin the collection of taxes filed in a federal court of equity was between citizens of different states and involved more than \$2,000 exclusive of interest and costs, and the amended bill averred that, if the assessment was allowed to be certified to the various county officers and taxing districts in the state, the unlawful assessments could not be collected except by a multiplicity of suits and by long and costly delays, federal jurisdiction in equity was not ousted because of an alleged adequate remedy at law in the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 797, 798; Dec. Dig. § 262.*]

6. TAXATION (§ 448*)—ASSESSMENT—PUBLIC SERVICE CORPORATIONS—STATUTES—CONSTRUCTION.

Revenue Act Okl. April 17, 1908 (Laws 1907-08, p. 635) § 6, created a state board of equalization required to examine the various county assessments, and to equalize, correct, and adjust the same as between the counties by increasing or decreasing the aggregate assessed value of the property, or any class thereof, to conform to the fair cash value, and to order and direct the assessment rolls of any county to be corrected, and to adjust the valuation of the real and personal property of the several counties. Section 10 provides that the same officers shall constitute a board of assessors to assess property subject to taxation of all public service corporations doing business within the state, requiring the board to meet on a specified day before meeting as a board of equalization to assess the property of such corporations, etc. Held, that such sections did not create two separate and distinct boards, but that section 10 should be construed as merely providing the mode and manner of valuing the property

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of public service corporations, and that the same was not in violation of Const. art. 10, § 21, creating the board of equalization, and providing that such board shall adjust and equalize the valuation of real and personal property, perform such other duties as may be prescribed by law, and shall assess all railroad and public service corporation property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 448.*]

7. TAXATION (§ 611*)—ASSESSMENT—SUIT TO ENJOIN—PLEADING.

In a suit to enjoin an assessment of complainant's property, objections that the assessment was invalid because at some meetings of the board of assessment the Attorney General was not present in person, and at other meetings the Secretary of State was not present in person, and because the board in making the assessment included the value of complainant's franchise acquired under the laws of the United States, and that the value of the franchise was not given separately and independently of other property, will not be considered where not raised by the bill.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1250; Dec. Dig. § 611.*]

8. TAXATION (§ 611*)—ASSESSMENT—INVALIDITY—COMPLAINT—CONSTRUCTION.

In a suit to restrain the enforcement of an assessment of complainant's property for taxation, an averment that the returns made by complainant to the State Auditor of the value of each item of its property gave due consideration to the value of complainant's franchise within the state not derived from the United States, the same being of small value because complainant had not at any time been able and was not permitted to earn a sufficient amount to maintain and operate its telegraph system within the state, was not equivalent to an affirmative averment that any part of complainant's franchise within the state was derived from the United States.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 611.*]

9. TAXATION (§ 8*)—CORPORATIONS—FRANCHISES—ACQUISITION FROM UNITED STATES.

The fact that a corporation of one state derived its franchise from the United States under Act Cong. July 24, 1866, c. 230, 14 Stat. 221, providing for the establishment of telegraph lines along post roads, etc., did not relieve the corporation from the burdens of taxation in another state in which it had property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 21; Dec. Dig. § 8.*]

10. CONSTITUTIONAL LAW (§ 284*)—DUE PROCESS OF LAW—TAXATION—ASSESSMENT—NOTICE OF HEARING.

Where it affirmatively appeared that complainant had notice and appeared before the board of assessors, and was heard in relation to the assessment of its property made pursuant to Revenue Act Okl. April 17, 1908 (Laws 1907-08, p. 633), the fact that no formal notice was served because the statute fixed an impossible date for the meeting of the board of assessors for the year 1908 did not render the assessment invalid as taking of complainant's property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 893-896; Dec. Dig. § 284.*]

11. TAXATION (§ 493*)—VALUATION OF PROPERTY—REVIEW BY COURTS.

The judgment of a state board empowered to fix the valuation of property for taxation cannot be set aside on proof that the valuation was other than that fixed by the board, where there was no evidence of fraud, and no gross error in the system on which the valuations were made.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 876-883; Dec. Dig. § 493.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

12. TAXATION (§ 493*)—ASSESSMENT—INEQUALITY.

On the issue whether there was an intentional reduction of property other than that of public corporations by the state board of equalization, it would be presumed that there was no such intentional reduction; the burden of proving the contrary being on the complainant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 881; Dec. Dig. § 493.*]

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Suit by the Western Union Telegraph Company against M. E. Trapp, as Auditor, and others. From a decree dismissing the bill, complainant appeals. Affirmed.

S. T. Bledsoe (J. R. Cottingham, on the brief, and G. H. Fearons and Francis N. Whitney, of counsel), for appellant.

Charles West, Atty. Gen. of Oklahoma, for appellees.

Before ADAMS, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. The parties are arranged in this court as they were in the court below, the appellant being the complainant in the court below, and the appellees the defendants in the court below, and will be hereafter referred to as complainant and defendants, respectively.

The amended bill challenges the assessment of complainant's property for taxation in the state of Oklahoma for the year 1908, and the relief sought is an injunction enjoining the state board of assessors, composed of the Governor, State Auditor, State Treasurer, Secretary of State, Attorney General, State Inspector and Examiner, and President of the Board of Agriculture, and especially the State Auditor, from certifying the assessment made by the board to the various counties of the state for extension on the tax roll.

It is averred in the bill that pursuant to the requirements of the laws of Oklahoma complainant filed with the state board of assessors a complete statement of all its properties in the state of Oklahoma, with a correct statement of the actual cash value of each item thereof, including the franchise rights in connection therewith; that the board increased the value of its property to three times the amount at which it had been returned; that the valuation as made was arbitrarily made without any justification or excuse; that the act of the board of assessors in so valuing the property of the complainant was fraudulent and wrongful and amounted to denying the complainant the equal protection of the laws and the taking of its property without due process of law; that the board of assessors in so valuing its property intentionally overvalued the same in order to impose upon complainant a greater part than its just share of the burden of taxation. It is further averred that the property of other citizens of the state was assessed at less than 75 per cent. of its actual cash value; that the property of complainant of like character as that owned by other citizens of the state was assessed at three times its actual cash value;

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that such under assessment of the property of other persons and corporations, other than public service corporations, located in the state of Oklahoma, was made by the board of equalization systematically, intentionally, and purposely, and that, unless enjoined, it would cause the same to be certified to the county officers of the several counties of the state upon the records thereof for the purpose of taxation, thus casting upon the complainant more than its just share of the burden of taxation. It is also alleged in the bill that the state board of equalization which equalized the property of the counties was required by the Constitution of the state to assess the property of complainant, but that said board did not do so, but the same was assessed by the board of assessors of the state in violation of the terms of the Constitution of the state; that the board of equalization and the board of assessors were two separate and independent bodies, each acting in a regularly organized capacity, keeping minutes of its proceedings and actions in matters coming before it; that the boards acting separately did so in recognition of the Constitution and statutory provisions that they were separate and distinct tribunals, at no time exercising a common jurisdiction. It is further averred that in doing all of the wrongful acts complained of defendants were acting in their official capacity as members of the state board of assessors pursuant to a statute of Oklahoma approved on the 17th of April, 1908; that the assessment was wholly void because of the (1) arbitrary, wrongful, and fraudulent action of the board in assessing the property of complainant at three times the value of the property returned by complainant; (2) under the Constitution of the state of Oklahoma (article 10, § 21) a state board of equalization is created, and it is made the duty of the board to adjust and equalize the valuation of the real and personal property in the several counties in the state and to perform such other duties as may be prescribed by law, and to assess all railroad and public service corporation property; that, inasmuch as the Constitution of the state provided that this property should be assessed by the state board of equalization, the provisions of the statute creating a board of assessors is invalid as being in conflict with the Constitution of the state, and that the assessment made by the board of assessors is a nullity and of no validity whatever; (3) because both the value fixed upon the property of complainant was much greater than its fair cash value, and the general property of the state was assessed at less than 75 per cent. of its cash value, which resulted in placing a greater burden upon the complainant's property than was placed upon other property taxed in this state, in violation of the provisions of the Constitution of the United States, and of article 5 of the Constitution of the State of Oklahoma; (4) that under and by virtue of the provisions of section 21, art. 10, of the Constitution of Oklahoma, it is made the duty of the state board of equalization to adjust and equalize the valuation of the real and personal property of the several counties in the state other than public service corporations, but, that neither the Constitution nor the statute under which the state board of equalization and the board of assessors assumed to act makes any provision for equalizing the assessment of the property which is assessed by the board of

assessors, either as between the various properties assessed by the board or with the other property in the state assessed by the various local assessing officers; that therefore complainant has been denied the equal protection of the laws; (5) because the law creating the board of assessors does not provide for giving any notice to persons or corporations, whose property is to be assessed by it, of the time or place when the board shall consider the return made by it and assess its property for the purpose of taxation.

After averring its willingness to pay the taxes justly due, the bill prays for an injunction enjoining the board and the auditor from acting and dealing with the assessment as a valid and lawful assessment of the property of the complainant, and from certifying the same to the county and other officers of the state. The averments of the amended bill were put in issue by answers by the several defendants, and replications filed to these answers. Testimony was taken, and the case was brought on for final hearing, resulting in a decree dismissing the bill.

[5] It was suggested at the oral argument, and is repeated in the brief filed on behalf of the appellees, that the Circuit Court was without jurisdiction to hear and determine this suit because there was an adequate remedy at law. This suggestion will be first noticed, because, if the Circuit Court was without jurisdiction, its decree would have no force and effect, and this appeal should be dismissed.

The record shows that the complainant is a citizen of the state of New York, that the defendants were all citizens of the state of Oklahoma, and that the amount involved in the suit exceeds the sum of \$2,000, exclusive of interest and costs. The Constitution and laws of the United States confer upon the Circuit Courts jurisdiction to hear and determine controversies at law and in equity between citizens of different states in which there is involved more than \$2,000, exclusive of interest and costs. This cannot be said to be a suit against the state within the eleventh amendment to the federal Constitution, although the board consists wholly of state officers. It is a suit brought by a taxpayer in which it is charged that the defendants are about to execute a taxing law of the state against the complainant in such a manner that, in view of the mode in which other taxing laws are executed against a large part of the taxable property of the state, the defendants will impose upon the complainant more than its just share of the burden of taxation in violation of its right under the Constitution of the state to pay only an equal share of the taxes in proportion to the value of its property. In other words, it is a suit against individuals by which it is sought to enjoin them from doing certain acts which they assert to be by the authority of the state, but which the complainant avers in its bill is without lawful authority. *Huidekoper v. Hadley*, 177 Fed. 1, 100 C. C. A. 395; *Smyth v. Ames*, 169 U. S. 518, 18 Sup. Ct. 418, 42 L. Ed. 819; *Reagan v. Trust Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Pindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Cummings v. Bank*, 101 U. S. 153, 25 L. Ed. 903.

[1] The power of taxation is the power to take from the owner that which is his to help defray the expense of the protection received from the government, and, if in any case this power is illegally exercised, it is an invasion of private right, and in the absence of some specific limitation of the remedy, imposed by law, the party injured may resort to the courts to vindicate his right against those who attempt such invasion by any form of action which he could use against any other wrongdoer with respect to the same class of wrongs.

[2] It is quite true that the state may curtail the jurisdiction of its courts of equity to interfere by injunction in the collection of taxes alleged to be illegal by providing that no injunction shall issue in such case. The United States has made such a limitation. Revised Statutes U. S. § 3224 (U. S. Comp. St. 1901, p. 2088). Our attention has not been called to any law of Oklahoma containing such limitation, but, if such law exists, it affects only the jurisdiction of its own courts of equity, and does not diminish or restrict the jurisdiction of federal courts of equity, because only an act of Congress can do that. *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, 37 L. Ed. 1052; *Furnace Co. v. Witherow*, 149 U. S. 574, 13 Sup. Ct. 936, 37 L. Ed. 853; *Kirby v. Railway Co.*, 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569. If the suit is one over which the Circuit Court of the United States sitting in equity has jurisdiction by virtue of the Constitution and laws of the United States and according to the general principles governing equity jurisdiction, the power to issue an injunction against state officers is not restricted by a state statute which only applies to injunctions issued out of the state courts. As already suggested, the Circuit Court has jurisdiction in a suit between citizens of different states, and it is only necessary to inquire whether any ground exists for invoking the powers of a court of equity.

[3] It is settled law that a suit to enjoin the collection of a tax will not be entertained by a court of equity on the sole ground that the tax is illegal or excessive. It must be made to appear that the circumstances make the wrong complained of of such a peculiar character that the remedies in a court of law are inadequate, and thus bring the case under some recognized head of equity jurisdiction. *Singer Sewing Machine Co. of New Jersey v. Benedict*, 179 Fed. 628, 103 C. C. A. 186; *Ogden City v. Armstrong*, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *Allen v. Car Co.*, 139 U. S. 658, 11 Sup. Ct. 682, 35 L. Ed. 303; *Railway Co. v. Cheyenne*, 113 U. S. 516, 5 Sup. Ct. 601, 28 L. Ed. 1098. It is averred in the amended bill in this suit that, if the assessment made by the defendants is allowed to be certified to the various county officers and taxing districts in the state of Oklahoma, the unlawful assessments cannot be collected "except by a multiplicity of suits and by long and costly delays thereon." To prevent a multiplicity of suits is a well-recognized head of equity jurisdiction. *Dows v. City of Chicago*, 11 Wall. 108, 20 L. Ed. 65; *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646, 35 L. Ed. 273; *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, 35 L. Ed. 1035; *San-*

ford v. Poe, 69 Fed. 546, 16 C. C. A. 305, 60 L. R. A. 641. But it is said that the complainant had an adequate remedy at law, under the Constitution and laws of Oklahoma, in the state court.

[4] The rule is that statutory remedies at law furnished by a state in its courts will not oust the equitable jurisdiction of a federal court of equity. *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. In that case Justice Harlan said:

"One who is entitled to sue in the federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action."

See, also, *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689; *McConihay v. Wright*, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932. The conclusion reached is that the Circuit Court had jurisdiction.

[6] We come now to consider the merits of the amended bill and the issues raised by it. The provision of the state Constitution, which it is contended has been violated, is section 21, art. 10, and is as follows:

"Sec. 21. There shall be a state board of equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State, Attorney General, State Inspector and Examiner, and President of the Board of Agriculture. The duty of said board shall be to adjust and equalize the valuation of real and personal property of the several counties in the state, and it shall perform such other duties as may be prescribed by law, and they shall assess all railroad and public service corporation property."

Legislation was necessary to render this provision of the Constitution operative, for it provides that "the board shall perform such other duties as may be prescribed by law." The Legislature by an act approved April 17, 1908, known as the revenue act, attempted to supply this legislation. Sections 6 and 10 are the only two sections of the act requiring consideration, and are as follows:

"Sec. 6. The Governor, State Auditor, State Treasurer, Secretary of State, Attorney General, State Examiner and Inspector, and President of the Board of Agriculture, shall constitute the state board of equalization, and said board of equalization shall hold a session at the capitol of the state, commencing on the first Monday in August of said year.

"It shall be the duty of said board to examine the various county assessments, and to equalize, correct and adjust the same as between the counties by increasing or decreasing the aggregate assessed value of the property, or any class thereof, in any way or all of them, to conform to the fair cash value thereof as herein defined, and to order and direct the assessment rolls of any county in this state to be so corrected as to adjust and equalize the valuation of the real and personal property of the several counties in the state."

"Sec. 10. The Governor, State Auditor, State Treasurer, Secretary of State, Attorney General, State Examiner and Inspector, and President of the Board of Agriculture, shall constitute the board of assessors for the purpose of assessing the property subject to taxation under the law of all public service corporations doing business in this state. Said board shall meet at the capitol on the first Tuesday of March, 1908, or as soon thereafter as practicable, for the purpose of making the assessment on such properties, and shall assess said properties in the manner provided by the Constitution and laws of this state, taking into consideration all rights, privileges and

franchises connected therewith, and shall cause said assessment to be certified by the State Auditor to the county clerks of the several counties of the state in a manner provided by law. For the purpose of making said assessment, said board of assessors shall have power to require of any such corporations any additional information concerning its business and affairs to that now provided by law as it may deem necessary, and shall have the power of the District Court to compel the production of books and papers. Public service corporations as used in this section shall, in addition to those mentioned in the Constitution, be held to include pipe lines, waterworks, electric light and power and gas companies. The information furnished by any officer, agent or employé or other representative of any corporation by affidavit or otherwise shall not be binding on the Board of Assessors or Board of Equalization as to the property and values thereon owned by such corporation or used any place within this state; but such board of assessment and such board of equalization are authorized to add any additional property and to increase the valuation of any such property in order to obtain a full and complete list and schedule thereof at its actual cash value."

It will be observed that section 6 fixes the time when the board shall meet as a board of equalization, and makes it the duty of the board to examine the values of the assessments, and to equalize, correct, and adjust the same between the counties upon the basis of a fair cash value, and that section 10 constitutes the same officers a board of assessors for the purpose of assessing the property of public service corporations doing business within the state, and fixes the time when the board shall meet as a board of assessors. It specifies what shall be included in such assessment; provides that the auditor shall certify to the county clerks of the several counties of the state the assessment so made; confers upon the board the power to require any public service corporation to furnish information concerning its property; and authorizes the board of equalization to add any property not returned, and "to increase the valuation of any such property in order to obtain a full and complete list and schedule thereof at its actual cash value." It is insisted by complainant that by this legislation two separate and distinct boards were created; that section 6 created a board of equalization, and that by section 10 another and independent board was created for the purpose of assessing public service corporations.

If it be true that the assessment was made by a board other than the board authorized by the Constitution to make the assessment, its acts would be invalid. It becomes important, therefore, to determine whether this legislation created two separate boards, or merely provided the manner in which the same board should perform its duties as a board of equalization and as a board of assessors. This depends upon the proper construction of the statute. The statute must, of course, be so construed, if possible, as to avoid conflict with the Constitution. A clear statement of the rule is found in Lewis' Sutherland's Statutory Construction (2d Ed.) § 83, where it is said:

"Another universal principle applied in considering constitutional questions is that an act should be so construed, if possible, as to avoid conflict with the Constitution, although such a construction may not be the most obvious or natural one. Courts may resort to an implication to sustain a statute, but not to destroy it. But the courts cannot go beyond the province of legitimate construction in order to save a statute, and where the meaning is plain, words cannot be read into them or out of them for that purpose."

Applying this rule to the statute under consideration, we do not think it can be said that the Legislature intended to, or did, create two separate and distinct boards. The same officers perform the double function of equalizing the assessment of property other than that of public service corporations, and of assessing the property of public service corporations. The statute, as we view it, merely prescribes the time and manner in which the board created by the constitutional provision should perform its dual duty of equalizing, as provided in section 6, and assessing, as provided in section 10. It is true the statute would perhaps have been plainer if it had simply provided when the board mentioned in section 6 should meet for the purpose of assessing the property of public service corporations, and the mode and manner of doing so, instead of enumerating again, as it does in section 10, the same officers mentioned in section 6; but in view of the provision of the Constitution that these officers shall constitute a board of equalization, and that the duty of such board shall be to equalize the assessed valuation of other property in the various counties of the state, to assess the property of railroad and public service corporations within the state, and perform such other duties as shall be prescribed by law, we think it would be a strained and unwarranted construction of this statute to hold that merely because the same officers are mentioned in both sections the Legislature intended thereby to create two separate and distinct boards in direct violation of the plain provisions of the Constitution.

[7] But it is said that the assessment is invalid because it appears from the record that at some of the meetings of the board the Attorney General of the state was not present in person, but was represented by his assistant, and that at other meetings of the board the Secretary of State was not present in person, but by his deputy. The record, however, shows that a majority of the board was present at every meeting; but, be this as it may, the objection is without merit, for the reason that there is no averment in the bill that every member of the board was not present at all the meetings, and the rule is that evidence cannot be regarded unless it relates to some issue of fact made by the pleading. In *Cucullu v. Hernandez*, 103 U. S. 105-116, 26 L. Ed. 322, the court said:

"The evidence to show the facts on which this claim is based cannot be regarded, for there is no averment in the bill to which it can be applied. It is not pertinent to any issue in the case."

The same suggestion applies to the objection that the assessment is void because the board in making the assessment included the value of complainant's franchise acquired under the laws of the United States, and that the value of such franchise was not given separately and independently from other property, but was included in the total valuation in such a way that no separation could be made. There is no averment in the bill that complainant's franchise, or any portion of it, was acquired under any law of the United States. [8] The only averment approaching it is:

"That the returns made by your orator to the Auditor of the State of the value of each item of its property were made giving due consideration

to the value of such franchise as it may have in the state not derived from the United States, which are of small value because your orator has not at any time been able, and is not now permitted, to earn a sufficient amount to pay the cost of maintaining and operating its telegraph system within the state."

This is not equivalent to an affirmative averment that any part of complainant's franchise within the state of Oklahoma was derived from the United States; neither is it charged in the bill that the board considered, in arriving at its valuation of complainant's property, any franchise derived from the United States, and the evidence that the complainant accepted the provisions of the act of Congress of July 24, 1866 (chapter 230, 14 Stat. 221), must therefore be disregarded.

[9] If, however, we were to hold the averment above quoted sufficient, and that the evidence could be considered, it would not aid the complainant's case, for it has been repeatedly held by the Supreme Court that the mere fact that a corporation of one state derived its franchise from the United States under the act of July 24, 1866, does not relieve it from the burdens of taxation in another state in which it has property. In *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 548, 8 Sup. Ct. 963, 31 L. Ed. 790, Mr. Justice Miller, speaking for the court, said:

"This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the Federal government, carries with it any exemption from the ordinary burdens of taxation. * * * It never could have been intended by the Congress of the United States in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

See, also, *Western Union Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49; *Western Telegraph Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116; *Telegraph Company v. Texas*, 105 U. S. 460, 26 L. Ed. 1067.

[10] It is also suggested that, as the law made no provisions for notice or any opportunity to be heard, the complainant is deprived of its property without due process of law in violation of the provisions of the Constitution of the United States. It is quite true that for this particular year, 1908, for the board of equalization to sit as a board of assessors the statute fixed an impossible date, namely, the second Tuesday of March, whereas the act was not approved until the 17th of April. The object and purpose of a notice is that the taxpayer may have an opportunity to appear before the board, and be heard in relation to his assessment. If, however, as appears affirmatively by the record in this case, the complainant had notice and appeared before the board and was heard in relation to the assessment of its property, the mere fact that a formal notice was not served upon it would not render the proceeding void.

[11] Neither do we think there is merit in the suggestion that the assessment is void because the board, in valuing the complainant's

property, valued it higher than the relative value of other property subject to taxation in the state. The rule is:

"The judgment of a state board empowered to fix the valuation for taxation cannot be set aside by the testimony of witnesses that the valuation was other than that fixed by the board, where there is no evidence of fraud and no gross error in the system on which the valuations were made." *Railway Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031; *Adams Express Co. v. Ohio*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Coulter v. Louisville & Nashville Rd. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; *C. B. & Q. Ry. Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636.

The record shows that there was a reduction of the valuation on real estate and other property assessed by the township officers, and after local equalization by the county commissioners certified by the counties to the State Auditor. But this was not true of all the property. There was an increase of 4.3 per cent. on pleasure carriages, 7.9 per cent. on watches, 85.3 per cent. on plate and jewelry, 41.2 per cent. on pianos, a reduction of 21.3 per cent. on land, 16.9 per cent. on town lots, and an average reduction upon all property of about 17 per cent. This increase and decrease was based on the assessed valuation fixed by the various county boards of equalization. There is testimony in the record tending to show the actual cash value of property in the various counties, and this testimony, taken in connection with the original assessments as returned by the county assessors and the general changes made by the state board of equalization, is quite persuasive that the board did not reach exact cash values. But it falls far short of establishing that there was any actual fraud on the part of the board, or that the individual members were actuated by any purpose of intentionally undervaluing the property returned by the several counties for the purpose of making the complainant bear more than its just share of the burden of taxation.

[12] In determining whether there was an intentional reduction of property other than that of public service corporations, we start out with the presumption of right action on the part of the board, and that the members thereof conscientiously discharged their duties under their oaths of office, and the burden is upon the complainant to show the contrary. The record in this case shows that at the hearing before the board numerous complaints from different parts of the state were made to the board of excessive assessments; also requests to leave the assessments unchanged; that discussions were had by the board developing contrary opinions, all resulting in the action taken. For the complainant, the evidence, or practically all of it, is circumstantial, while the evidence offered on behalf of the defendants tends to refute any intention to depart from a cash valuation.

While we have not discussed the assignments of error separately, they have all been carefully considered in connection with the record, and we think the evidence fails to warrant the conclusion that the board intentionally undervalued these assessments returned to the Auditor by the several counties, and that, if the property returned by the counties was reduced below its actual cash value, it was an error of judgment rather than any purpose on the part of the board to under-

value this class of property. *Coulter v. Rd. Co.*, 196 U. S. 599, 25 Sup. Ct. 342, 49 L. Ed. 615; *C., B. & Q. Ry. Co. v. Babcock, Treasurer, etc.*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636.

The decree of the Circuit Court is affirmed.

PULLMAN CO. v. TRAPP, Auditor, et al. †

(Circuit Court of Appeals, Eighth Circuit. March 18, 1911.)

No. 3,437.

1. TAXATION (§ 482*)—CORPORATIONS—ASSESSMENT—NOTICE AND HEARING.

Where, in a suit to restrain the enforcement of an assessment of a corporation's property, the record showed that the assessment was finally made after the first Monday in August, which was the date fixed by Revenue Act Okl. April 17, 1908 (Laws 1908, c. 71, art. 1), for the meeting of the Board of Equalization, such fact eliminated the objection that the assessment was not made by the board on sufficient notice and hearing.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 482.*]

2. TAXATION (§ 397*)—CORPORATIONS—PRIVILEGES AND FRANCHISES.

Where a sleeping car company operated its cars within the state, the State Board of Equalization in valuing the company's property for taxation was not limited to the value of the company's tangible property, but was entitled to consider in addition the company's rights, privileges, and franchises.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 672; Dec. Dig. § 397.*]

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Suit by the Pullman Company against M. E. Trapp, as Auditor, and others, to restrain the enforcement of a tax assessment. From a decree dismissing the bill, complainant appeals. Affirmed.

S. T. Bledsoe (J. R. Cottingham, on the brief, and G. S. Fernald, of counsel), for appellant.

Charles West, Atty. Gen. of the State of Oklahoma, for appellee.

Before ADAMS, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

RINER, District Judge. This case was brought by the Pullman Company to impeach the assessment of its property made by the same board in the same year, and in its material features is so nearly like the case of *Western Union Telegraph Company v. M. E. Trapp, Auditor, et al.* (just decided) 186 Fed. 114, that no separate statement of the special facts is necessary, and the conclusions reached in that case are decisive of the same points in controversy in this case. [1] The record in this case, however, discloses that the assessment of complainant's property was finally made after the first Monday in August, which was the date fixed by the revenue act as the time for the meeting of the Board of Equalization, and, as suggested by the Circuit Court:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

† Rehearing denied.

"This fact alone may well be held to eliminate the objection that the assessment was not made by the Board of Equalization upon sufficient notice and hearing."

The property of course differs in character, and the bill charges that it was assessed at three times its value, "including whatever rights or privileges might be actually considered in connection therewith." The return of complainant's property made to the Auditor embraced only cars apportioned to Oklahoma. June 27th a hearing was given to the complainant, and the valuation was fixed at \$18,000 per car for the cars belonging to the company in Oklahoma. July 30th representatives of the company were heard on a request for revision of the assessment, and on August 6th the value was finally fixed by the board at \$20,000 per car. The record, we think, discloses that the company returned only its tangible property, and at a valuation depreciated below cost of construction or purchase according to the period of use.

[2] That the board was not limited to the value of the tangible property of the complainant—that is to say, the value of the cars predicated on the cost of construction, purchase, and extent of depreciation—but was authorized to assess all of its property, and in doing so to take into consideration its rights, privileges, and franchise, has been often decided. In Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031, the Supreme Court said:

"As the property of companies engaged in such commerce may be taxed (Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged."

We do not think the record shows that the assessment was greater than the value of complainant's property in the state, or that it was intentionally excessive.

The decree is affirmed.

In re KESSLER et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 160.

1. BANKRUPTCY (§ 245*)—TRUSTEES—DUTIES.

A bankrupt's trustee, representing not only the bankrupt, but the general creditors, must realize from the estate all that he can for distribution.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 245.*]

2. BANKRUPTCY (§ 246*)—TRUSTEES—POWERS.

In his representative capacity a bankrupt's trustee may assert claims, avoid preferences, and collect assets where the bankrupt, if there had been no bankruptcy, could not act.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 246.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 273*)—TRUSTEES—POWERS.

A bankrupt's trustee could pay out of the funds in his hands a debt secured by collateral in excess of the amount thereof, and claim subrogation to the rights of the creditor for the benefit of the general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 273.*]

Petition to Review and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of Alfred Kessler and others, composing the firm of Kessler & Co. bankrupts. From an order of the District Court, the Merchants' National Bank of the City of New York and another appeal, and file petition to review said order. Affirmed.

On petition to review and appeal from an order of the District Court of the United States for the Southern District of New York, dated August 12, 1910, modifying and confirming a report made by a special master and providing that Lawrence E. Sexton, trustee of Kessler & Co., bankrupts, is entitled, as holder of \$39,000 of notes indorsed by Kessler & Co. to the National City Bank, to share in certain funds held by him as security for notes of Robert B. MacLea Company, and to have the same applied to the payment of the said \$39,000 pro rata with the Merchants' National Bank, the Banque de Bale and Kessler & Company, Limited, of Manchester, England.

George Zabriskie and Albert B. Kerr, for appellants.

Wallace MacFarland and S. J. Rosensohn, for trustee and appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. Prior to October 30, 1907, Kessler & Co. were bankers doing business in New York; they were adjudicated bankrupts November 22, 1907, and Lawrence E. Sexton became their trustee on December 31, thereafter. The R. B. MacLea Company was engaged in business in New York as importers and dealers in dry goods. On July 13, 1904, this company made an agreement with Kessler & Co. whereby the bankers agreed to extend to the merchants a credit of \$50,000 to be advanced as needed on the promissory notes of the merchants bearing interest at the rate of 6 per centum per annum. The merchants agreed to hold their stock as security for any indebtedness due to the bankers and undertook to deliver to the bankers such reasonable transfers or assignments as were necessary to protect and secure the bankers. All orders for the sale of goods were to be submitted to the bankers and approved by them, they agreeing to guarantee the payment of such accounts for a commission of $2\frac{1}{2}$ per centum on the amount of such accounts. All accounts for goods sold were to be transferred to the bankers and stamped as follows:

"This account has been assigned and is only payable to Kessler & Co., bankers, 54 Wall street, New York."

The assignment was not only for the purpose of protecting the bankers in their guaranty, but as additional security for any indebtedness which at any time might be due them from the merchants. When paid to the bankers the proceeds of such accounts less commissions were to be placed to the credit of the merchants and applied on the indebtedness due from the merchants to the bankers. In the event

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of failure of the merchants to carry out any of their agreements or in the event that their statements proved to be untrue, the bankers were at liberty to declare due and payable all unpaid advances made by them.

At the time of the failure of Kessler & Co. on October 30, 1907, notes of the MacLea Company to the order of Kessler & Co. to the amount of \$96,000 had been received by the latter company. Kessler & Co., before their failure, had transferred all but one of these notes as follows:

To the Merchants' Bank of New York.....	\$30,000
To the Banque de Bale.....	15,000
To the City Bank of New York.....	39,000
To Kessler & Co., of Manchester.....	5,000
	<hr/>
	\$89,000

The amount due the City Bank was reduced to \$12,000 by a deposit of \$27,000 standing in the name of Kessler & Co. which was set off by the bank against the liability of Kessler & Co. Subsequently the trustee in bankruptcy paid off or satisfied the aforesaid balance and received the \$39,000 of MacLea notes, indorsed by Kessler & Co., together with the collaterals. Mr. Sexton, as trustee, collected from the collaterals a sum which, with interest, amounted on January 1, 1910, to \$32,215.70. The sum of \$12,148.20 was collected from other sources, making the total amount of the fund held as security for the \$89,000 MacLea notes the sum of \$44,363.90.

The foregoing statement of facts sufficiently presents the questions debated. It is contended for the trustee that when the \$39,000 MacLea notes were acquired by him by the appropriation of the funds of the estate, subsequent to the bankruptcy of Kessler & Co., the bank no longer had a claim against the bankrupts as indorsers on the notes. He insists that he, as trustee, became subrogated to the right of the bank to the security for the notes—to wit, ^{39/89} or about \$20,000.

On the part of the appellant banks it is urged that the trustee did not become a purchaser of the MacLea notes with their collaterals and was not subrogated to the rights of the City Bank in the notes. They insist also that the appellants are entitled to the proceeds of the merchandise and accounts in preference to the trustee and that as judgment creditors they are entitled to the entire proceeds of the merchandise.

The special master found that the trustee was not paying the debt of a third person but a debt of the estate, that he did not become subrogated to the rights of the City Bank and did not buy the interest of the bank in the notes. It is argued that he simply redeemed certain property, the legal title to which was in the bankrupt estate, from the lien of the bank as pledgee.

The District Court held that in acquiring the MacLea notes, after the petition in bankruptcy, with funds of the estate at least to the amount of \$27,000, the trustee became a purchaser and entitled to the pro rata share to which the City Bank was entitled. The record does not contain all the facts which apparently have a bearing upon the questions involved, but upon the facts as they appear we are of

the opinion that the District Judge was right in his reasoning and conclusions.

[1] It was clearly the duty of the trustee, representing not only the bankrupt but the general creditors, to realize from the estate all that was possible for distribution among the creditors. [2] In his representative capacity a trustee may assert claims, avoid preferences and collect assets where the bankrupt, if bankruptcy had not intervened, could not act. [3] Finding that the bankrupt has borrowed money upon collaterals in excess of the debt, we see no reason why the trustee may not, out of the funds in his hands, pay the debt and divide the balance realized from the transaction among the general creditors, even though the bankrupt would be precluded from so acting. If we hold otherwise, the act of the trustee, instead of inuring to the benefit of the estate, is a distinct disadvantage, depleting its funds for the benefit of other holders of the MacLea notes and collaterals. We agree with the District Judge in the following conclusion:

"The proper inquiry is in what right is any given claim advanced? If it is the bankrupt's claim then truly the trustee must stand in that bankrupt's shoes; but if it is his own claim, depending on his own acts created by himself, or by the statute he does not represent the bankrupt, and his rights are not to be measured by those of the bankrupt. If Kessler had discharged the loan made by the City Bank, he could not have claimed to be subrogated to the pledgee's rights of the bank in the MacLea notes, because he was a principal debtor—doing no more than the law expected him to do in paying his own debts. The trustee was not the City Bank's debtor; when he paid off that debt, he was making an investment with the money of the general creditors, and as their fiduciary agent, and I perceive no legal reason why on general principles of equity, and in accordance with the spirit of section 67, subds. "c" and "f" of the bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, pp. 3449, 3450]), he may not be held to be subrogated to the rights of the City Bank in the MacLea notes."

The order is affirmed with costs.

WELLS FARGO & CO. v. ZIMMER.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1911.)

No. 3,455.

1. NEGLIGENCE (§ 136*)—INJURY TO PERSON ON STATION PLATFORM—JURY QUESTIONS.

Whether plaintiff was struck by defendant express company's truck while walking along a station platform *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 136.*]

2. NEGLIGENCE (§ 61*)—CONCURRENT CAUSES—INJURY TO PERSONS ON STATION PLATFORM—LIABILITY.

If an express company employee's negligence contributed to injury of a person struck by a truck, while walking along a station platform, the company is liable, though negligence of outsiders who assisted in pushing the truck contributed to the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. TRIAL (§ 273*)—INSTRUCTIONS—EXCEPTIONS—TIME FOR TAKING.

Exceptions to instructions must be taken before the jury retires.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 680–682; Dec. Dig. § 273.*]

4. NEW TRIAL (§ 6*)—APPEAL AND ERROR (§ 977*)—DISCRETION.

An order granting or refusing a new trial, which the court has power to make, is discretionary, and cannot be reviewed by writ of error or appeal.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 9, 10; Dec. Dig. § 6,* Appeal and Error, Cent. Dig. §§ 3860–3865; Dec. Dig. § 977.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Ernest L. B. Zimmer against Wells Fargo & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert E. Olds (Frank B. Kellogg and C. A. Severance, on the brief), for plaintiff in error.

Frank D. Larrabee (Otto N. Davies, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. [1] Plaintiff was upon a depot platform in the city of Minneapolis, Minn., to meet a friend expected to be on an incoming train. As the train came into the depot, plaintiff walked forward upon the platform toward the rear of the train, and while walking along he alleges that he was struck in the back and calf of the leg by a truck, pushed against him by one Patterson, the agent of defendant. By reason of being so struck he sustained the injuries complained of.

Evidence on the part of plaintiff was to the effect that plaintiff was struck from behind upon the back and calf of the leg and thrown forward against one Erpenbach, who was directly in front of him. Plaintiff immediately on regaining his balance turned back, and saw Patterson moving the truck and no other person about the truck. Erpenbach, as soon as plaintiff was thrown against him, turned around and saw Patterson moving the truck and no other person with him. On the part of defendant the testimony was that the truck did not strike the plaintiff, but passed to one side of him, and, further, that two other persons, by the name of Chapman and Alexander, not in the employ of defendant, participated with Patterson in the movement of the truck. It is claimed on the part of defendant that there is no evidence to show that the truck did in fact strike the plaintiff, as neither plaintiff nor his witness Erpenbach saw the truck hit plaintiff, and that it cannot be said that defendant was shown to have been guilty of any negligence except by applying the doctrine of res ipsa loquitur. It is apparent from the evidence that there was nothing about the platform which could have struck plaintiff in the back and leg as claimed excepting the truck in question, which was being pushed in the rear of plaintiff, and we think the evidence in this respect of such a substantial

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

character as to justify submitting to the jury whether or not the plaintiff was injured by reason of the truck of defendant striking him in the back and upon the calf of the leg. [2] It is claimed by defendant that even though the injury to plaintiff was caused by reason of the truck striking him as alleged, inasmuch as the preponderance of the testimony showed that Chapman and Alexander assisted in the movement of the truck, it cannot be determined from the evidence whether the negligence alleged was that of Patterson or Chapman or Alexander. The testimony is clear, however, that Patterson had hold of the handle of the truck, guiding its movement, and the case was by the court submitted to the jury upon the question of the negligence of Patterson; the court telling the jury in effect that, if Patterson in moving the truck was free from negligence, then the defendant was not liable; that if plaintiff sustained the injury alleged by reason of the truck striking him, and his being struck by the truck was because of negligence on the part of defendant's agent Patterson, then defendant would be liable. In this respect the charge of the court was as follows:

"If you determine that Patterson himself was guilty of negligence in pushing the truck and that such negligence contributed to any injury which Zimmer then received, of course, the negligence of Chapman or Alexander is no defense for the express company in this action. It makes no difference how negligent Chapman was, and it makes no difference how negligent Alexander was, if Patterson himself was negligent and this negligence in handling the truck contributed to the accident, then the plaintiff is entitled to recover."

This was a correct announcement of the law. The defendant would not be relieved from liability, if its agent Patterson was negligent, because the negligence of third parties co-operated with such negligence in producing the injury to plaintiff. For one whose negligence concurs in producing an injury to another is liable to the party injured. Shearman & Redfield on Neg. (5th Ed.) §§ 31, 122.

Complaint is made to various portions of the instructions of the court, and especially to that which eliminated or took from the jury all question as to the negligence of Chapman and Alexander. We cannot consider, however, any of defendant's exceptions to the court's instructions for the reason that they were not taken in time. The court instructed the jury on the 22d day of December, 1909, the jury returned their verdict on the 23d, and judgment was entered thereon on that day. Exceptions were not taken to the instructions until the 28th day of February, 1910—two months after the trial. [3] Whatever may be the practice in the state court, in the federal court exceptions to instructions must be taken at the time and before the jury retires. *Bracken v. Union Pac. Ry. Co.*, 5 C. C. A. 548, 56 Fed. 447; *St. L., I. M. & S. Ry. Co. v. Spencer*, 18 C. C. A. 114, 71 Fed. 93; *Mountain Copper Co. v. Van Buren*, 66 C. C. A. 151, 133 Fed. 1; *Hindman v. First Nat. Bk.*, 50 C. C. A. 623, 112 Fed. 931, 57 L. R. A. 108.

[4] Defendant filed an application for a new trial, based not only upon errors of law occurring during the trial, but chiefly upon newly discovered material evidence, which could not with reasonable diligence have been found and produced upon the trial. This application

was heard on May 23d upon numerous affidavits filed to support and controvert the same. On June 3d the application was denied; the journal entry of the court reading as follows:

"This cause came on to be heard before the court on May 23rd, 1910, upon motion of the defendant for a new trial. After considering the evidence produced at said hearing, the arguments of counsel thereon, and the other evidence presented at said hearing, with the briefs of counsel thereon, it is now ordered that said motion be and the same is hereby denied."

"An order granting or refusing a new trial, which the court has the jurisdiction or power to make, is discretionary and cannot be reviewed by a writ of error or appeal in the federal courts." City of Manning v. German Ins. Co., 46 C. C. A. 144, 107 Fed. 52.

Plaintiff in error cites and places reliance upon the case of Mattox v. U. S., 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. In that case the trial court excluded the affidavits offered in support of the motion for a new trial. The Supreme Court announced the rule of law as being that the allowance or refusal of a new trial rests in the sound discretion of the court, which cannot be made the subject of review by writ of error, but held that, as the trial court excluded the affidavits in support of the motion and did not consider them, the court in that respect committed an error and the action of the court in excluding the evidence offered in support of the motion for a new trial was subject to review.

In the case before us the court received the affidavits in evidence and based its ruling upon full consideration thereof, and its judgment overruling the motion is not subject to review.

The judgment is affirmed.

GULBENKIAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 161.

CUSTOMS DUTIES (§ 79*)—RECOVERY OF DUTIES—STATUTORY REMEDY.

Under Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, containing a system for the correction of errors in the exaction of import duties, and providing that, when the duty on imported merchandise is based on the value thereof, the duty shall be assessed on the actual market value or wholesale price in the principal markets of the country from whence imported, an importer of wool subject to a duty under Tariff Act July 24, 1897, c. 11, § 1, schedule K, 30 Stat. 182 (U. S. Comp. St. 1901, p. 1664), dividing wool into classes, and fixing a duty based on valuation, must conform to the statutory method, on the appraiser increasing the valuation over the amount stated in the invoice, and thereby subjecting the importer to a higher duty; and where he fails to take the requisite steps to secure a correction of the errors, if any, the decisions of the appraiser and collector as to value, classification, rate, and amount are final, and the importer may not recover excessive duties paid.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 195; Dec. Dig. § 79.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Gullabi Gulbenkian and another against the United States to recover excessive import duties paid. There was a judgment of the Circuit Court (175 Fed. 860), dismissing the complaint, after trial before the court without a jury, and plaintiffs bring error. Affirmed.

Hatch & Clute (Walter F. Welch and Edward S. Hatch, of counsel), for plaintiffs in error.

Henry A. Wise, U. S. Atty. (W. S. Wemple, Asst. U. S. Atty., and John N. Boyle, of counsel), for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The action was brought to recover \$8,755, for excess of duties paid on certain wools imported into the port of Boston between November 2, 1903, and March 4, 1904. It will not be necessary to pass upon the question whether or not such action may be brought under Tucker Act March 3, 1887, c. 359, 24 Stat. 505 (U. S. Comp. St. 1901, p. 752), or whether the facts shown make out a case of duress. The language of Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 131 (U. S. Comp. St. 1901, p. 1886), is so plain that a brief statement of what took place will indicate the proper disposition of this appeal.

Under Tariff Act July 24, 1897, c. 11, § 1, schedule K, 30 Stat. 182 (U. S. Comp. St. 1901, p. 1664), wool is divided into different classes. Class 3 is defined in paragraph 351, and plaintiffs' wools were of that class. On wools of this class, the value whereof is 12 cents or less per pound, duty was fixed at 4 cents per pound (paragraph 358); if the value exceeds 12 cents, the duty was fixed at 7 cents per pound (paragraph 359). It is apparent that, although no ad valorem duty was imposed, it was necessary to determine the value in order to enable the collector to make a proper classification for duty. Customs Administrative Act, § 19, provides:

"That whatever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, * * * in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States."

Upon a prior importation to the port of New York the appraiser raised the value of part of the wool from the amount stated in the invoice, which was less than 12 cents per pound, to an amount in excess of that value, and in consequence increased duty was assessed and paid. Having taken the various steps required by the customs administrative act, the importers brought that case before the Circuit Court, and eventually before this court. We held that the increase of the valuation was not warranted by the facts, reversing the Board of General Appraisers and the Circuit Court. 153 Fed. 858, 83 C. C. A. 40.

A similar increase of valuation was made on the importations which are the subject of this case. What the plaintiffs then did is thus stated in their brief:

"When the full board of three (General Appraisers) decided against them, their Boston representative went to the appraiser and the collector's office at Boston and stated that they had nothing else to do now but to raise their invoices to conform with the board's reappraisement decisions, and they accordingly made up their entries in conformity therewith, to avoid any further penalties, and to get their goods and save them from general order expenses and procure their delivery. * * * In altering their invoices to conform, * * * they were compelled to pay additional duties, for which this proceeding is brought to recover."

Since it was subsequently held by this court (*Gulbenkian v. U. S.*, *supra*) that the action of the appraiser in theoretically distributing the wool at Bagdad into "white" and "colored" was arbitrary, and not warranted by the law or the facts, and since the same improper method of appraisement was followed in Boston, plaintiffs contend that their payment of additional duties was under duress and involuntary, and that "the money in equity and good conscience belongs to these claimants, and that the court should accordingly imply a promise to repay the same on the part of the United States."

The difficulty with this proposition is that it wholly ignores the provisions of the customs administrative act by which Congress has enacted a system whereby errors and mistakes of the customs officers can be corrected, and duties improperly exacted from the importer can be recovered. Section 13 provides that, if the importer is dissatisfied with an appraisement, he may within two days give notice in writing to the collector, who shall at once direct a reappraisement by one of the General Appraisers. The decision of the appraiser or of the General Appraiser in cases of reappraisement *shall be final and conclusive* as to dutiable value, unless the importer shall within two days give notice in writing to the collector, who shall thereupon transmit the invoice and all the papers to the Board of General Appraisers and their conclusion as to dutiable value shall be final and conclusive. Section 14 provides that the decision of the collector as to the rate and amount of duties (which necessarily involves classification) *shall be final and conclusive* unless written notice of dissatisfaction is given within ten days. This notice sends the case to the Board of General Appraisers, and section 15 provides for a review of their decision in the court, and that all final judgments, when in favor of the importer, shall be paid by the Secretary of the Treasury.

This system of corrective justice is complete in itself. In the case of the New York importations the present plaintiffs conformed to it and obtained relief. It must be concluded that Congress did not intend to allow any other mode to redress a supposed wrong in the operation of the laws for the correction of duties on imported merchandise. *Nichols v. U. S.*, 7 Wall. 122, 19 L. Ed. 125.

The authorities cited by plaintiffs do not sustain their contention. In *Swift v. U. S.*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341, the court is careful to point out that:

"No formal protest made at the time is by statute a condition to the present right of action, as in cases of action against the collector to recover back taxes illegally exacted."

In Re Fassett, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, the question was not whether excessive duties had been collected on imported merchandise, but whether the seagoing steamship *was* "imported merchandise." In Dooley v. U. S., 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074, decided at the same time with De Lima v. Bidwell, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041, the goods were brought either from Porto Rico to the United States or vice versa. The court held that duties upon such goods exacted by a collector were impositions "upon goods which were not imported at all," and therefore not within the purview of the customs administrative act, but also held that:

"As applied to customs cases this remedy [customs administrative act] is doubtless conclusive."

Inasmuch as plaintiffs failed to take the requisite steps to secure a correction of the errors of appraiser and collector in the case of their Boston importations, the decisions of those officers as to value, classification, rate, and amount must stand as final and conclusive as far as those importations are concerned.

Judgment affirmed.

COLEMAN v. DECATUR EGG CASE CO.

(Circuit Court of Appeals, Eighth Circuit. March 14, 1911.)

No. 3,456.

1. BANKRUPTCY (§ 160*)—VOIDABLE "PREFERENCE"—INSOLVENCY.

Where a debtor, at the time it delivered a part of its stock in trade to a creditor, within four months of the filing of a petition in bankruptcy against it, had left stock in trade worth about \$2,500, and owned notes and open accounts worth about \$1,300, and owed about \$40,000, it was insolvent, and the transfer operated to give the creditor a voidable "preference," within Bankr. Act July 1, 1898, c. 541, § 60, cl. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 160.*

For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

2. BANKRUPTCY (§ 304*)—VOIDABLE PREFERENCE—KNOWLEDGE OF CREDITOR—QUESTION FOR JURY.

Where an insolvent debtor, within four months of the filing of a petition in bankruptcy against it, transferred the bulk of its stock in trade to a creditor, who had demanded payment, and who at the time of the transfer admitted that he had his suspicions as to the solvency of the debtor, and who saw the debtor's stock and knew that the transfer would cripple it for continued business, and who made no inquiries touching the debts or assets of the debtor, the issue whether the creditor had reasonable cause to believe that the debtor intended to give a preference, within Bankr. Act July 1, 1898, c. 541, § 60, cl. "a," "b," 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), must be submitted to the jury.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 304.*]

In Error to the District Court of the United States for the South-eastern Division of the District of Missouri.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Frank B. Coleman, trustee of the estate of the H. N. Saylor Cooperage Company, bankrupt, against the Decatur Egg Case Company. There was a judgment for defendant, and plaintiff brings error. Reversed and remanded.

Lee W. Grant, for plaintiff in error.

R. B. Oliver, Jr. (J. H. Bradley, R. B. Oliver, and Allen L. Oliver, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

ADAMS, Circuit Judge. This was a suit by a trustee in bankruptcy to recover a preference claimed to have been given to a creditor of the bankrupt within four months next preceding the filing of the petition for an adjudication against it. The preference is said to have consisted in the transfer to the defendant, the Egg Case Company, of a lot of staves and other cooperage material taken out of the stock in trade of the bankrupt in partial settlement of an indebtedness due the defendant. The cause was tried to a jury, and at the close of all the evidence a verdict was directed in favor of the defendant. From the judgment entered on that verdict, the trustee prosecutes error.

To constitute a voidable preference within the meaning of section 60, cl. "a" and "b," of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), the debtor at the time of making the transfer must have been insolvent, and the receipt of the property transferred must have had the effect of enabling the favored creditor to obtain a greater percentage of his debt than any other creditor of the same class. In addition to these things, the creditor must have, at the time of the transfer, had reasonable cause to believe that it was intended thereby to give him a preference.

[1] The proof discloses that the property transferred was worth about \$7,000; that the remaining stock in trade of the bankrupt was estimated to be worth about \$2,500, but was sold by the trustee for about \$1,700. There were some notes and open accounts belonging to the bankrupt, which realized about \$1,300. At the time of the transfer the debtor owed about \$40,000. He was, therefore, hopelessly insolvent, and the preference necessarily operated to give the Egg Case Company a greater percentage of its debt than any other creditor of the same class could get. The only question left is whether the defendant, at the time of receiving the transfer, had reasonable cause to believe a preference was intended to be given him.

A general reference to the testimony is all the demands of the case require. The debtor owed to the Egg Case Company, at the time of the transfer, about \$13,000. This was represented by drafts or acceptances, some of which were overdue and protested. Upon the receipt of the stock the Egg Case Company credited the amount of its invoice value upon the acceptances, some of which were due, and some of which were not due. Mr. Vail, president of the Egg Case Company, had been urgently demanding payment of its debt for some time. On the 16th day of December, 1908, he wrote the following letter to the Cooperage Company:

"* * * Now, Sayler, we have got to have some money. I can't stand my men and bills off any longer. * * * Now, do something. I am down here, where I can't do anything. Our men here are poor, and can't help me with the case. Of course, I know how you are and feel about the situation, but yet your condition is nothing compared to these poor devils in here that have nothing. Do something."

This letter was followed by a personal visit of Vail to the debtor's place of business in St. Louis on the 21st day of December. He gives an account in his testimony of that visit. He says:

"I bought the stock of goods of Mr. Sayler on the 21st of December. I came into St. Louis on the 21st of December. After I had gotten my breakfast, I went down and met Mr. Sayler, and gave him the usual morning greeting, and I asked him for money, that my bills were pressing me, and he said, 'Sales are not so good, and I can't give you anything.' Then I looked around and says: 'If your sales are bad, and your collections are bad, and you can't help me out, I have got to have relief some way; sell me some of the stock here.' He says: 'All right. No harm in selling you stock.' So I went into the warehouse and bought this bunch and that bunch of cooperage stock, and after we had agreed on the price, then he had some stock he claimed was mine, that had been refused, and I took that in."

The proof shows that on this occasion Vail made no inquiries touching the debts or the assets of the debtor. The whole transaction consumed but a few moments. He saw the stock, and necessarily knew what he proposed to take would deprive his debtor of the great bulk of its stock in trade, and would cripple it for continued business. He said on his examination that he did not know anything that would lead him to believe that his debtor was then insolvent, but he admits that he had suspicions.

The foregoing, with other testimony of like character, presents a fair view of the condition of things that surrounded the parties at the time the defendant received the transfer in question. This court, speaking by Judge Hook, in Pittsburgh Plate Glass Co. v. Edwards, 78 C. C. A. 191, 148 Fed. 377, said as follows:

"The bankrupt was hopelessly insolvent. That he intended a preference is inferred as a necessary consequence of his act in giving the mortgage [which in that case constituted the challenged transfer] while in such financial condition, and an examination of the record impresses us with the belief that the appellant's attorney was so well satisfied of the bankrupt's insolvency, and its effect upon the mortgage he was about to take, that he purposely traveled as close to the edge of actual knowledge as he could without obtaining it. * * * He ignored other sources of information, which were at hand, and were so obvious and so much more accurate and reliable that, in view of the undisputed facts of the case, intentional avoidance is suggested."

[2] It is not necessary in this case to find the debtor had reasonable cause to believe a preference was intended. Our inquiry is whether there was any evidence from which a jury might reasonably make that finding. We think the facts of the case, not only those which we have referred to, but others of like character, together with the inferences reasonably to be drawn from them, were sufficient to take the case to the jury. It was an unusual transaction for a creditor to require payment of his merchandise debts out of stock in trade of the debtor, and especially so to go to the extent of taking nearly all of it. The record also seems to disclose a purpose to avoid securing information touch-

ing the financial condition of the debtor. Sources of true information concerning it were available to the defendant at the time its president took the stock. The books were there. The debtor, who was familiar with his business, was there. But neither the books were asked for, nor was any question put to the debtor concerning its assets or liabilities. The creditor knew, or must have known, that by taking practically all his stock in trade he was taking away from his debtor the means of prosecuting his business. *McElvain v. Hardesty*, 94 C. C. A. 399, 169 Fed. 31.

There is a suggestion that part of the stock which the creditor took was some that had not been accepted by the debtor, and therefore that the title never passed to the latter. It is unnecessary to pass on this question now, as the case must be retried, and this issue, amongst others, can then be determined.

The judgment is reversed, and the cause remanded for a new trial.

CHICAGO & N. W. RY. CO. v. KENDALL.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1911.)

No. 3,472.

1. CONSTITUTIONAL LAW (§ 246*)—CLASS LEGISLATION—RAILROADS—LIABILITY FOR FIRES.

Rev. Laws Supp. Minn. 1909, § 2041, declaring that every railroad corporation owning or operating a railroad within the state shall be responsible in damages to every person or corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use on the railroad, and each such railroad corporation shall have an insurable interest in the property upon its railroad route, was not unconstitutional, as arbitrary class legislation.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 246.*]

2. DAMAGES (§ 111*)—MEASURE—DESTRUCTION OF BUILDINGS.

In an action against a railroad company for the destruction of buildings along its route by a fire set out by a locomotive, the measure of damages is the value of the buildings detached from the land, and not the difference in the value of the land before and after the destruction of the buildings.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 274–278; Dec. Dig. § 111.*]

3. RAILROADS (§ 481*)—FIRES—DESTRUCTION OF PROPERTY—EVIDENCE.

In an action against a railroad company for destroying plaintiff's buildings, evidence of defendant's station agent, not shown to have had personal knowledge of any fires having been set, that he settled losses claimed to have resulted from fires set by defendant's engines at other places about the same time of year as the fire claimed by plaintiff to have destroyed his buildings, was incompetent.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 481.*]

4. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSIONS.

In an action for loss by fire alleged to have been set out by defendant railroad company, questions asked of defendant's station agent with reference to losses alleged to have been paid by him for other fires, so framed as to call for the witness' conclusion as to whether the claims were based on fires which were set by defendant's engines, were improper.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the Circuit Court of the United States for the District of Minnesota.

Action by Joseph B. Kendall against the Chicago & Northwestern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and new trial granted.

W. D. Abbott (L. L. Brown and S. H. Somsen, on the brief), for plaintiff in error.

Charles C. Willson, for defendant in error.

Before HOOK, Circuit Judge, and RINER and WM. H. MUNGER, District Judges.

WM. H. MUNGER, District Judge. Plaintiff (defendant in error) was the owner of a brickmaking plant at Byron, Minn., located adjacent to defendant's right of way; said brick plant consisting of buildings, drying sheds, coal and engine house, etc. On the night of September 18, 1909, the same were destroyed by fire claimed to have been communicated by sparks from an engine operated by defendant (a corporation and plaintiff in error) over its line of railroad, and plaintiff brought this action against the defendant to recover his damages caused by such fire.

No claim of negligence on the part of the defendant was alleged in the petition; plaintiff basing his right to recover upon section 2041 of the Revised Statutes of Minnesota, as amended in 1909, which reads as follows:

"Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by the locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it and may procure insurance thereon in its own behalf for its protection against such damages."

Upon the trial a verdict and judgment was given in favor of plaintiff, to reverse which defendant brings the case to this court.

[1] It is urged that this statute is unconstitutional, "because it is arbitrary class legislation and without any reasonable basis; that it applies only to corporations engaged in the operation of a railway, and does not include individuals, copartnerships, receivers, or trustees, that might be doing identically the same thing with identically the same instrumentalities under identically the same conditions." A similar statute of Missouri was before the Supreme Court in the case of St. Louis & San Francisco Railway Co. v. Mathews, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, where the same objections were urged. That court, after reviewing many English and American authorities, held the statute constitutional, and quoted with approval the following language from the opinion in Grissell v. Housatonic R. R., 54 Conn. 461, 462, 9 Atl. 140, 1 Am. St. Rep. 138:

"There is no force in the suggestion that the statute under consideration unjustly selects only railroad corporations to bear the burden of an extraordinary risk. It is confined to them, because they alone have the privilege of taking a narrow strip of land from each owner, without his consent, along the route selected for the track, and of traversing the same at all hours of

the day and night, and at all seasons, whether wet or dry, with locomotive engines that scatter fire along the margin of the land taken, thereby subjecting all combustible property to extraordinary hazard of loss, and that, too, for the sole profit of the corporation."

In view of the decision of the Supreme Court in the foregoing case, it must be held that the statute in question is constitutional.

At the close of all of the evidence defendant requested the court to direct a verdict in its favor, which request was refused. As a new trial, for reasons hereafter mentioned, must be had, and the evidence at that time may be somewhat modified, we do not think it profitable to now analyze the evidence found in the record, but content ourselves by saying that, from a full consideration thereof, we think there was sufficient to submit the question to the jury to say whether the fire was caused by sparks from an engine of defendant.

[2] It is insisted that the court erred in permitting plaintiff to show the value of the buildings in their then condition; defendant insisting that the measure of damages was the difference in value of the real estate before and after the destruction of the buildings by the fire. In Thompson on Negligence, vol. 2, p. 1262, it is stated:

"For the purposes of actions for injuries through negligence, many things, which are attached to the realty and a part of it, such as fruit trees, houses, timber, etc., are considered as separate and distinct from it, because they have a value which is distinct from the value of the land. Therefore, where buildings, trees, crops, etc., are destroyed or injured, the proper measure of damages is not the difference in the value of the land before and after the injury, but of the buildings, trees, etc., themselves; and where buildings are destroyed by fire the proper measure of damages is the value of the buildings when destroyed, and not the cost of replacing them, though this may be shown in evidence, in order to enable the jury to arrive at a just estimate of the value."

We are not called upon to affirm the correctness of all stated in the above excerpt. It is quite probable that fruit, ornamental, and shade trees, have no real value detached from the realty, and that for the destruction of such property the measure of damages would be the difference in value of the realty. What we do decide, and all that we decide, is that buildings have a value detached from the realty, and that such value is a proper measure of damages. Matthews v. Mo. Pac. Ry. Co., 142 Mo. 645-664, 44 S. W. 802; White v. C., M. & St. P. Ry. Co., 1 S. D. 326, 47 N. W. 146, 9 L. R. A. 824; Greenfield v. C. & N. W. Ry. Co., 83 Iowa, 276, 49 N. W. 95.

[3] During the trial of the case plaintiff called as a witness the station agent of the defendant located at Rochester, Minnesota, when the following questions and answers were given, each over the objection of the defendant:

"Q. Did you have the business of paying off persons who had lost by fires from engines set on the right of way? A. I have done some of that; yes, sir.
Q. Were the fires which consumed the property of adjacent owners, last September, which were assumed and paid for by the railroad company, which were caused by sparks from their engines running upon the road? A. I remember settling at least two claims during the fall of last year, but I don't remember the month in which these fires took place. Q. Who were these people? A. One was a man by the name of Schoonfelt. Q. Were there not two different fires and two different occasions on which you paid him? A. Yes; my recollection is that Schoonfelt's claim covered two losses some-

where near the same dates. That is my recollection. Q. What other? A. I don't remember the other man's name. It was some man living between Chester and Rochester, on the south side of the road. I don't remember the man's name."

This testimony was clearly incompetent. Conceding that it was competent for plaintiff to show that engines of the defendant company had set fires at other places at about the same time of year, as tending to show that the fire in question was set by defendant's engine, it clearly was incompetent to show that defendant had settled claims for fires claimed to have been set by defendant's engines. It was not shown that the witness had personal knowledge of any fires having been set; that he simply settled losses claimed to have resulted from fires set by defendant's engines. Clearly defendant had a right to settle a claim of damages alleged to have been caused by fire, without admitting that it was responsible for such fire.

[4] The questions were framed in a manner to call for the conclusion of the witness as to whether such claims were based upon fires which were set by defendant's engines. The conclusion of the witness in that respect was wholly incompetent. Evidence of other fires could only be established by facts showing that the fires originated from sparks from an engine of the defendant.

Because of the error committed by the court in admitting this evidence, the case is reversed, and a new trial granted.

HERMANEK v. CHICAGO & N. W. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. March 29, 1911.)

No. 3,388.

1. MASTER AND SERVANT (§ 190*)—INJURIES TO SERVANT—SUITABLE TOOLS—DUTY TO FURNISH—DELEGATION.

The duty to furnish a servant suitable tools being a positive duty of the master, the delegation of such duty to another servant renders the latter in the performance thereof a vice principal and not a fellow servant of an employé injured by a failure to properly perform the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.*]

2. MASTER AND SERVANT (§ 221*)—INJURIES TO SERVANT—DEFECTIVE TOOLS—PROMISE TO REPAIR—ASSUMED RISK.

An employé does not assume the risk by continuing to work a reasonable length of time with worn and defective tools, after having notified the employer or foreman standing in the employer's place of the worn and defective condition of the tools, and obtaining a promise that new or repaired ones would be obtained and furnished, and this whether the defective tools were simple or complex.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

3. MASTER AND SERVANT (§ 285*)—INJURIES TO SERVANT—DEFECTIVE TOOLS—QUESTION FOR JURY.

Where plaintiff, a trackman, was injured by being struck by the head of a spike he was endeavoring to pull with a clawbar, and the evidence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was conflicting on the question whether the clawbar, by reason of the edges of the claws being worn and dulled, would not take hold of the spike as far below the head as a sharp bar would, thereby rendering it unsafe for use, whether the head of the spike broke because of the use of a dull and worn clawbar, and whether such condition was the proximate cause of the injury, *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 285.*]

4. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where a railroad trackman was struck and injured by the head of a spike while he was endeavoring to withdraw it with a dull clawbar, whether plaintiff was negligent in standing with his face downward directly over the spike was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

Adams, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

Action by John Hermanek against the Chicago & Northwestern Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

F. F. Dawley (C. W. Bingham and C. E. Wheeler, on the brief), for plaintiff in error.

James C. Davis (J. M. Grimm, J. H. Trewin, and A. A. McLaughlin, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. This action was brought to recover for a personal injury sustained by plaintiff while in the employ of the defendant as a section hand at work upon defendant's line of road. The injury occurred while plaintiff and a coemployee were in the act of pulling a spike out of a tie by the use of a clawbar and spike maul; plaintiff holding the clawbar, and his coemployee using the maul to drive the clawbar under the head of the spike. While thus working, the head of the spike broke off and struck the plaintiff in the eye, causing the injury complained of.

The negligence charged against defendant is that it failed to furnish the plaintiff a proper and safe clawbar with which to draw spikes; the clawbar in question having become worn in such a manner that the head of the spike was more likely to be broken off than with a perfect bar, with sharp edges, which would catch against the body of the spike. At the close of the evidence the trial judge directed a verdict for the defendant, and the case is brought here for review.

Four questions have been presented and argued: (1) Did the plaintiff assume the risk of an injury of the character in question? (2) The accident resulting from the ordinary use of a simple hand tool, and there being no hidden dangers, and no complications connected with the use of the same, was there actionable negligence on the part

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the defendant? (3) Was the plaintiff guilty of contributory negligence, in that, with full knowledge of the dangers incident to driving a clawbar under the head of a spike with a spike maul, he stood directly over the spike, in a position where injury would naturally result if the head of the spike flew off? (4) Was the negligence, if any, of John Barry, the foreman, the negligence of a coemployé, for which the defendant would not be liable?

[1] The evidence discloses that the railroad company kept a stock of tools, including clawbars, on hand at its shops in Clinton; also repaired and sharpened bars that were sent there; that it was the practice and duty of Barry, defendant's section foreman, when the tools became worn and needed repairing, to send them to Clinton for repair, and either other like tools, properly repaired, were sent the foreman, or the defective and worn ones sent in were repaired and returned to him; that it would take two or three days to send the tools from the section upon which plaintiff was working to Clinton to have them repaired and returned. Such being the case, Barry, the section foreman, was not a coemployé in respect to this particular matter. The duty to furnish the plaintiff with proper and suitable tools was a positive duty of the defendant. Barry, the section foreman, was the employé to whom the defendant had intrusted the duty of seeing when the tools upon his section required repairing, and the duty of having them, when worn and needing repair, sent to defendant's shops for that purpose; and, as the duty of furnishing suitable and safe tools was a positive duty imposed upon defendant, it having delegated that duty to Barry, he was not, in that respect, a coemployé of defendant. *Hough v. Railway Co.*, 100 U. S. 213-219, 25 L. Ed. 612; *Northern Pac. R. R. Co. v. Peterson*, 162 U. S. 346-353, 16 Sup. Ct. 843, 40 L. Ed. 994; *Homestake Mining Co. v. Fullerton*, 16 C. C. A. 545, 69 Fed. 923.

[2] The evidence discloses that the plaintiff, on one or two occasions before the injury in question, complained to Barry, the foreman, of the worn and defective condition of the bars in question, and that they were dangerous to use; Barry stating in response thereto that he would fix them or send them to Clinton to be fixed. Whether the evidence in this regard shows a specific promise upon the part of Barry to procure new or repaired bars, that plaintiff so understood Barry's promise, and relied upon the same, is not altogether clear; but the evidence in this respect is of such a character that it should have been submitted to the jury to say whether or not Barry's statements to plaintiff were intended by Barry, and understood by plaintiff, to be a promise that new or repaired tools would be furnished, and whether plaintiff continued to work with the tools, relying upon such promise. The law is that an employé does not assume the risk by continuing to work a reasonable length of time with worn and defective tools, after having notified the employer, or the foreman, standing in the place of the employer, of the worn and defective condition of the tools, and obtained from the employer, or foreman, standing in his place, a promise that new ones or repaired ones would be obtained and furnished. *Hough v. Railway Co.*, supra; *Homestake*

Mining Co. v. Fullerton, *supra*; Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 125 Fed. 470.

[3] Upon the question as to whether the clawbar, by reason of the edges of the claws being worn and dulled, would not take hold of the spike as far below the head as a sharp one would, thereby rendering it unsafe for use, the evidence was conflicting, so that it was for the jury to say whether the head of the spike broke off because of the use of the dull and worn clawbar, and whether such condition was the proximate cause of the injury. No sound reason exists for a different rule being applied to a simple tool than to a complex one, when the defective and dangerous character has been called to the master's attention by the servant, and a promise made by the master that the defect would be remedied or a new tool furnished. Louisville Hotel Co. v. Kaltenbrun, 80 S. W. 1163, 26 Ky. Law Rep. 208. To the same effect may be said to be Cudahy Packing Co. v. Skoumal, *supra*.

[4] Whether plaintiff was guilty of such contributory negligence as to defeat a recovery by standing with his face downward directly over the spike which was being drawn was clearly a question of fact to be submitted to the jury.

The judgment is reversed, and a new trial granted.

ADAMS, Circuit Judge, dissents.

CAROLINA PORTLAND CEMENT CO. V. ANDERSON.

(Circuit Court of Appeals, Fifth Circuit. March 14, 1911.)

No. 2,090.

1. SHIPPING (§ 132*)—LIABILITY FOR DAMAGES TO CARGO—UNSEAWORTHINESS—HARTER ACT.

Proof that a vessel within a few hours after leaving port, and before encountering any peril of the sea, sprung a leak from defective butts in her bottom, and that, in addition, her steam pump was not in good working order, and broke down when put in use, raises a presumption that she was unseaworthy at the beginning of the voyage, which is not rebutted by evidence merely of previous diligence, and, in the absence of a stipulation therefor in the bill of lading, the owner is not exempted by Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (U. S. Comp. St. 1901, p. 2946), from liability for damage to cargo caused by such leakage.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 132.*]

2. SHIPPING (§ 148*)—FREIGHT—EFFECT OF LOSS OR DAMAGE TO CARGO.

Where a cargo owner is allowed as damages against the vessel for loss of cargo its full value at the port of delivery, he is not entitled to a reduction in freight on account of the loss.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 148.*]

Appeal from the District Court of the United States for the Southern District of Georgia.

Suit in admiralty by the Carolina Portland Cement Company against the schooner William H. Sumner, Charles Anderson, master, claimant. Decree for claimant, and libelant appeals. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
186 F.—10

J. P. K. Bryan, for appellant.

Anton P. Wright and W. C. Hartridge, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge. This is a libel by the Carolina Portland Cement Company against the American schooner William H. Sumner for damages to a cargo of Portland cement, wherein the cement was alleged to be damaged by sea water on a voyage from New York to Savannah in July, 1906, in the sum of \$2,500.

The bill of lading was as follows:

"Shipped in good order and condition by Alpha Portland Cement Company on board the schooner called the William H. Sumner, whereof Charles Anderson is master, now lying at the port of New York and bound for Savannah, Ga., to say, nine hundred (900) barrels of Alpha Portland cement, 400 pounds each; fifteen thousand two hundred bags (15,200) of Alpha Portland cement, 95 pounds each; vessel not accountable for condition of bags. Weight and contents unknown to master, being marked and numbered as in the margin and are to be delivered in the like order and condition at the port of Savannah, Ga. (the dangers of the seas only excepted), unto Carolina Portland Cement Co. or to their assigns he or they paying freight for the said cement, one dollar and ten cents (\$1.10) per ton of 2,000 pounds, without primage and average accustomed.

"In witness whereof the master or purser of the said vessel hath affirmed to three bills of lading of this tenor and date one of which being accomplished the other to stand void.

"Dated in New York the 5th day of July, 1906.

"Chas. Anderson."

The answer of the respondent, claimant of the schooner William H. Sumner, sets up the defense of "dangers of the sea," which caused the vessel to spring a leak in her butts in her bottom, which enabled the sea water to gain access to the hold thereof.

The claimant also brings a cross-libel against the Carolina Portland Cement Company for the freight on said cargo in the sum of \$992.20, being the freight on the total amount of the cargo; and also for the sum of \$98.78 general average claimed against the company, shipper and owner of the cargo. The answer of the Carolina Portland Cement Company to the cross-libel denies the allegation of delivery of the cement, except in a greatly damaged condition by sea water, and charges that the damage was caused by the unseaworthiness of the said vessel. The District Court on hearing the case dismissed the libel for damages to the cargo and sustained the cross-libel, and decreed against the Carolina Portland Cement Company for the freight, in the sum of \$992.20, being the freight on the total amount of the cargo; and also for the sum of \$98.78, general average claimed against the company, shipper and owner of the cargo. In a former decision we held that the schooner William H. Sumner was not seaworthy at the beginning of the voyage, but, as the owners had used due diligence to make her seaworthy, they were in this suit entitled to the benefit of the Harter act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]); and thereafter on application we reconsidered our former decision and granted a rehearing.

On this rehearing and full argument, we have again considered the evidence and the law applicable thereto.

[1] We now hold that the William H. Sumner was not seaworthy at the inception of the voyage under the test of seaworthiness as given in *The Silvia*, 171 U. S. 462-464, 19 Sup. Ct. 7, 43 L. Ed. 241, because the proof is that within a few hours after leaving port, and before encountering any peril of the sea, she sprung a leak from defective butts in the bottom of the vessel; and that, in addition, her steam pump was not in good order and broke down when put in use, and from these circumstances the presumption of unseaworthiness arises. *Pars. Mar. Law*, 138; 2 Arnold on Ins. (Perkins' Ed.) 689; *The Planter*, 2 Woods, 490-491, Fed. Cas. No. 11,207a; *Work v. Leathers*, 97 U. S. 380, 24 L. Ed. 1012; *Pac. Coast S. S. Co. v. Bancroft-Whitney Co.*, 94 F. 180-196, 36 C. C. A. 135, and cases there cited. And see *The Southwark*, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. This presumption of unseaworthiness is not rebutted by evidence of previous diligence, nor by the proof as to subsequent storms and perils of the sea; and, as the bill of lading contained no exception as to seaworthiness, the owners are not entitled to the benefit of the Harter act. See *The Carib Prince*, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181. It follows that the decree of the District Court should be reversed and a decree rendered for the appellant.

In order to save a reference to ascertain the damages and amount of recovery, we have taken the trouble to go over the evidence. From our examination we conclude the appellant's damages to be as follows:

310 barrels of cement turned to stone @ \$1.90.....	\$ 589 00
600 wooden barrels @ .35.....	211 40
358 sacks of cement @ .47½.....	170 15
2,550 cloth sacks @ .10.....	255 00
Labor pay rolls.....	356 85
Four and one-half (4½) weeks' wages to Chisolm.....	39 00
<hr/>	
Making a total of.....	\$1,621 40
From this amount should be deducted for contract freight.....	992 30
<hr/>	
Balance	\$ 629 10

for which appellant should have a decree.

We reject the claim for Chisolm's personal account \$102.03, and Ford's expense account \$15.65, as we find no sufficiently itemized proof in the record.

[2] We reject appellant's claim for deduction of freight on 77 tons of cement turned to stone based on *Ridyard v. Phillips*, 4 Blatchf. 444, Fed. Cas. No. 11,820, *Duthie v. Hilton*, L. R. (C. P.) vol. 4 (1868-9) 138, *Asfar & Co. v. Blundell*, vol. 1, L. R. (Q. B. Div. 1896) 123-127, because we allow appellant full value thereof based on prices at port of delivery.

And we reject claimant's demand for contribution for expenses in Philadelphia in refitting.

The decree of the District Court is reversed and the cause is remanded, with instructions to enter a decree in favor of the Carolina Portland Cement Company against the master of the schooner William H. Sumner and his sureties for the sum of \$629.10, with legal interest from judicial demand and for all costs.

AETNA LIFE INS. CO. et al. v. LEONARD et al.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1911.)

No. 2,096.

RECEIVERS (§ 154*)—EXPENSES—APPORTIONMENT.

Mortgagees of part of an insolvent corporation's property are not chargeable with part of the expenses of a receivership, which they did not seek, and which appears to have been conducted in the interest of unsecured creditors.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279-282; Dec. Dig. § 154.*]

Appeal from the Circuit Court of the United States for the Western District of Louisiana.

Receivership proceedings against the Ozone Lumber Company and others. From an order apportioning expenses and taxes, the Aetna Life Insurance Company and others appeal, adversely to A. H. Leonard, receiver, and others. Affirmed.

W. P. Hall and E. W. Sutherlin (G. W. Jack and W. A. Mabry, on the brief), for appellants.

J. D. Wilkinson and Leon R. Smith (N. C. Blanchard, on the brief), for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. From the record before us, containing parts of the proceedings below, it appears that A. H. Leonard, by a consent order, was appointed receiver of four corporations—the Ozone Lumber Company, Limited, and three others. The property of the corporations has been sold and the proceeds distributed, and no objections are urged to anything that has been done except on one point. The receiver was allowed \$25,000, the attorney for the receiver \$15,000, and the special master \$2,000, and various other expenses of the receivership were allowed and paid. The property sold for a large sum, about \$400,000. Excluding several special properties that were sold separately, so as to preserve the particular liens on the same, the property of the Ozone Lumber Company, Limited, sold for \$375,000. This amount being divided in proportion to the appraisement, the timber or mortgaged property realized \$290,000; the other fund, or unmortgaged property, \$85,000.

The lien or mortgages of the Ozone Lumber Company, Limited, applied only upon the timber. The other property was unincumbered save for some special liens. Out of the fund derived from the timber, William Edenborn, who held the vendor's lien on the timber, was paid \$189,050 in full of his privileged claim. The claims of the other interveners, arising out of the mortgage indebtedness alone amounted to \$131,450, and, as the proceeds of the sale of the mortgaged property (the timber) was not sufficient to pay their second mortgage, they were paid only \$96,509, becoming ordinary creditors for the balance, \$34,941.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

No objections are made to these allowances, nor to any item of expenses, but the sole question relates to an apportionment of the expenses and taxes. The objection can be best shown by the following, which is the only assignment of error:

"The court erred in refusing to charge the mortgaged property of the Ozone plant with its proportion of the taxes and of the costs of the receivership, including the fees of the receiver and of the attorneys, which were based largely upon the amount of the sale of this mortgaged property, which should have been made to bear its part of the costs of selling the property and realizing the fund for the mortgage creditors."

The appellants' contention is that the expenses of the receivership should be so apportioned between the mortgaged property and the unincumbered property as to charge 77 per cent. of such expenses to the mortgaged property, taking from the mortgagees about \$40,000 that has already been paid to them on the mortgage debt.

There is nothing in the record to show that it would be equitable or just to permit the large expenses of the receivership, or any part of it, to be used to lessen the security of the mortgagees. The mortgagees did not ask for the appointment of a receiver, nor does the record show that it was to their interest to have a receiver appointed. There is nothing to show that they were put on notice that a receivership suit costing nearly \$50,000 was being conducted at their expense. On the contrary, the bill asking for a receiver is in the nature of a "creditors' bill," and on its face shows that it was brought in the interest and for the benefit of inferior lien and general creditors. It appears that the entire proceeds of the mortgaged property were insufficient to pay the mortgage debts. We think the court ruled correctly in refusing to take any part of such proceeds to pay such expenses. A different rule would probably prevail where the mortgagees had the receiver appointed, or where the appointment was necessary to protect their interests.

We are assured by statements at the bar that the taxes and the costs of the receivership have been fully paid by the receiver pursuant to the decrees of the court, which are not copied in the record, being omitted from the transcript; the "same being made in accordance with præcipe for appeal." These omitted decrees, we presume, directed the payment of taxes, costs, and expenses out of the general fund in the hands of the receiver, and applied the entire proceeds of the sale of the mortgaged property to the payment of the first mortgage and the part payment of the second mortgage.

We find nothing in the record before us that would make it proper for this court to sustain the assignment of error.

Affirmed.

REDFERN, Immigration Com'r, et al. v. HALPERT. †

(Circuit Court of Appeals, Fifth Circuit. March 14, 1911.)

No. 2,069.

1. ALIENS (§ 54*)—PROCEEDINGS TO DEPORT—DECISION OF SECRETARY OF COMMERCE AND LABOR—CONCLUSIVENESS.

The decision of the Secretary of Commerce and Labor in proceedings to deport an alien, under Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (U. S. Comp. St. Supp. 1909, p. 459), is not final; but the court, on habeas corpus, may inquire into the whole case.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 112; Dec. Dig. § 54.*]

2. ALIENS (§ 40*)—IMMIGRATION STATUTES—CONSTRUCTION.

The immigration statutes should be strictly construed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.*]

3. ALIENS (§ 54*)—DEPORTATION—TIME FOR DEPORTATION.

The three-year period within which an alien may be deported, under Immigration Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (U. S. Comp. St. Supp. 1909, p. 459), begins to run from the date of his first entrance into the country; and a temporary absence, with the intention to return, cannot interfere with his status as a resident, nor give the immigration authorities the right to deport him.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Habeas corpus by Lena Halpert against Samuel Redfern, Immigration Commissioner, and others. From a judgment granting relief to the petitioner, defendants appeal. Affirmed.

Charlton R. Beattie, U. S. Atty., for appellants.

H. L. Landfried, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In this case, which is an appeal from the decree in a habeas corpus case, we find the following to be the facts, as shown by the transcript: That the relator, Lena Halpert, a feme sole, aged 23 years, came to this country from Russia with her father when she was 13 years old, and landed in New York City, and took up residence therein; that her father continued to reside in the United States for several years, when he returned to Russia for his family, and lately has returned to and now resides in New York; that Lena Halpert continued to reside in New York City until 1909, when she came to the city of New Orleans, whence she proceeded on her way to Panama, for the purpose only of making a trip to that country, and always with the intention of returning to her domicile in New York City, and she actually did return to New Orleans, on her way to New York, and landed in New Orleans January 10, 1910, and was duly admitted by the immigration officer; that on January 21, 1910, she was arrested as an alien lately landed in this country, and subject to deportation as a prostitute entering the country for the purpose of prostitution and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

† Rehearing denied April 11, 1911.

other immoral purposes, under Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (U. S. Comp. St. Supp. 1909, p. 448). Under this state of facts, the judge a quo held as follows:

"I have no doubt that the relator is a prostitute and that she was such when she arrived at New Orleans from Panama. I am equally certain that she was not a prostitute when she came to New York from Russia. There is no doubt the Secretary of Commerce and Labor would have the right to order her deported at any time within three years after her arrival, if she had been brought here for immoral purposes, or was found within the same period in a house of prostitution. Therefore the only question to be determined in this case is: When does the three years begin to run? Both relator and respondent have cited a number of cases, but none, however, of controlling authority. [1] I find nothing in the law (Act Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 459) making the decision of the Secretary of Commerce and Labor final, and I am satisfied I have the right to inquire into the whole case. [2] The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed.

"It is contended by respondent that in the instant case the relator, having come to the United States as a minor, could not be considered as having come here with the intention of acquiring a domicile, and therefore has no status as a resident. I cannot agree with this view of the case. It seems to me that no greater hardship could be occasioned than by deporting an alien, who had come to this country at a tender age and lived here until after majority. Deportation in such case is tantamount to exile. [3] In my opinion the law must be held to mean that the three-year period within which an alien may be deported begins to run from the date of his first entrance into the country, and a temporary absence, with the intention to return, cannot interfere with his status as a resident, nor give the immigration authorities the right to deport him."

As a majority of the judges of this court agree with the judge a quo in his application of the law to the facts, the decree of the Circuit Court is therefore affirmed.

RIPINSKY v. HINCHMAN et al.

(Circuit Court of Appeals, Ninth Circuit. March 9, 1911.)

No. 1,782.

APPEAL AND ERROR (§ 852*)—QUESTIONS PRESENTED FOR REVIEW—PLEADINGS.

Where the complaint in a suit to determine an adverse claim to an application for a patent to land in Alaska for trade purposes, under Act May 14, 1898, c. 299, § 10, 30 Stat. 413 (U. S. Comp. St. 1901, p. 1469), was several times amended, and so changed as to convert the cause into a simple suit in equity to remove a cloud from title, and such amended complaint was the only one appearing in the record on appeal, the appellate court can only consider the cause of action as therein stated.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 852.*]

On rehearing. Reversed and remanded.

For former opinion, see 181 Fed. 786.

J. H. Cobb and R. W. Jennings, for appellant.

L. P. Shackleford, Alfred Sutro, and H. D. Pillsbury, for appellees.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WOLVERTON, District Judge. Since the decision was rendered in this cause, counsel for appellees have filed a petition for rehearing, based principally upon the ground that the court failed to take into account the Alaska statutes applicable to procedure in the determination of adverse claims to the purchase of public lands occupied for trade purposes within the territory. Counsel frankly state that they failed to call the court's attention to the statutes, and no note was made of them in the opinion. The complaint, which is found in the record, is set out, in effect, in the opinion rendered, and appears to be the ordinary suit in equity for the determination of an adverse claim to real property—nothing more. It is now claimed by counsel that the suit was in reality instituted, under the Alaska statutes, for the determination of an adverse claim to application for purchase of land occupied for trade purposes, and for patent thereto, and in proof of that fact they have appended a copy of the original complaint filed in the cause. It is not shown when the complaint was filed, but it appears to have been verified on July 2, 1906.

The statutes referred to provide, in substance, that a citizen of the United States is entitled to purchase 80 acres of land, occupied for the purposes of trade, and that he is required to make proof thereof in support of his application to purchase, which shall be filed with the surveyor general, who shall thereafter file certified copies of such proof in the United States land office in the land district in which the claim is situated. The applicant is thereupon further required to publish notice of such claim, and post a copy thereof upon the land, for at least 60 days. If any person has an adverse interest or claim to the tract of land involved, he must file in the land office an adverse claim, setting forth the nature and extent of his demand, within such 60 days' publication of notice or 30 days thereafter; and within 60 days after such filing of adverse claim, he is required to institute an action in the proper district court of Alaska to quiet the title to such claim. Section 10 of an act for extending the homestead laws to the District of Alaska, adopted May 14, 1898 (30 Stat. 409, 413 [U. S. Comp. St. 1901, p. 1469]). The procedure provided for in this section has since been made applicable to the acquirement of homesteads in Alaska. Act March 3, 1903, 32 Stat. 1028 (U. S. Comp. St. Supp. 1909, p. 549).

It appears from the original complaint that the complainants attempted to pursue the requirements of these statutes, and that it was the endeavor to settle an adverse claim to the claim of the defendant Ripinsky in pursuance thereof. Among other things, it is shown that Ripinsky filed his application for patent on the 2d day of March, 1906, and thereafter published notice; and on June 3, 1906, and within 30 days after the period of publication of said notice, the plaintiffs filed in the land office their notice of adverse claim, a copy of which is annexed to the complaint. If that complaint was filed immediately after the date of its verification, the action would have been commenced within the requisite 60 days; so that for all the purposes of prosecuting an action for the quieting of the title as adverse claimants, under the statutes (section 10), the complaint appears to be sufficient.

However, this complaint was thrice amended, and it is perfectly manifest that counsel completely changed their theory as it respects the cause of suit, because it is apparent from the third amended complaint that the proceeding was resolved into a simple equitable suit for the determination of an adverse claim to title, having no relation whatever, by reference or otherwise, to the statutes. Thus, in the determination of the cause, this court considered the complaint as found in the record, and could render no different decree from that which was resolved upon.

Nor can it now, without a reformation of the pleadings, do more than to modify it, so that the cause may be remanded to the court below for such other proceedings as to that court may seem proper; and such will be the order of the court.

BENBROOK v. UNITED STATES.†

(Circuit Court of Appeals, Eighth Circuit. March 8, 1911.)

No. 3,897.

INTERNAL REVENUE (§ 40*)—RETAIL LIQUOR DEALERS—PLACE FOR SALE.

One who has paid a special tax entitling him to retail liquor at his regular place of business does not violate Rev. St. § 3242 (U. S. Comp. St. 1901, p. 2094), by delivering liquor to a customer at the latter's residence, though the sale be completed there.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. § 40.*]

In Error to the District Court of the United States for the Western District of Arkansas.

Charles L. Benbrook was convicted of retailing liquors without a special tax, and he brings error. Reversed and remanded.

J. Wythe Walker and Chester H. Krum (L. P. Miles, on the brief), for plaintiff in error.

John I. Worthington, U. S. Atty. (L. W. Gregg, Asst. U. S. Atty., on the brief), for the United States.

Before SANBORN and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

ADAMS, Circuit Judge. On July 3, 1909, Benbrook was indicted for carrying on the business of retail liquor dealer without having paid the special tax, in violation of section 3242 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 2094). He kept a drug store at Fayetteville, Ark., and part of the time within the three years preceding the finding of the indictment had a license to carry on that business, and part of that time had no such license. The proof shows conclusively that he paid the special tax entitling him to do so from July 1, 1907, to June 30, 1909, with the exception of six months, between July 1, 1908, and December 31, 1908. The proof tended to show that during this period of two years, and prior thereto, Benbrook sold whisky to divers persons in Fayetteville; but there was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

† Rehearing denied April 14, 1911.

a conflict as to when he sold it—whether at times when he had a license or at times when he did not have one. The proof also tended to show that at times during this period of two years one Joe Liles, a cripple living at a boarding house some distance away from the drug store, occasionally sent a messenger or a note to the drug store requesting Benbrook to bring him some whisky, and that Benbrook on several occasions took a pint of whisky to him, and received pay from him at his boarding house.

In view of this testimony, the trial court, after properly charging the jury on the main issues involved, instructed them:

"If you find the defendant, on receiving word that Joe Liles wanted medicine, or wanted whisky, on one or more occasions took from his place of business a pint of whisky, and carried it and delivered it to Joe Liles, and collected the pay therefor at Joe Liles' boarding house in another part of the town of Fayetteville, then the * * * sale was made when the whisky was delivered and the money collected; * * * and if you should so find, and further find that, when such sales occurred, defendant had not paid the special tax to sell liquor at Joe Liles' boarding house * * * then you should find him guilty as charged in the indictment."

Due exception was saved to this instruction, and the action of the court in giving it was assigned for error.

We think this was an erroneous exposition of the law. The court in effect held that even if defendant had paid the special tax, and was thereby licensed to sell whisky at retail at his regular place of business, yet if on one or more occasions he complied with the request of a customer, made to him at his place of business, and delivered some whisky to the customer at his residence, and if he there received pay for it, his license would not protect him, as he would then be carrying on the business, not at the place where licensed, but at the residence of his customer. It may be true, as charged by the learned District Judge, that title to the whisky did not actually pass to Liles until the delivery and payment were made at his boarding house; but this legal incident of the transaction did not change the place for carrying on the business from the drug store, where the supply was kept and where orders were received, to the boarding house.

The statute (section 3242), when read in connection with section 3239 (page 2093), which requires a retail liquor dealer to place and keep conspicuously in his establishment or place of business all stamps denoting the payment of the special tax required of him, in our opinion, contemplates that the retail liquor dealer may carry on business under one license, or by virtue of paying one special tax, only at one place, at one time. This we understand to be the ruling and practice of the Treasury Department in charge of this business. Benbrook, therefore, according to the instruction of the court, even though he might have paid the special tax and have been entitled to carry on the business of a retail liquor dealer in Fayetteville at his drug store, was required to pay as many more special taxes as he had customers, provided he took their orders for delivery and payment at their homes. According to this interpretation of the law, the large dry goods stores of our cities would be "carrying on business" at the residences of their customers, provided they took orders at their stores for goods to be delivered and paid for at the residences. The usual and accepted

meaning of these words, when applied to present methods of transacting business, would not, in our opinion, warrant such interpretation.

The instruction was not only erroneous, but it was highly prejudicial. According to it, even though the jury might have found the defendant had sold no whisky at his place of business when he did not have a license to do so, they still might have found him guilty, provided he delivered a pint or more of whisky at Liles' house pursuant to an order given at his drug store, even at a time when he had a license to carry on a retail liquor business at that store.

There are other assignments of error; but, as the case must be remanded for a new trial, we do not deem it necessary to consider them.

The judgment is reversed.

THE WILLIAM H. TAYLOR.

THE P. R. R. NO. 32.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

Nos. 211, 212.

COLLISION (§ 61*)—TUGS AND TOWS MEETING—FAILURE TO COMPLY WITH PASSING AGREEMENT.

A finding of the trial court affirmed that a collision between the tows of the tugs Taylor and P. R. R. No. 32, meeting in Arthur Kill, was due solely to the fault of No. 32 in failing to comply with an agreement to pass starboard to starboard, which was proper under the special circumstances.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. § 61.*

Collision with or between towing vessels and vessels in tow, see note to The John English, 100 C. C. A. 581.]

Appeals from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by Isaac E. Ewing and by John Newman against the steam tugs William H. Taylor, the Taylor Dredging Company, claimant, and the P. R. R. No. 32, the Pennsylvania Railroad Company, claimant. Decree (174 Fed. 727) against the No. 32 alone, and her claimant appeals. Affirmed.

This cause comes here upon appeal from decrees of the District Court holding the tug P. R. R. No. 32 solely responsible for damages resulting from the collision of libelant's coal barges with the tow of the tug William H. Taylor. The collision happened in Arthur Kill, near the Baltimore & Ohio Railroad bridge.

Burlingham, Montgomery & Beecher (W. S. Montgomery and Roderick Terry, Jr., of counsel), for appellant.

Carpenter & Park (J. E. Carpenter, of counsel), for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Appellants concede that the evidence as to the exact place of collision is "very conflicting," as indeed it was; some

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the witnesses stating that No. 32 was kicking up the mud on the Staten Island shore, and others stating that the Taylor's tow was doing the same thing on the New Jersey shore; the channel being about 300 feet wide. All of the witnesses were examined in the presence of the District Judge. He found that the collision happened "about opposite Morse creek," a finding which is apparently not challenged. He also found that the Taylor was navigated as far as possible to the New Jersey side of the channel, but that the tow of No. 32, under the action of the wind, swung over into the waters in which the Taylor was navigating. This is substantially a finding that the collision happened well over towards the New Jersey shore. Upon the testimony as it stands, especially that of the disinterested witnesses from the dredge, we certainly cannot disturb these findings.

If the collision took place where these findings locate it, the fault of No. 32 is clear, because the collision occurred some 1,500 feet below the bridge, and the obstruction to her hauling over towards the Staten Island shore, which was interposed by the anchored dredge, terminated certainly not more than 800, and probably 600, feet below the bridge. Had she changed direction under a hard-a-starboard helm as soon as she cleared the dredge, her tow would not have reached the place where the collision happened; she had space and time enough to keep clear of the waters in which the Taylor was navigating.

We are satisfied that the position of the dredge and scow was such as to constitute a special circumstance which warranted the Taylor in proposing to pass starboard to starboard.

The decrees are affirmed, with interest and costs.

THE MONTROSE.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

Nos. 202-205.

SHIPPING (§ 84*)—LIABILITY OF VESSEL—INJURY TO STEVEDORES.

Libelants, four in number, who were longshoremen employed in loading a ship, fell into the water and were injured by the breaking of the companion ladder furnished by the ship for their use while they were passing together from the ship to the wharf. The ladder was of wood, and both side pieces broke in the middle. No fault or latent defect in the wood appeared. *Held*, that the inference from the facts was that it originally was, or had become, insufficient for the use for which it was furnished, and that the ship was liable for the injuries.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 349-351; Dec. Dig. § 84.*]

Appeal from the District Court of the United States for the Eastern District of New York.

Suits in admiralty by Daniel Sullivan, Martin McNulty, John Murray, and Joseph Mulcahy, respectively, against the steamship Montrose; Robert Glegg, claimant. Decrees for libelants, and claimant appeals. Affirmed.

See, also, 178 Fed. 495.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Convers & Kirlin (J. Parker Kirlin and Russell T. Mount, of counsel), for appellant.

Robert Stewart (R. G. Barclay, of counsel), for appellee Mulcahy.

George W. Bristol (Woolsey Carmalt, on the brief), for appellees Sullivan, McNulty, and Murray.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. March 9, 1908, at noon, the four libelants while passing from the deck of the steamer Montrose to the wharf by way of a companionway ladder, were thrown into the water through the breaking of the ladder. They were longshoremen, servants of the stevedore employed to load the steamer, and the ladder was provided by the owners of the steamer for their use. It was three years old, of teakwood, about 24 feet long, with a hand rope passing through four stanchions clamped on the outer side. The sides were $1\frac{5}{8}$ inches thick by $6\frac{1}{2}$ wide, and the treads $1\frac{1}{4}$ thick by 8 inches wide. It lay fore and aft, between the side of the vessel and the wharf, and above the wharf.

After the accident, being no longer fit for its original purpose, the master cut it up to make smaller ladders, and naturally cut off the ragged ends at the break. These were kept in the ship some time, but eventually lost, and at the trial only a piece of one of the smaller ladders was produced to show the kind, size, and character of the wood. An examination of the broken parts would probably have thrown light upon the case, and the libelants contend that because of their absence all presumptions should be against the claimant as contra spoliatorem. But, regrettable as the circumstance is, we cannot regard the master as a spoliator. What he did in disposing of the remains of the ladder was entirely in accordance with good shipkeeping, and it is not strange that he was somewhat careless about the broken ends, in view of the fact that the libelants seemed to have sustained nothing more than a ducking, and did not make claim for some months afterwards. Moreover, his testimony as to the appearance of the broken parts was very frank. A latent defect would have been a good defense to the ship; but he conceded that there was no indication of any in the wood.

As the ladder broke in the middle, we are quite satisfied that every one on it at the time must have been thrown into the water, and that there were not more than the four libelants who were in the water. The shipowner furnished the ladder for the use of the longshoremen, among others. At the time of the accident it lay alongside at an angle of between 20 and 30 degrees from the wharf, in a position allowing nearly the maximum strain at the center. The shipowner should have expected that, out of gangs of longshoremen consisting of not less than six, hurrying to and from their work, at least four might use the ladder at the same time and in close proximity to each other. As it broke on each side in the center between two treads, and it is admitted that no fault or latent defect was disclosed, the inference is that it originally was or had become insufficient for the use which the owners should reasonably have expected it would receive. The decrees are affirmed, with interest and costs.

SWIFT FERTILIZER WORKS et al. v. OKOLONA COTTON OIL CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 7, 1911.)

No. 2,141.**APPEAL AND ERROR (§ 5*)—WRIT OF ERROR—WHEN IMPROPER.**

A decree in chancery cannot be reviewed on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8-21; Dec. Dig. § 5.*]

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Action by E. Van Winkle Gib & Machine Company against J. W. Taylor and another. The Swift Fertilizer Works and others bring error, adversely to the Okolona Cotton Oil Company and others, from a decree confirming a master's report on their petition of intervention. Writ of error dismissed.

W. J. Lamb, for plaintiffs in error.

T. D. Young, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. In the equity suit pending in the Circuit Court entitled E. Van Winkle Gib & Machine Co. v. J. W. Taylor and Tishomingo Savings Institution, wherein the court took possession of large blocks of property and appointed a receiver, the Swift Fertilizer Company and other creditors intervened, asserting a prior lien on proceeds arising from the sale of certain property in the hands of the receiver. This petition of intervention was referred to a master, who reported adversely thereto. Petitioners then filed exceptions, and they were overruled and the master's report was confirmed.

From this decree the Swift Fertilizer Company and others sued out this writ of error, assigning errors as follows: (1) Said master's report and the said decree of the court erred in its conclusion as to the facts and the law touching the rights of the petitioners. (2) The special master's report and the decree of the court erred in its finding of the facts as disclosed in the record, and the law covering the same, in finding and reporting against the allowance and payment of the petitioner's claim.

A writ of error is not the appropriate mode of bringing up for review a decree in chancery. McCollum v. Eager, 2 How. 61, 11 L. Ed. 179; Murdock v. City of Memphis, 20 Wall. 590, 621, 22 L. Ed. 429; Hayes v. Fischer, 102 U. S. 121, 26 L. Ed. 95.

The writ of error is dismissed, with costs.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

AUTOPIANO CO. V. AMPHION PIANO PLAYER CO.

(Circuit Court of Appeals, Second Circuit. March 15, 1911.)

No. 199.

1. PATENTS (§ 328*)—INFRINGEMENT.

The O'Connor patent, No. 789,053, for a web-guiding device, is not for a pioneer invention, but for an improvement on prior devices regulating the lateral displacement of note sheets in musical instruments, the defects of which the patentee sought to correct by substituting surface control of the sheet for edge control, which, as stated in the specification, was objectionable because the edges of the sheet were thereby injured; and, in view of such statements, of the prior art, and of the proceedings in the patent office, the patent cannot be construed to cover an edge-controlled device. As so limited *held* not infringed.

2. PATENTS (§ 234*)—INFRINGEMENT.

A patent for the very character of device which a prior patentee had rejected as objectionable and sought to avoid, as shown by his specification, carries with it a strong presumption that the later device is not an infringement of the earlier patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 234.*]

3. PATENTS (§ 173*)—"PIONEER PATENT."

A pioneer patent is one covering a function never before performed, a wholly novel device, or one of such novelty and importance as to make a distinct step in the progress of the art as distinguished from a mere improvement or perfection of what had gone before.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 248; Dec. Dig. § 173.*

For other definitions, see Words and Phrases, vol. 6, p. 5380.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by the Autopian Company against the Amphion Piano Player Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Hand, District Judge, in the court below:

I agree with the complainant that there is nothing shown in this patent to justify any challenge of its patentable novelty, and that complainant's Exhibit 3 would have been an infringement of the patent had it not been for the license which O'Connor had given to the defendant at the time when the only machine of the kind is proved to have been sold. The real issue between the parties, however, is whether complainant's Exhibit 4 comes within the scope of the patent. It must be conceded that, at first blush, the variation of Exhibit 4 has every indication of being colorable, designed merely for the purpose of avoiding the effect of the patent. Nevertheless, the purpose of the defendants is irrelevant, if the actual structure does not infringe the claims. The question is simply of the reasonable scope of the invention, which may be gathered from the patent itself, from the state of the art when it appeared, and from an analysis of the file-wrapper in the Patent Office. I shall therefore take up in this order these three means of ascertaining the intention of the patentee.

The patentee states the general objects of his invention on page 1, lines 9-21, and from these it appears that it is not merely to obtain an automatic regulation for a sheet or web, but that the object of the invention is to do this "by means of the margins of the sheet or web itself, without any perforation or cutting, or other special preparation of the sheet, and without in any way injuring the edges of the most delicate or fragile fabric." It should

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

be noted, therefore, that in stating in most general terms the object of his invention the patentee distinguishes between the margins which are to regulate the sheet, and the edges, injury to which, even of the most delicate fabric, the patent will avoid. Proceeding upon the same page, from lines 37 et seq., he speaks of the "serious and well-recognized difficulties" which have been experienced in the art of maintaining the proper position of a sheet of paper, and particularly that the devices formerly used were unsatisfactory, because the edges of the paper or fabric became injured. He adds (page 1, lines 55-61): "Hence the objection to employing for thin webs, and especially for those which have to be run through repeatedly these centralizing devices, the operation of which is inaugurated by physical or forcible contact with the leading edge of the web as the latter shifts sidewise." The difficulties so raised he claims to avoid in his invention by devices which will "be automatically actuated by the lateral deflections of the web, which, when in its normal or central position, serves to hold the web-guiding or centralizing devices out of operation, and which by its divergence to one side or the other, allows the appropriate guiding or centralizing devices to come into operative contact." Page 1, lines 95-98; page 2, lines 1-4.

At the outset, therefore, it appears expressly that the general object of the invention is to avoid edge control, especially in "thin webs," "which have to be run through repeatedly," and that this control the patentee means to replace through a control by means "of the margins of the sheet or web itself without any perforations." It cannot after this preamble of the patent be said truly that edge control is an equivalent of the surface control, which is what he means by "margins," as is disclosed later in the patent. That is not an equivalent which is particularly repudiated in the broadest terms, and the avoidance of which is a part of the very object of the patent. I am, of course, assuming that the description and the claims are consistent with the preamble, as I shall now try to show.

The figures and descriptions in the patent which follow the preamble all show structures which not only operate by surface control, but cannot operate in any other way. Following them are 20 claims upon the meaning of which this case turns. Of these the complainant concedes that only six have any bearing on Exhibit 4. These are Nos. 5, 10, 15, 16, 19, and 20. Of the others the first four, and the sixth, seventh, and eighth clearly include surface control only, and are limited in that respect closely to the actual disclosure. The eleventh, twelfth, and thirteenth are variations of the tenth claim, and the seventeenth and eighteenth variations of the sixteenth claim. The ninth claim is somewhat similar to the fifth, because the words "means, normally held out of operation," are substantially equivalent to "means, maintained in inoperative condition" in claim 5 (Fowler's testimony, XQ. 131). The fourteenth claim is of a different character, and does not affect this problem. It is clear enough, therefore, that some of the claims can only be read upon surface control, and the question will be whether there is a sufficient indication of a different intention in the claims in suit.

The fifth claim, which is the first in suit, is as follows: "The combination, with a traveling sheet or web, of a tracker-bar, and means, maintained in inoperative condition by the sheet when in its normal position, for restoring the normal relation of the sheet and the tracker-bar when uncovered by the edge of the sheet." Exhibit 4 shows the traveling sheet or web, the tracker-bar, and means for restoring the normal relation of the sheet and the tracker-bar when uncovered by the edge of the sheet. Although the disclosures indicate by these words that this is to be done directly, the mere interposition of a lever certainly does not remove it from the range of equivalents. The remaining element of the combination is found in the words: "Maintained in inoperative condition by the sheet when in its normal position." In Exhibit 4 the sheet in its normal position maintains nothing. So far as the restoring means goes, it might be wholly removed, and nothing would happen. The complainant's expert, Fowler (folio 164) says: "The position of the sheet is the factor which determines the condition of operativeness or inoperativeness of the adjusting means." This is mere sophistry. All that he and the expert Browne can in fact truthfully say is that, when the sheet is in normal position, its movement to abnormal opens the guide-openings; and, when it

moves back, it closes the guide-openings. That is a very different thing from saying that, when it is in normal position, it maintains the means inoperatively. There would be as much reason in saying that the axe which fells a tree has all along maintained it upright. Now, no element of the combination may be omitted in the interests of the patent. It is as much a part of the patent that the means shall be inoperatively maintained by the sheet as that there shall be a tracker-bar or a web. These words aptly describe what I have called surface control, and there is nothing else disclosed or suggested which they can mean. The issue is irrelevant whether or not the removal of the sheet in figures 1 or 3 of the patent in suit would leave them "inoperative condition," though much evidence was taken upon it. It is quite clear that the patentee must be understood as so understanding it, else he could not have spoken of the "inoperative condition" as being "maintained by the sheet."

The next claim is No. 10, which reads as follows: "In combination with mechanism employing a traveling sheet or web, a tracker provided with a guide-opening, arranged to be closed by the sheet, when the latter is in its normal position, means for propelling the sheet across the tracker, and pneumatic devices governed by the guide-opening for adjusting the relation of the tracker and the sheet-propelling means when the opening is uncovered." Exhibit 4 shows the traveling sheet and web, the tracker provided with the guide-openings, means for propelling the sheet across the tracker, and pneumatic devices governed by guide-openings for adjusting the relation of the tracker and the sheet and propelling means when the opening is uncovered. However, the guide-opening is not "arranged to be closed by the sheet when the latter is in its normal position." The language here is plainer than in claim 5, because the claim is more specific. No fair interpretation of the words permits the statement that the guide-openings in Exhibit 4 are arranged to be closed by the sheet, when the latter is in its normal position. Here, again, the expert Fowler evades the question. He says; "The covering and uncovering of the guide-openings is determined by the lateral deflection of the note-sheet. In the structure of the patent the note-sheet is the active agent in closing the guide-openings." Folio 172. The expert Browne says (folio 1289): "The point of the claim is that the note-sheet may occupy a normal and an abnormal position, and that the result of the movement from normal to abnormal position is to open the guide-opening, and the contrary movement closes it." Here, also, these gentlemen confuse the action of the web in moving from an abnormal position, with the statement in the patent, which is that the sheet closes the guide-opening when it is at rest. Whether it be an important difference or not, there cannot be the least doubt that it is one thing to close the means by the movement of the sheet, and another to close it by its immobility. That the importance is great is here also shown by the fact that this describes, and under the disclosures can only describe, surface control, which, as the prior art will show, is the only control which could be closed by the sheet when in normal position.

Claim 15 is as follows: "In combination with mechanism employing a traveling sheet or web, a tracker provided with an adjustable guide-opening." This claim verbally reads upon Exhibit 4. I shall not consider it until later.

Claim 16 is like claim 10, except that the combination is stated to be in an "automatic musical instrument." It is subject to the same objections as claim 10, and there are therefore only two claims, 5 and 10, which it is important to consider here. In both of these, as I have shown, the claim reads upon a device for surface control, and not upon a device for edge control; at least, not under the disclosures, and, as will subsequently appear, not under the prior state of the art. The surface control, as I have already shown, is especially pointed out in the patent as one of the advantages of the patent, and the patentee claims it as such. There is nothing within the four corners of the patent anywhere to suggest that he conceived his patent when applied to sheets in combination with tracker-bars, as having both edge and surface control. Nor is there the least reason to suppose that he contemplated two patents: One, for surface control for traveling webs with or without trackers; the other for the combination of web and tracker with restoring means, whether or not they operated by surface or by edge control. That

there is no color for a contrary contention will appear more fully when the file-wrapper is considered.

So much, therefore, for the patent itself. In the prior art at the time that the application was filed, the relevant patents are not many. Paper machines had long been used, and consisted of rollers upon which a web of pulp had to travel. This web frequently got out of adjustment, and the patents cited were for the purpose of re-establishing the alignment of the web, Hutton, 140,418, Barry, 260,356, Smith, 339,703, and Smith, 362,674 were all machines for this purpose and were all designed upon the same theory, which was to re-establish the normal position of the web by tilting one end of the roller higher than the other, thus causing the web to run askew, and so to move along the roller itself. This tilting was effected by a mechanism set in operation as soon as the edge of the web touched it on either side, if the web ran sidewise upon the bar. It is not necessary to enter into the details of these inventions. They are relevant for this purpose only to show that the re-establishment of the normal position of a traveling web by edge control automatically acting upon the roller itself was known in 1873. Of course, none of these patents touched automatic musical instruments, or the combination of web and tracker.

More closely relevant are the two patents of Cottrell, 477,352, and Lyon, 642,141. Each of these applies likewise to a traveling sheet or web, and was primarily designed, unlike the other patents, for printing presses. The divergence of the sheet from the normal position in both cases by forcible contact moves a pendant arm aft. If moved enough, this arm, which is one pole of an electric current, touches, or breaks from, another arm, constituting the other pole, and, when the current is established or broken, it sets in motion a restoring mechanism, which, in the case of Cottrell, shifts the roller itself laterally into normal position, and, in the case of Lyon by a skew roller, shifts the sheet upon the roller. Both Cottrell and Lyon would read upon the first three claims of the patent in suit, were the word "edge" substituted for the word "surface"; and, if claims 5 and 10 contemplate edge control, they differ from either Cottrell or Lyon only by the fact that the combination is of a tracker-bar with a traveling sheet.

Of specific inventions to regulate the lateral displacement of note-sheets on musical instruments there is only one, which is Clarke, 625,744. This was a device for accomplishing precisely the same result as the patent in suit, but it was not automatic. By means of a thumb-screw the tracker could be shifted laterally, and the openings in the tracker be preserved in proper registration with the note-sheet. It had various disadvantages, one of which was that it took some time to perform it, during which the discords so produced must continue. It differed from Cottrell and Lyon, however, in that there was no fixed proportion between the degree of lateral restoration and the movement of the sheet.

Two other inventions adapted to musical instruments are Tremaine & Pain, 552,796, and Fleming, 621,963. Both of these operated by surface control, but they were designed to establish, not lateral, but longitudinal, adjustment. They were to keep in synchronism two simultaneously moving rollers, and so to play a harmonious duet. The first operated by a double bellows through a most complicated mechanism. It is relevant to the patent in suit only as showing surface control through the uncovering by the sheet of apertures in the tracker-bar, and the connection of these apertures with a supplementary bellows so adjusted as to uncouple the driving clutch of either roller and so to arrest it, till the other had established with it proper synchronism. Fleming operates through the surface of the sheet by means of electric contact points and magnets. In this respect it is analogous to figure 2 of the patent in suit, as Tremaine & Pain is to figures 1 and 3. In these patents, also, it should be observed that there is no fixed proportion between the degree of the restoration effected and the movement of the sheet. I mention this because the complainant somewhat relies on it as showing novelty, though it is hard to see why. O'Connor nowhere suggests that feature as an element of his patent, and his disclosure in figure 3 directly contradicts it, because in that machine the correction depends directly upon the progress of the "take-up" roll, just as in Cottrell, Lyon, or any of the earlier edge control patents.

This shows that there remained open for invention the following possibilities: Automatic control of moving webs without trackers, by their surface; automatic control of webs with trackers, by surface or edge. No one, I think, would contend that it was invention to adapt the automatic control of web and tracker to a musical instrument, especially as the common instance of such web and tracker was in automatic musical instruments. O'Connor invented lateral surface control for webs both with and without trackers. There remained, therefore, open to him as an unclaimed possibility edge control for webs in combination with tracker; and the sole question here is whether his claims may be expanded to include that, although he does not differentiate the application of his invention to the web alone from its application to the combination of web and tracker. In saying this I am assuming that the idea of Cottrell, if applied to web and tracker, would have constituted an invention in itself, which it seems to me would have been the case. The reason why his claims when limited to a combination of web and tracker should not be so expanded is simply the entire absence of any indication that he had the edge control in mind, together with the positive limitations contained in the patent itself of all the invention to surface control. It is, of course, not enough to justify the expansion of claims that the claims might have been expanded without losing patentable novelty, nor does it make any difference whether the patentee did not think of the application which he omitted, or whether, having thought of it, he supposed it would not be a valid, or practical, invention, and so voluntarily abandoned it.

To meet the difficulties in the patent itself, the complainant urged that his invention should be regarded as a pioneer. In support of this he says quite truly that he was the first to make possible an 88-note piano player. Theretofore, it had been possible practically only to make a 65-note player within manageable limits of the art. The deviations which were inherent in an unregulated note-sheet were so great as only to admit an aperture of one sixty-fifth of the total length of the note-sheet, and to reduce the aperture to one eighty-eighth resulted in discords. The question is whether this constituted a "pioneer invention." That phrase does not admit of exact definition, but perhaps as good as any is that of Mr. Justice Brown in *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537, 561, 562, 18 Sup. Ct. 707, 718, 42 L. Ed. 1136, where he says that a pioneer patent must be one "covering a function never before performed, a wholly novel device, or one of such novelty and importance as to mark a distinct step in the progress of the art, as distinguished from a mere improvement or perfection of what had gone before."

In this case the function had been performed before. It was performed, though not automatically, by Clarke in the patent which has been mentioned, and it was performed from the outset automatically, though imperfectly and inadequately, by the rollers of automatic musical instruments. I refer to the fact that all such rollers have flanges at either end, which are designed to keep, and do keep, the web in lateral adjustment, and so keep them in registration with the tracker, though they do so well enough only to allow of a 65-note sheet. The fact that these flanges did not permit of an accurate enough control to allow an 88-note player does not meet the fact that they were used, just as Clarke's patent was used, to accomplish this very function, and they did perform it, within limits.

Nor is it true that O'Connor's was a wholly novel device, which is the second suggestion of Mr. Justice Brown. Perhaps surface control was a new device at least when used to control lateral deviations, but edge control was not a new device to control such deviations, at least as shown in Cottrell. O'Connor does not claim the pneumatic means as new in the art, and, as I have shown, his invention, whatever it might have been, did not include restoration means operating out of relation to the forward movement of the sheet.

Finally, not only was the device not wholly new, but it was not one of such novelty or importance as to mark a distinct step in the progress of the art as distinguished from a mere improvement or perfection of what had gone before; because the result was precisely an improvement or perfection upon the flange control, as I have said. Or it may be stated as an automatic adjustment of the device of Clarke, as shown by Tremaine & Pain

and Fleming. I do not mean to suggest that to combine together these elements was not a meritorious and excellent invention, for I think it was, nor that it did not require real inventive skill, and was not patentably novel. All that, however, does not make it a "pioneer," unless it takes its place at the head of the art in means or result, which this patent does not. In one sense, it is, of course, true that any invention must be a distinct step in the progress of the art, but the pioneer step must be in a new direction, not along the path already indicated by what has gone before. Moreover, even in the case of a pioneer patent, the claims cannot be expanded so as to cover devices which are clearly excluded, and, as I have already tried to show, the language of the specifications coupled with the claims themselves do not admit of the necessary expansion without disregarding the express limitations which O'Connor chose to impose upon himself for whatever reason that may have been.

The third method of approach is to consider the file-wrapper itself. Of course, in considering the file-wrapper, the authorities repeatedly hold that the clear meaning of the claims cannot be limited by what took place in the Patent Office. On the other hand, it is the constant practice of courts in the interpretation of the language found in the patent to consider the estoppels arising from the file-wrapper as a legitimate method of interpreting the intent of the patentee. It is quite true that claims 5 and 10 were not substantially changed at any time in their course through the Office, but it does not at all follow from that that the statements of the patentee in relation to claims which were challenged may not be relevant, where the language used in the unchanged claims is substantially the same as the language in respect of which his statements were made, which is the case in this patent. As originally presented, claims 1, 2, and 3 were four in number, of which the first three concerned only the rectification of a traveling sheet, without tracker. Against them were at once cited Cottrell and Lyon, in the action of August 16, 1900. To meet the objection, O'Connor might have changed those claims alone, and as to his other claims have relied upon the novelty of the application of Cottrell and Lyon to a sheet in combination with a tracker. This, however, he did not do, but amended his specifications generally by the insertion already quoted of lines 55-61 on page 1, and of lines 96-98 on page 2. These words limited the scope, not alone of the first three claims, to which objection had been made, but of the whole patent, making clear that he conceived his invention to consist in avoiding edge control. His remarks also in the same communication of January 18, 1901, leave no doubt of his own interpretation of the effect of these words and of his conception at that time of his invention as limited to surface control. Thus he says: "The citations from the prior art are typical examples of the objections which are sought to be obviated or remedied by the present invention. The pendant rods O and O' of Cottrell and the lever of Lyon are, when brought into operation, pushed aside by physical contact with the web.

* * * The edge of the paper continues to rub against the rods or levers, which are liable to tear or turn over the edges of the web, before the latter is restored to place. This might not be objectionable for some uses, particularly where the paper is run through the machine only once, as in printing machines and in paper bag machines, or where the paper is thick and strong. But where the paper is thin or delicate, and especially where the same paper is required to run repeatedly through the machine, as in the case of automatically operated musical instruments, and similar machines, the use of such a means or levers resting against the edges of the paper is undesirable. This would be particularly true in case of the perforated paper webs employed as note-sheets, in which it frequently happens that a longitudinal series of perforations lies near to the edge so that the latter would very easily be turned over edgewise by such devices as those of the references."

The changes in the specifications and these remarks seem to have satisfied the examiner as to claims 1, 2, and 3, but he still objected to the word "interposition" as used in the first four claims, in the action of February 5, 1901, especially in view of figures 1 and 3 of the specifications. To meet this objection, in his communication of March 30, 1901, the patentee changed the word "interposition" to "surface," and in the accompanying remarks he said: "This invention resides not in the form, arrangement or any other

peculiarity of these 'contact devices,' either electrical or pneumatic, but in 'devices for guiding or restoring the web to its normal position' when provided with either of these well-known forms of contact means when 'held out of operation by the interposition of the web.'" We have here an explicit statement that the invention "resides" in the fact that the restoring devices shall be held out of operation by the web, which can only mean surface control. There is no suggestion that in some forms of the invention, not covered by claims 1 to 4, it may "reside" in other combinations, no limitation of this general language, but a statement apparently meant to apply to the invention in all its forms. He further concludes the same communication as follows: "In claim 1, however, he (O'Connor) has yielded to the preference of the examiner, and substituted the word 'surface,' thus clearly expressing a characteristic feature, in which all the present devices differ from those of the patents previously cited, which operate to push the guiding devices into operation by the action of the edges of the web." Here, again, the patentee clearly shows that the differentiation of claims 1, 2, and 3 from the citations made applies to all his devices, and not simply to those in which the web is not in combination with the tracker.

This disposes of all the claims except claim 15, which reads as follows: "In combination with mechanism employing a traveling sheet or web, a tracker provided with an adjustable guide-opening." The question here is as to the "adjustable guide-opening." When originally presented on November 12, 1901, this claim was followed by claim 16, which reads as follows: "The combination in an instrument of the class specified of a tracker provided with a guide-opening and means for adjusting the said opening laterally of the sheet." This was at once objected to by action of November 21, 1901, upon the ground that the drawings did not show any means for lateral adjustment. To this objection, on November 29, 1901, O'Connor responded by an argument, which, I must confess, seems to me quite conclusive of the validity of the claim. He showed that a swivel adjustment, such as was the only possible alternative of lateral adjustment, would have been inefficient for the obvious purposes of any adjustability whatever; but the examiner repeated his objection, and, although there was talk of an appeal in O'Connor's communication of August 13, 1903, no appeal was ever taken and the rejection of the claim stood. In view of this, therefore O'Connor on well-recognized principles of law assented to the examiner's ruling that the specifications did not disclose lateral adjustment, which is the only kind of adjustment provided in Exhibit 4. Claim 15 does not specify lateral adjustment, but it seems clear that, when O'Connor assented to the rejection of a specific claim for lateral adjustment, he cannot insist upon that by way of construction of claim 15 which will include implicitly and by interpretation what had been expressly disallowed. Therefore no fair intendment of any of the claims in question can be held to include Exhibit 4, unless I should treat them like the "nose of wax, which may be turned and twisted in any direction," and into which Mr. Justice Bradley says that courts must not permit claims to be transfigured. *White v. Dunbar*, 119 U. S. 47, 51, 7 Sup. Ct. 72, 30 L. Ed. 303. It is no hardship to O'Connor to be limited to the invention which he so specifically defined and which he obviously alone intended. The edge control, which he asserts to be in all cases unsatisfactory, and especially in the case of sheets which must be repeatedly used, may now prove to be of advantage; if so, he was wrong in thinking the contrary, and another man, adopting edge control, has made a new invention, even if he has adopted some of the elements of O'Connor's combination. To seize upon an idea which O'Connor rejected and to prove it fruitful and feasible is surely not to infringe his patent. Moreover, there is a strong presumption that there is patentable novelty between the two, one not being an improvement upon the other (*Kokomo Co. v. Kitselman*, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689), and this is especially the case when the earlier patent is repeatedly cited against the subsequent patent, as was the case (*New Jersey Wire Co. v. Buffalo Metal Co.*, 135 Fed. 1021, 68 C. C. A. 672, and [C. C.] 131 Fed. 265, 268).

There remains only the question of Exhibit 3, which is a precise copy of O'Connor's patent and a clear infringement. Up to the date of the transfer of O'Connor to the plaintiff, no one claims that this structure was not licensed,

nor has the complainant shown any infringement by the use of Exhibit 3 after the expiration of the license so given. Of course, it was no infringement to manufacture O'Connor's patent while his license lasted, and, in order to bring the defendants into a court of equity, he must show either that after the expiration of the license the patent was infringed, or that the defendant thereafter threatened to infringe it. He has shown neither of these things, and his bill must therefore fail.

Let a decree pass dismissing the bill, with costs.

L. W. Southgate and W. K. Richardson, for appellant.
Philip C. Peck, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree affirmed, with costs.

**INTERURBAN RY. & TERMINAL CO. v. WESTINGHOUSE ELECTRIC
& MFG. CO.**

(Circuit Court of Appeals, Sixth Circuit. March 24, 1911.)

No. 2,080.

1. PATENTS (§ 107*)—ANTICIPATION—PRIOR ABANDONED APPLICATION.

An abandoned application for a patent is not a bar to a patent to a later applicant, either as negativing novelty or as a printed publication.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 150; Dec. Dig. § 107.*]

2. PATENTS (§ 81*)—PRIOR PUBLIC USE—SUFFICIENCY OF EVIDENCE.

In order to defeat a patent by evidence of prior public use more than two years before application for the patent was made by another, the proof must be very clear and definite, and as a general proposition mere oral testimony, depending on the memory of the witnesses, without the production of any visible sign or contemporary memoranda certainly fixing the character of the alleged anticipating structure, will not be regarded as sufficient, although such rule is not inflexible.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. § 81.*]

3. PATENTS (§ 324*)—SUITS FOR INFRINGEMENT—PRELIMINARY INJUNCTION—REVIEW OF ORDER.

The general rule which should govern the appellate court in reviewing orders granting preliminary injunctions in patent cases is that the order will not be disturbed, unless it clearly appears that the court below has exercised its discretion upon a wholly wrong comprehension of the facts or law of the case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. § 324.*]

4. PATENTS (§ 297*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION—EFFECT OF PRIOR DECISIONS.

When there has been a prior adjudication sustaining a patent and the infringement thereof in the same or in another circuit, where its validity was contested on full proofs, a Circuit Court should, on motion for preliminary injunction, sustain the patent and leave the determination of its validity to the final hearing; and the rule is more emphatic when the former decision was by a court in the same circuit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481-488; Dec. Dig. § 297.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. PATENTS (§ 306*)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where a patent in suit has only a very short time to run, and the interruption to defendant's business may be seriously affected by the granting of a preliminary injunction, it may be properly refused, on the giving of a sufficient bond to respond to any decree for damages recovered.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 500, 501; Dec. Dig. § 306.*

Grounds for denial of preliminary injunctions in patent infringement suits, see note to Johnson v. Foos Mfg. Co., 72 C. C. A. 123.]

6. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—CONTROLLING SWITCH FOR ELECTRIC RAILWAYS.

An order granting a preliminary injunction against infringement of the Lange & Lamme patent, No. 518,693, for a controlling switch for electric railways, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Suit in equity by the Westinghouse Electric & Manufacturing Company against the Interurban Railway & Terminal Company. From an order granting a preliminary injunction, defendant appeals. Affirmed.

C. V. Edwards, for appellant.

L. F. H. Betts, for appellee.

Before SEVERENS, WARRINGTON, and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. This is an appeal from an order granting a preliminary injunction by the court below, restraining the appellant from infringing, pendente lite, claims 13 and 14 of patent No. 518,693 granted to Lange & Lamme for improvements in controlling switches for electric railways. The patent was issued April 24, 1894. This patent was the subject of a former suit in equity brought by the same complainant against the Electric Controller & Supply Company of Ohio in the Circuit Court for the Northern District of Ohio, for the infringement of the same claims as are herein alleged to be infringed by the present defendant. In that case the validity of this patent, so far as respects the claims 13 and 14, was upheld, and upon proof showing infringement thereof the court entered a decree for the complainant. The defendant appealed to this court, where, in an opinion delivered by Judge Knappen, upon full consideration of all the grounds alleged, particularly the former patents relied upon as anticipating the Lange & Lamme invention, this court sustained the validity of the invention and affirmed the decree of the lower court. 171 Fed. 83, 96 C. C. A. 187. In the present case, in addition to the former patents shown in the former case, the defendant relies upon newly discovered evidence, and claims that this additional evidence is so conclusive of anticipation and former use as to satisfy the court that these claims of the patent in suit are invalid; in other words, that the proof of the anticipatory matter is now so complete as to show that the lower court was in error in granting the preliminary injunction here complained of. It seems to be conceded by counsel for the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appellant that this court would not depart from its former ruling on the patent in suit without satisfactory evidence of other facts which ought to induce a different conclusion in respect to the validity of the patent, and undoubtedly that is the reasonable thing for the appellant to expect.

We come, then, to the consideration of the question, and it is really the only question presented by the case, whether in fact the showing now made is such that the court ought to reach a different conclusion and hold the patent to be invalid. The new facts principally relied upon consist of an application for a patent filed in the Patent Office by one Frank B. Rae on April 13, 1891, for an electric motor controller of an improved construction so nearly resembling that of the Lange & Lamme patent as to seriously endanger the latter patent, if Rae's application had been diligently prosecuted to the issuance of a patent thereon. But for some reason, after having rested in the Patent Office, it was abandoned and allowed to become forfeited on February 20, 1896, about five years after the application had been filed. Evidence was offered which it is claimed tends to show that, before and after this application was filed, public use was made of this invention, extending back more than two years before the filing of the application of Lange & Lamme. We will consider first the application and the filing thereof in the Patent Office:

The defendant claims that the pendency of that application at the time of the filing of the later application was sufficient to defeat the patent obtained by Lange & Lamme. But this contention cannot be maintained. It may be conceded that, if Rae had pursued his application and had obtained a patent, such a consequence might have followed. But Rae's application was not pursued. No patent was ever granted. The result was that, on the forfeiting of his application, the whole proceeding became void. There was nothing in the circumstance that it had been in the files of the Patent Office which was of a character such as to defeat the validity of the Lange & Lamme invention.

"Novelty is not negatived by any prior abandoned application for a patent. Abandoned applications for patents are not, by the statutes, made bars to patents to later applicants. They furnish no evidence that the processes or things they describe were ever made or used anywhere. Being only pen and ink representations of what may have existed only as mental conceptions of the men who put them upon paper, they do not prove that the processes or things which they depict were ever known in any country. Nor can they be classed among printed publications, for they are usually in writing, and are not published by the Patent Office." Walker on Patents (4th Ed.) c. 3, § 58.

The statute defines the circumstances required to effect such a result. The applicable provision is that of the third clause of section 4920 of the Revised Statutes (page 3395, U. S. Comp. St. 1901), which in defining the defenses which may be made to a patent says:

"(3) That it had been patented or described in some printed publication prior to his supposed discovery or invention thereof."

As has been said, an application for a patent pending in the office is not such a printed publication as the statute contemplates, and, indeed, it is not a publication at all. Then with regard to the alleged

prior use of the Rae invention. While his application for a patent is of no importance, so far as it is to be regarded as an anticipation of Lange & Lamme's invention, we think it might have value in ascertaining the character of the thing so publicly used, though its value would be somewhat impaired by the fact that the structure might have been, as is perhaps generally the case, improved after the alleged use and before the application was finally made. The settled rule is that, in order to defeat a patent by evidence of prior public use more than two years before application for a patent is made by another, the proof must be very clear and definite, and as a general proposition it has been held that mere oral evidence, depending on the memory of the witness or witnesses, without the production of any visible sign or contemporary memoranda certainly fixing and defining the character of the alleged anticipating structure, will not be regarded as sufficient. Still it has been held that this rule is not inflexible, and upon the testimony of witnesses who are shown to be familiar with the thing or matter described, if it is so definite and specific in detail as to induce the court to feel that it is treading on safe ground, the fact may be established without the production of any tangible exhibit. And in one case decided by this court the evidence, although it was based only upon the memory of witnesses, was so clear and convincing, and the familiarity of the witnesses in regard to what they were testifying about so well established, that we were satisfied beyond a reasonable doubt that the alleged anticipating structure was what it was claimed to be. American Roll-Paper Co. v. Weston, 59 Fed. 149, 8 C. C. A. 56.

In the case before us we have read with much care the testimony offered by the defendant to show the alleged prior public use. There is evidence which is satisfactory to show that some sales were made of controllers by the company with which Rae was associated, but in two important particulars the testimony is too vague and indefinite to be safely relied upon. First, in regard to the character and construction of the controllers which were sold. This company had been accustomed to make and sell, or at least to sell, machines of the kind which were in use, before the Rae invention or Lange & Lamme's and it is easy to see how, after the lapse of time, details of the machines so sold might not be accurately recollected, and the testimony upon that point seems uncertain. And, secondly, in regard to the time when the alleged use was made, the evidence is not specific, and is contradictory, so much so that we should not feel at all secure, if we were to rely upon it as fixing the time of the alleged use. We may well suppose that the court below took the same view of it, and, if it did, we have no settled conviction that the court was in error. The result is that the defense of anticipation, either by the Rae application or by the alleged prior public use, is not made out, or in respect to the matter of prior public use, not so clearly made out, that we should be warranted in reversing the order, which in the circumstances rested largely in the discretion of the court.

Several previous patents were produced, and were relied on at the hearing in the court below, which, it is said, have never been shown in any previous litigation upon this patent, and which are urged as

anticipations of the patent in suit. Those most nearly in point are two British patents, one to Johnson granted in 1875, and to Hartnell granted in 1886. The latter especially would seem to crowd the Lange & Lamme patent into close quarters; but there are differences, and upon final hearing and more critical examination it may be found that these differences are sufficient to leave ground for the patent in suit. We are not to be understood as indicating an opinion which might embarrass the Circuit Court when it reaches this point for final judgment. It is sufficient now to say that, if the lower court doubted the efficacy of these new patents to show anticipation of the patent in suit, we cannot say that such doubt was without foundation.

The rules by which the appellate court should be governed in reviewing orders for preliminary injunctions have been stated in several cases decided by this court. The general rule is that the order will not be disturbed unless it clearly appears that the court below has exercised the discretion, which it admittedly has, upon a wholly wrong comprehension of the facts or law of the case. We select the following for illustration: Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 26 C. C. A. 107; Loew Filter Co. v. German Am. Filter Co., 107 Fed. 949, 47 C. C. A. 94; Proctor & Gamble Co. v. Globe Refining Co., 92 Fed. 357, 34 C. C. A. 405; Paris Medicine Co. v. W. H. Hill Co., 102 Fed. 148, 42 C. C. A. 227. And when there has been a prior adjudication sustaining a patent and the infringement thereof in the same or in another circuit, where the validity of the patent has been contested upon full proofs, the Circuit Court should, upon a motion for preliminary injunction, sustain the patent, and leave the determination of the question of its validity to be determined upon the final hearing. Duplex Printing Co. v. Campbell Printing Press & Mfg. Co., 69 Fed. 250, 16 C. C. A. 220. In this case the rule was fully illustrated. For although we sustained an order for a preliminary injunction, yet on appeal from the final decree, we approved the dismissal of the bill. Campbell Printing Press & Mfg. Co. v. Duplex Printing Co., 101 Fed. 282, 41 C. C. A. 351. This rule is even more emphatic when the former decision was made by a federal court in the same circuit.

It is contended that other suits depending upon the validity of this patent, one in the Circuit Court for the Southern District of Ohio and another in the Circuit Court for the District of New Jersey, in which the Bullock Electric Manufacturing Company, which is the manufacturer of the machines used by this defendant is a party, are pending, and the court below ought not to have granted this injunction until those suits shall have been determined. But if the facts are as suggested, we are not aware of any valid legal reason why they should be regarded as sufficient to deter the court from granting an injunction when demanded by the owner of the patent.

The time during which the plaintiff's patent has yet to run is now very short, and, while we must affirm the order, we think, in view of the serious consequences which might occur to the defendant from an interruption of its business, equity will be best subserved by suspending the injunction, upon the defendant's giving a bond sufficient in

form and substance to be approved by the clerk of the Circuit Court, conditioned to satisfy all such damages as the plaintiff may sustain from the continuation of the use of the invention in the defendant's business, to be hereafter found and decreed.

The order of the court below will be affirmed, with costs, subject to the provision indicated in regard to suspending the injunction on giving bond by the defendant. If a bond is not given, the injunction may issue.

VARLEY DUPLEX MAGNET CO. v. OSTHEIMER et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 121.

DEPOSITIONS (§ 94*)—ADMISSIBILITY IN EVIDENCE—NONRESPONSIVENESS OF ANSWERS—DISCRETION OF COURT.

Where a party, examined in France by commission, was asked if he saw a certain person in May, and by the next question to state the conversation between them, and he answered that he did not remember seeing such person in May, but saw him in March, and in answer to the next question stated the conversation which occurred then, it was within the discretion of the court to admit such testimony, although not responsive; the adverse party having had notice on the return of the deposition of the correction in the date, and not having applied for leave to cross-examine on the point.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 269-275; Dec. Dig. § 94.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by George R. Ostheimer and another against the Varley Duplex Magnet Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 159 Fed. 655, 86 C. C. A. 523.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendants in error, who were plaintiffs below. The judgment was entered upon a verdict rendered on a retrial of the action. A judgment in favor of plaintiffs on the first trial was reversed for error in the admission of testimony. In our opinion (159 Fed. 655, 86 C. C. A. 523) the cause of action was briefly stated as follows:

"The action is to recover damages for fraud. The complaint alleges in substance that in December, 1899, defendant gave a written option to one Drake for the sale of 49 patents issued in certain foreign countries for \$600,000, to expire March 1, 1900, but with the privilege of a further extension for four months upon the payment of \$20,000; that Drake entered into negotiations with the plaintiffs for the sale of said option and patents; that, the original option being about to expire, the plaintiffs, induced by and relying upon the statements therein, paid to the defendant two-thirds of said \$20,000 for the extension thereof, the remaining one-third being paid by said Drake; that at the time of the execution of said option, and of said payment, the defendant did not own said patents, and the same had not been issued or applied for; that the representations contained in said option were false and fraudulent; and that the plaintiffs have been damaged. The answer admits the making of the option and the payment for the extension thereof. It also admits that the patents mentioned in the option had not been actually is-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

sued at the time it was extended, but alleges that Drake was aware of this fact, and informed the plaintiffs, who at all times knew and approved the situation regarding the patents. It denies any statement which ever deceived or misled the plaintiffs."

Since the first trial the answer has been amended so as to deny that the two-thirds of \$20,000 was paid by the plaintiffs, but it avers that the \$20,000 was paid to the defendant by Drake, whom it alone knew, and it denies that the payments were made in the belief that the European patents had actually been issued.

Treadwell Cleveland (Harry W. Hayward, of counsel), for plaintiff in error.

Coudert Bros. (F. R. Coudert and Paul Fuller, Jr., of counsel), for defendants in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). Our former opinion may be consulted for a statement of the testimony and its bearing upon the issues. Plaintiff's case on the first trial rested upon depositions of Drake and of the plaintiffs, taken upon written interrogatories at Paris, France. Before the second trial these three witnesses were re-examined, and their new depositions, or rather parts of them, read in evidence. Defendant's counsel also read in evidence parts of Drake's first deposition. In consequence the testimony in the two records is not identical; but we do not find any such changes in the second record as would call for a restatement of the case. Drake made some statements in his second deposition which, it is contended, are in conflict with some of his earlier statements; but the effect of these variations upon the credit to be given to his later statements was a matter for the jury's consideration.

A letter from Drake to Varley, dated March 22, 1900, which was not in the former record, was also read in evidence by defendant. Defendant places much reliance upon a statement which it contains. Drake therein rehearses various telegrams and letters which had passed between himself and Varley, and in so doing writes:

"I have not referred to your letter written simultaneously with your telegram of the 25th of February reading: 'Option holds good to March 15th. Full particulars by letter.' This very complete and interesting letter was promptly received, and full consideration given thereto by my two immediate associates."

The "very complete and interesting letter" thus referred to is manifestly one dated February 21, 1900, and it contains a statement which would seem to indicate that the patents, or some of them, had not then been issued. Defendant's counsel argues that, if that letter was shown to plaintiffs before they paid their money, they must have known that there were no patents, and so could not have been deceived. He calls attention to the circumstance that the passage quoted is a statement of plaintiffs' own witness, and makes much of the circumstance that they were not asked if it had been shown to them.

So far as we can make out from the record, there is nothing mysterious about the failure to interrogate plaintiffs as to the truth of Drake's quoted statement. The plaintiffs' depositions were taken in Paris October 25, 1909. Drake's deposition was not taken until Janu-

ary 12, 1910. For aught that appears the October depositions may, before that date, have been returned to the circuit court. It is impossible to tell from the transcript of record whether or not the letter was shown to Drake when his deposition was taken. There is no statement that the signature is his. All that appears is that on the second trial, in March, 1910, "defendant's counsel offers letter from Drake to Varley, dated March 22, 1900. Received in evidence, and marked 'Defendant's Exhibit B4.'" For aught that appears, the first intimation that plaintiffs had of Drake's having made the statement contained in the letter may have been when it was thus offered in evidence at the trial.

But, if it be assumed that it was produced and came to the knowledge of plaintiffs' counsel when Drake was examined in Paris two months before, the circumstance that plaintiffs were not asked specifically about Drake's statement was merely one for the consideration of the jury. When the letter of March 22d was admitted in evidence as a writing of Drake's, it was proof only of the fact that on that date Drake informed Varley that he had shown the prior letter to his immediate associates. Neither he nor any one else testified that he did so show it. Ephrussi testified that at the time plaintiffs paid the money he did not know that the patents had not been issued; that "on the contrary [he] understood that they had been issued, otherwise [he] would not have paid the money." The judge instructed the jury that it was for them to find whether Drake in some way communicated what Varley had written him to the plaintiffs, telling them that they might, if they wished, infer that he did. This was all defendant was entitled to, as the testimony stood, and the finding of the jury on this question must be taken as conclusive.

On the former appeal we held that Drake was not the agent of the plaintiffs, was not their partner, and that his knowledge of the non-issue of the patents could not be imputed to them. There is nothing in the present record to call for a different conclusion. It appears here, as it did on the first trial, that defendant made and subsequently signed a written statement, which untruthfully indicated that 49 patents had been issued; that the statement was prepared for the purpose of promoting the sale of foreign patents to "prospective buyers"; and that it was given to Drake for the purpose of negotiating the sale to others than Drake. We see no reason to modify the conclusion expressed in our former opinion that plaintiffs had made out a case which entitled them to go to the jury. No exceptions to the charge have been argued, and the question whether the verdict was against the weight of evidence cannot be considered here.

We do not find that the original prospectus contained statements so inconsistent with the offer to sell "patents issued in England, France, Germany, Belgium, Austria, Norway, and Sweden, making 7 countries —7 patents in each country" that the jury would have been justified in holding that plaintiffs were negligent in not themselves making an independent search of the records of those countries to ascertain whether these 49 patents, or any of them, had been issued. There was no error in the court's refusal to charge as requested on the question of plaintiff's negligence.

Error is assigned to the admission of testimony by Ostheimer as to what took place at a conversation between himself and Drake held between March 1st and 15th. This witness was examined by commission. The fourteenth direct interrogatory asked him if he saw Drake between the 1st and 5th of May. The fifteenth asked, if the answer to the fourteenth question was yes, what took place at the interview. To the fourteenth question the witness answered:

"I do not remember seeing Mr. Drake between the 1st and 15th of May, 1900; but I did see him between the 1st and 15th of March, 1900."

And in reply to the fifteenth question he gave the substance of the interview. Objection was taken to the latter part of the first answer, on the ground that it was "not responsive," and exception reserved. We agree with the trial judge that the objection was good formally, but without merit in essence, and think his disposition of it was a proper exercise of discretion. It is suggested that, since the direct interrogatory referred to a conversation in May, instead of March, defendant was misled, and did not frame cross-interrogatories, because he was not concerned with a conversation in May. But, when the commission was returned, he was advised of the correction made in the date; and, if he had then applied for leave to cross-examine on that point, relief could have been given.

Exception was reserved to the refusal of the court to allow Varley to identify a letter of February 21st as being the letter referred to by him in a telegram sent by him on February 25th, reading as follows:

"Option holds good to March 15th. Full particulars by letter."

We think the witness should have been allowed to answer the question put to him; but the refusal was not harmful, because it is abundantly manifest from the series of letters and telegrams that the one referred to was that of February 21st.

We find nothing that calls for discussion in any of the other assignments of error.

The judgment is affirmed.

MOTION PICTURE PATENTS CO. v. ULLMAN et al.

(Circuit Court, S. D. New York. September 27, 1910.)

MONOPOLIES (§ 21*)—RIGHTS OF MEMBERS—SUIT FOR INFRINGEMENT—ALLEGATION OF UNLAWFUL CONSPIRACY.

It is no defense to a suit for infringement of a patent that the complainant and third persons have entered into an illegal combination or conspiracy in restraint of trade; and such defense is not aided by an allegation in the answer that the suit is not brought in good faith to prevent infringement, but for the purpose of making such conspiracy effective.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. § 21.*]

In Equity. Suit by the Motion Picture Patents Company against Isaac W. Ullman, Sidney M. Ullman, Duff C. Law, William Paley,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and the Film Import & Trading Company. On exception to answer. Exception sustained.

Richard N. Dyer and Leonard H. Dyer, for complainant.
Littlefield & Littlefield, for defendants.

HOLT, District Judge. I think the great weight of authority is to the effect that it is no defense to a suit for the infringement of a patent that the complainant and third parties have entered into a combination or conspiracy in restraint of trade, in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]). Strait v. National Harrow Co. (C. C.) 51 Fed. 819; Otis Elevator Co. v. Geiger (C. C.) 107 Fed. 131; General Electric Co. v. Wise (C. C.) 119 Fed. 922; Independent Baking Powder Co. v. Boorman (C. C.) 130 Fed. 726; Motion Picture Patents Co. v. Laemmle (C. C.) 178 Fed. 104. Such a suit is not based on contract, but on tort, and, of course, the fact that a man has entered into some illegal contract does not authorize others to injure him with impunity.

The paragraph of the answer excepted to alleges that the suit is not brought in good faith to prevent infringement, but for the purpose of carrying out and making effective a contract, combination, and conspiracy between the complainant and the Eastman Kodak Company to monopolize the manufacture, sale, and use of moving pictures in violation of the Sherman act. But the bill is a simple bill for the infringement of a patent. Its purpose is apparent on its face. The mere assertion that it has some other purpose is not an allegation of fact, and is not admitted by the exception. If incidentally it effects some other result, that does not authorize infringement.

My conclusion is that the exception should be sustained.

DUNBAR V. CHARLESTON & W. C. RY. CO.

(Circuit Court, S. D. Georgia, N. E. D. April 8, 1911.)

DEATH (§ 31*)—DEATH OF HUSBAND—WIFE'S RIGHT TO SUE—TEMPORARY SEPARATION.

That a wife was temporarily separated from her husband at the time he was killed while in defendant's employ did not affect her right to recover damages under the employer's liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1909, p. 1171]) for his wrongful death.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31.*]

At Law. Action by Sallie Dunbar, as administratrix of the estate of her deceased husband, against the Charleston & Western Carolina Railway Company, to recover damages for wrongful death under the employer's liability act. At the trial the defendant's counsel offered to prove that the wife, who was suing for the death of her husband, was temporarily separated from him. This was objected to. Objection sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A. L. Franklin and William H. Fleming, for plaintiff.
W. K. Miller, and F. B. Grier, for defendant.

SPEER, District Judge. This question goes pretty far into the subject of domestic relations. Now that is a subject which in its comprehensiveness and intricacies is not surpassed by any other. If the courts, in estimating the value of the husband's life to the wife, should permit counsel to inquire into the degree of affection or intimacy existing between them, such are the complexities of connubial existence, it would probably be true that we could never come to the end of such a case. Of course, it is suspected (perhaps by the uninformed) that husbands and wives have occasionally what are sometimes called "tiffs." Sometimes they separate; but, if they are separated only in one of these "tiffs," it is usually only an elongation of the "tiff." *Varium et mutabile semper famina.* A liberal translation may be found in the familiar verse:

"O woman, in our hours of ease,
Uncertain, coy, and hard to please;
When pain and anguish rend the brow,
A ministering angel thou."

It may be, then, that this wife, though for the time "out with" her Simon, if she had heard he was in trouble, would have flown to become his ministering angel. Separations of this sort do not amount to much. The law gives the parties the *locus paenitentiae*; that is (again translating liberally), the opportunity of getting together again. The unhappy pair will be presumed to live in the relationship of husband and wife until they have been separated in the manner pointed out by law. This is by a decree of divorce *a mensa et thoro*, that is (translating strictly), "from bed and board," or *a vinculo matrimonii* (translating liberally), from the sacred bonds of matrimony.

I do not think, therefore, it is safe or justifiable at all in an inquiry of this sort to inquire into the degree of felicity or infelicity which existed between the husband and wife.

LOUISVILLE & N. R. CO. v. SILER et al.

(Circuit Court, E. D. Kentucky, at Frankfort. January 9, 1911.)

No. 686.

1. CONSTITUTIONAL LAW (§ 80*)—ENCROACHMENT ON JUDICIAL POWERS—STATE REGULATION OF RATES—VALIDITY OF KENTUCKY STATUTE.

Act Ky. March 10, 1900 (Laws 1900, c. 2; Ky. St. § 820a; Russell's St. § 5358), known as the "McChord Act," which makes it the duty of the State Railroad Commission, on complaint thereof, to hear and determine whether a railroad company is exacting extortionate rates, and, if it so finds, to make and fix just and reasonable rates to be charged thereafter, does not confer judicial powers on the commission, in violation of sections 27, 28, 109, and 135 of the state Constitution, which provide for the distribution of the executive, legislative, and judicial powers of the

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state, designate the judicial tribunals, and forbid persons in one department from exercising any power belonging to either of the others, since the end to be attained by the hearing is the fixing of rates, which is legislative, and to which the determination of the reasonableness of existing rates is a necessary preliminary.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 143-147; Dec. Dig. § 80.*]

2. CONSTITUTIONAL LAW (§ 298*)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY.

To entitle a railroad company to invoke the protection of the constitutional provision against the taking of property without due process of law against the enforcement of rates prescribed by a state, it must be shown that the rates are confiscatory, in that they do not yield the minimum reasonable return, as otherwise it will not be deprived of property by their enforcement, and what constitutes such reasonable minimum, as a judicial question, depends upon circumstances and locality, so that a general characterization of a rate as unreasonable is insufficient.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 847; Dec. Dig. § 298.*]

3. CONSTITUTIONAL LAW (§ 318*)—DUE PROCESS OF LAW—RIGHT OF REVIEW.

A statute authorizing a railroad commission to fix rates to be charged by a railroad company, which requires notice to the company and a hearing before the power can be exercised, is not unconstitutional, as depriving the company of its property without due process of law because it does not also provide for a judicial review of the order after it is made.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. § 318.*]

4. CONSTITUTIONAL LAW (§ 70*)—JUDICIAL POWERS—STATE REGULATION OF RATES—VALIDITY OF STATUTE—PENALTIES FOR VIOLATION.

If an order of a state railroad commission fixing rates to be charged by a railroad company is within the powers of the commission and otherwise legal, a court cannot rightfully pass on the wisdom of the penalties imposed by statute for its violation or the right to impose them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 131; Dec. Dig. § 70.*]

5. CONSTITUTIONAL LAW (§ 211*)—EQUAL PROTECTION OF LAWS.

It is only when a particular person or class of persons, including corporations, is denied equal privileges in comparison with those extended to others similarly situated, that the provision of Const. U. S. Amend. 14, which guarantees equal protection of the laws, is violated.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 211.*]

6. CONSTITUTIONAL LAW (§ 126*)—IMPAIEMENT OF CONTRACTS—RIGHTS GIVEN IN RAILROAD CHARTER.

Under Const. Ky. § 190, requiring corporations then in existence in the state to accept its provisions in order to have the benefit of future legislation, among which provisions is one that every franchise granted shall be subject to revocation, alteration, or amendment, a railroad company, which filed its acceptance after the passage of Ky. St. § 573 (Russell's St. § 2160), which provides that the provisions of all charters and articles of incorporation inconsistent with its provisions shall stand repealed, and by section 816 (section 5353) prohibits the taking of extortive rates by any railroad, and also after passage of McChord Act, March 10, 1900 (Laws 1900, c. 2; Ky. St. § 820a; Russell's St. § 5358), authorizing the State Railroad Commission to fix rates, cannot attack the constitutionality of such statute, or of orders made under it, on the ground of impairment of a contract made by its charter authorizing it to charge certain rates.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 325, 366-369; Dec. Dig. § 126.*]

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7. COURTS (§ 489*)—JURISDICTION OF FEDERAL COURTS—STATE REGULATION OF RATES—VALIDITY OF ORDERS OF STATE COMMISSION.

The federal courts can review an order of a state railroad commission fixing railroad rates, made pursuant to a valid state law, only on the ground that it is beyond the authority of the commission, as being confiscatory.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1324; Dec. Dig. § 489.*]

8. COMMERCE (§ 34*)—STATE REGULATION OF RATES—POWERS OF STATE—INDIRECT EFFECT ON INTERSTATE RATES.

The fact that a railroad company, in making up its schedule of through rates filed with the Interstate Commerce Commission, has taken the sum of its local rates in each state, does not remove such local rates from the jurisdiction of the state for the purpose of regulation, nor does the fact that a reduction of local rates by the state may incidentally place the company under the business necessity of reducing its interstate rates affect the legality of such reduction.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 26, 82; Dec. Dig. § 34.*]

9. CARRIERS (§ 18*)—RATES—REGULATIONS—ENFORCEMENT.

The individuals to whom the State Commission ordered the railroad company to make repayment of the excessive past rates are necessary parties to a bill in equity seeking to set aside the award of repayment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 16–18; Dec. Dig. § 18.*]

10. APPEAL AND ERROR (§ 479*)—SUPERSEDEAS.

Where the decision is appropriate to be reviewed, and where an absolute denial of the preliminary injunction would operate to destroy complainant's alleged rights, the restraining order will be continued pending the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2251–2256; Dec. Dig. § 479.*]

In Equity. Suit by the Louisville & Nashville Railroad Company against Adam T. Siler, Lawrence B. Finn, and Lew P. Tarlton, individually and as constituting the Railroad Commission of Kentucky. On motion for preliminary injunction. Denied.

The complainant brings its bill in equity against defendants as individuals, and also as officials composing the Railroad Commission of Kentucky. The complainant was organized as a corporation under a special charter granted by the state of Kentucky. It is invested with the usual powers of a steam railroad company, and is maintaining and operating a number of lines of railroad, comprising a main stem and various divisions and branches within the state, which are described in the bill by names and mileage. The complainant has its office and principal place of business in the city of Louisville, and the defendants are the duly qualified and acting members of the Railroad Commission mentioned, having their principal office in the city of Frankfort, in the Eastern district of the state, of which they are all inhabitants.

Complaint is made that on August 10, 1910, the Railroad Commission, upon petition of a number of shippers, passed an order declaring certain rates then exacted by the railroad company for the transportation of certain commodities between points named within the state were extortionate, unjust, and unreasonable, forbidding their further exaction, fixing lower rates, and declaring them to be just and reasonable, and, further, that the Commission at the same time passed another order finding that the complaining parties had paid sums in excess of just and reasonable rates for transportation of such commodities between the points alluded to, and that each was by said order awarded a stated sum of money representing such excess. Quite a number of grounds are stated in the bill against the validity of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

these orders. These grounds, so far as they need be passed upon, are stated in the opinion; but it may be said in passing that the statute under which the orders were made is claimed to be violative alike of certain provisions of the Constitutions of the state of Kentucky and of the United States.

The complainant prayed, among other things, for an injunction to restrain defendants individually, and also jointly as the Railroad Commission, from continuing the orders of August 10th, from recommending or causing to be instituted any prosecution by indictment or otherwise against complainant or its officers, agents, or employés, to recover any fine or penalty imposed by the statute, or on account of complainant's failure or refusal to put the orders, or either of them, into force on any of its lines, from filing a certified copy of the order finding and awarding reparation in the office of the clerk of the circuit court in any of the counties having jurisdiction, or into or through which any of the lines of road are operated concerning which the award was made, or in the office of the clerk of the circuit court of any other county within the state, and that meantime, and until a decision could be had upon complainant's motion for an injunction, a restraining order be granted immediately enjoining the acts in question, and that on final hearing the injunction as prayed be made perpetual, the orders be declared null and void, and that a mandatory injunction be issued commanding defendants to recall and revoke each of the orders, and also that the statute under which the orders were made be declared and adjudged to be in violation alike of the Constitutions of the state of Kentucky and of the United States.

On motion, and a showing of irreparable injury, a restraining order was on September 7, 1910, granted by Judge Cochran in accordance with the prayer of bill, to continue until September 26th of that month, when the motion for an interlocutory injunction would be heard. On the last-named date certain affidavits were filed by the parties, respectively, and on the same date defendants filed two demurrers, one to the whole bill and the other to part of the bill, stating various grounds. But Judge Cochran for good reasons declined to sit further in the case, stating that he would certify this fact to Hon. Henry F. Severens, presiding Circuit Judge. Upon proceedings specially taken Circuit Judge Warrington was designated to sit in the case, and in accordance with the act of Congress approved June 18, 1910 (36 Stat. p. 557, c. 309, § 17), District Judges Sanford and Denison were by the Circuit Judge called to his assistance on the hearing and determination of the application for an interlocutory injunction and all questions arising in the cause. On November 3, 1910, the parties to the cause appeared by their respective counsel, and leave was given to complainant to file an amended bill of complaint, and to defendants to amend their demurrers to conform to the bill of complaint as amended. The cause was argued on that day, and the printed record and briefs were filed on the 25th of the month.

By the amendment it is averred that at the date of the orders in dispute complainant owned and was operating lines of railroad in 57 counties of Kentucky, and that its "average total mileage of railroad lines then operated in that and other states was 4,590.55 miles"; that the rates which the Commission found to be extortionate on August 10, 1910, were less than the maximum charter rates which complainant was authorized to exact; that the new rates fixed by the Commission were arbitrary, unreasonable, and discriminatory for a number of reasons stated, which so far as necessary will be passed on in the opinion.

Albert S. Brandeis, Henry L. Stone, and Wm. G. Dearing, for complainant.

Jas. Breathitt, Atty. Gen., Jno. Francis Lockett, Asst. Atty. Gen., and McCord, Hines & Norman, for defendants.

Before WARRINGTON, Circuit Judge, and SANFORD and DENISON, District Judges.

PER CURIAM. In view of the character of some of the federal questions presented by the averments of the bill as amended and of

the good faith in which the questions are urged, it is scarcely necessary to say that jurisdiction of the cause is vested in this court through the presence of those questions, no matter how it shall be found necessary to decide them, or whether to decide them at all. *Siler v. Louisville & N. R. R. Co.*, 213 U. S. 175, 190, 29 Sup. Ct. 451, 53 L. Ed. 753. The nature of the federal questions made is for the most part like those relied on in that case, and they will be stated as we progress. The power of the Railroad Commission of Kentucky to adopt and enforce the orders in dispute, is denied.

By section 209 of the state Constitution, adopted September 28, 1891, a commission was established, to be known as the "Railroad Commission," comprising three commissioners, whose powers were to be—

"regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations and receive the same compensation as now conferred, prescribed and allowed by law to the existing railroad commissioners." *Russell's St. Ky.* 1909, p. 1622.

March 10, 1900, the General Assembly of Kentucky passed a law, known as the "McChord Act," entitled:

"An act to prevent railroad companies or corporations owning and operating a line, or lines of railroad and its officers, agents, and employés from charging collecting or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions." Laws 1900, c. 2; Ky. St. c. 32, § 820a; *Russell's St.* 1909, pp. 1303, 1304.

The body of the act need not be set out, for it appears in 213 U. S. at page 179, 29 Sup. Ct. 451, 53 L. Ed. 753, as also 183 U. S. at page 484, 22 Sup. Ct. 165, 46 L. Ed. 289, and in 103 Fed. at page 218. The rate order now in dispute was made by the Commission in virtue of this act. As pointed out in the statement, the constitutional validity of the act is challenged under both the state and federal Constitutions. The act has never been passed upon by the Court of Appeals of Kentucky; but it is claimed that certain other statutes which in parts at least were kindred to portions of the McChord act have been passed upon by the Court of Appeals. We shall consider these later.

The McChord act was, however, held to be violative of certain provisions of the state and federal Constitutions in a decision rendered by Judge Evans shortly after the enactment of the law. *Louisville & N. R. R. Co. v. McChord*, 103 Fed. 216. That suit was one of several brought by a number of railroad companies operating roads within the state, to enjoin the Commission from carrying into effect any of the provisions of the act. Upon appeal directly to the Supreme Court, it was held that the suits and the orders made in them were premature, and the decrees were reversed and the cases remanded, with direction to sustain the demurrers and dismiss the bills. The constitutional validity of the McChord act was not determined. *McChord v. Louisville & Nashville Rd. Co.*, 183 U. S. 483, 22 Sup. Ct. 165, 46 L. Ed. 289.

Later the complainant in the present suit filed a bill in this court to enjoin the enforcement of a certain order made by the Railroad Commission providing maximum rates for the transportation of all commodities by the railroad company to and from all points within the state. The cause was by stipulation submitted to Judge Cochran, who followed the decision of Judge Evans, holding the McChord act to be unconstitutional. Upon direct appeal to the Supreme Court it was again found unnecessary to pass upon the validity of the act, the court holding that "under the statute the Commission had no authority to make a general tariff," and the final decree of the Circuit Court was for that reason affirmed. *Siler v. Louisville & Nashville R. R. Co.*, supra, 213 U. S. 198, 29 Sup. Ct. 457, 53 L. Ed. 753.

We are thus brought to a consideration of the validity of the present orders of the Commission. It appears by the bill that on May 30, 1910, a number of distilling companies located and engaged in Kentucky in the manufacture, storage, and preparation for market and sale of whisky and other distillery supplies and products, and in shipping the same to and from their respective plants, filed a joint petition as plaintiffs with the Railroad Commission against the present complainant, alleging that their respective plants were located upon lines and at certain named stations of the railroad, which are specially set forth in the bill; that in order to operate their distilleries it was necessary for each of the distilling companies to cause to be transported over the railroad lines, from various points shown in an exhibit filed with the petition, certain commodities required in the manufacture and preparation of whisky and other distillery products for the market; that complaint was made in the petition of certain rates which were being exacted for transportation of the commodities mentioned between stated points of origin and destination both within the state of Kentucky, and in connection with the rates so charged certain other rates were set forth for transportation of the same commodities between the same points, which had been charged prior to March 25, 1910; that the rates complained of were in excess of the former rates, and were extortionate, unjust, and unreasonable, while the former rates had been maintained for many years, and were just and reasonable; and that the petitioners prayed that the Commission would, after due notice and investigation, make and fix just and reasonable rates, and not in excess of those charged prior to March 25, 1910. By a second paragraph the petitioners claimed reparation to the extent of the difference between the former rates and the existing rates; the amount claimed by each petitioner being specifically stated, with a prayer accordingly. It is further stated in the original bill:

"The evidence did show, and it is a fact, that on and for a number of years prior to the 25th day of March, A. D. 1910, this complainant did have in effect upon its lines of railroad, from the points of origin aforesaid to said points of destination, rates of transportation covering supplies for distilleries that were established and effective alone for the benefit of owners of distilleries located at said last-named points, and with a purpose to encourage the manufacture of whisky at said points on the lines of railroad of complainant; and it was shown by the evidence at said hearing, and it is a fact, that said rates (all of which were contained in the tariffs of complainant) did not apply to shipments of said supplies from the same points of origin to the same points of destination, when said supplies were in-

tended for other uses than those of the distilleries, but, on the contrary, in such cases, the rates that were contained in its tariffs were, in fact charged, collected, and received as aforesaid for like supplies when intended for distillery uses. * * * That at all such times said rates, applicable when the supplies were not for the use of distilleries, were the same rates which, under the tariff effective March 25, 1910, were made applicable also to said supplies when for such use; in other words, the difference in the rates based upon the intended uses of the supplies was abolished, but the rates made effective March 25, 1910, as aforesaid, were and are reasonable and just."

Plainly the issues before the Commission involved the question whether the rates which had for years prior to March 25, 1910, been charged for the carriage of distillers' supplies and products within the state of Kentucky, should be restored, and whether the difference between those rates and the rates which had been put into effect on March 25, 1910, and thereafter exacted down to the filing of the petition before the Railroad Commission, was recoverable as reparation. Upon these issues and the evidence adduced, as well as the arguments and briefs of counsel for both sides, the Commission on August 10, 1910, made the two orders. The recitals contained in these orders are alike, so far as they relate to the filing of the written complaint and exhibits, to the transmission of certified copies thereof by mail to the railroad company, to a written communication from the chairman of the Commission advising the railroad company of the general nature of the complaint and fixing a day for the hearing more than 10 days thereafter for the time and place of hearing and the appearance of the parties by their counsel, to the fact of testimony being adduced and the hearings upon both testimony and arguments, including the filing of briefs, and following these in the first order this appears:

"The Commission, now being fully advised, is of the opinion, and so orders, that the rates now charged, collected, and received by defendants for the transportation of the commodities to and from the points hereinafter stated are extortionate, unjust, and unreasonable, and by charging said rates defendant is and has been guilty of extortion. It is therefore, ordered that said defendant, Louisville & Nashville Railroad Company, be and it is hereby forbidden to charge, collect, or receive for the transportation of said commodities to and from said points wholly within the state of Kentucky rates in excess of the following rates for the transportation of said commodities to and from said points, as follows: [See table attached.] The Commission is of the opinion that the foregoing rates so fixed for the transportation of said commodities from and to said points are just and reasonable. It is further ordered that this order be entered upon the records of this office, and a copy thereof, attested by the secretary of the Commission, be furnished defendant."

The table of rates comprises 3 places of origin, viz., Covington, Newport, and Louisville, Ky., and 16 places of destination in that state. The rates are in cents per 100 pounds upon packages, barrels, bottles, etc., containing unnamed articles, while the articles that are named consist of corn, rye, malt or barley, and iron hoops. As we understand these rates, they are the same as the rates that were prior to March 25, 1910, charged for the carriage of distillers' supplies and products, but that they are by the order extended to all shippers of like packages and commodities between the points and along the lines

named, without regard to the occupations of such shippers; whereas the rates put in force by the railroad company on and after March 25, 1910, were the same as those previously exacted of shippers between said points on said lines who were not engaged as distillers. In other words, the uniform standard of rates as fixed by the railroad company on March 25, 1910, was that previously charged to nondistillers, while the uniform standard fixed on August 10, 1910, by the Railroad Commission was the one existing prior to March 25, 1910, in favor only of distillers. For reason stated later it will not be necessary or proper to pass upon the other order of the Commission.

The first objection to the rate order is that the statute in virtue of which it was made in terms confers judicial power upon the Commission in violation of sections 27, 28, 109, and 135 of the state Constitution. The first two of these sections provide for the distribution of the powers of government, legislative, executive, and judicial, and forbid persons in one of these departments from exercising any power belonging to either of the others. By section 109 the judicial power, both as to matters of law and equity, is vested in the Senate when sitting as a court of impeachment, the Court of Appeals, and "the courts established by this Constitution"; and by section 135:

"No courts, save those provided for in this Constitution, shall be established."

As regards the question of rates, it is made the duty of the commission by the McChord act, upon complaint made, or information received, or reason to believe that a railroad company is exacting "extortionate freight or passenger rates," * * * to hear and determine the matter as speedily as possible." The act requires the Commission to give the company complained of not less than 10 days' notice by letter mailed to an officer or employé stating the time and place of hearing, the nature of the complaint or matter to be investigated, and "to hear such statements, arguments or evidence offered by the parties as the Commission may deem relevant." The act further provides that, should the Commission determine that the company is or has been "guilty of extortion," the Commission "shall make and fix a just and reasonable rate," which the company may exact "for like services thereafter rendered." The rates so fixed—

"shall be entered and be an order upon the record book and signed by the Commission and a copy mailed to an officer or employé of the company affected. This rate shall be in force and effect at the expiration of ten days thereafter, and may be revoked and modified by an order likewise entered of record."

The contention is that the words employed in clothing the Commission with authority clearly indicate a design to invest the Commission with judicial power. It is clear that the rate-making power is vested, and that this is legislative in character. But it is said that the exercise of this power is dependent upon the duty "to hear and determine" whether the corporation "is or has been guilty of extortion," and that this duty cannot be performed without exercising judicial power.

Before the McChord act was passed, the General Assembly of Kentucky by section 816 (Russell's St. § 5353) had defined the exaction by any railroad company of "more than a just and reasonable rate of toll and compensation for the transportation of passengers and freight" as "extortion," and had by section 819 (Russell's St. § 5356) penalized such exaction as an offense. But a judgment and verdict of conviction under an indictment charging such offense was reversed in the case of *Louisville & Nashville Railroad Co. v. Commonwealth*, 99 Ky. 132, 136, 35 S. W. 129 (33 L. R. A. 209, 59 Am. St. Rep. 457), because the statute leaves "uncertain what shall be deemed a just and reasonable rate of toll and compensation." Further, in the course of the opinion it was said (at pages 139, 140, of 99 Ky., and page 131 of 35 S. W. [33 L. R. A. 209, 59 Am. St. Rep. 457]):

"No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury."

Apparently the difficulty encountered in that case was sought to be remedied by the McChord act; for the very mode prescribed by the McChord act for the exercise of the rate-making power was calculated to furnish the Commission with the facts necessary to ascertain what a just and reasonable rate would be, and also to put to the test the reasonableness or not of the existing rate. It is hardly conceivable in a contested case that the mind could be prepared to resolve the question of "extortion," or "extortionate rate," without obtaining and considering facts tending to show what would be a fair compensation for the service in issue; and those very facts would inevitably establish a standard for at once fixing a reasonable rate to be charged for the service and testing the character of the existing rate. The circumstance, then, that these two results must necessarily be reached in the manner pointed out, is one that ordinarily attends the exercise of legislative power.

It would therefore seem that the true intendment of the statute respecting rates was to bestow legislative power, rather than judicial power, and that the legislative power given to fix a just and reasonable rate to be enforced in the place and stead of the unreasonable rate necessarily embraced as part of the legislative power itself the right to find the fact of unreasonableness of the existing rate. If this latter right cannot be included in the grant of the legislative power so vested, without violating the provisions of the state Constitution concerning judicial power, it is difficult to see how any rate-making power at all could be granted. We cannot believe that the judicial power, which was designed to be alone vested in the courts mentioned in those provisions, was intended to prevent either the legislative department or the Railroad Commission from investigating into and finding facts which are but the necessary and familiar incidents and conditions to right legislation.

In reaching this conclusion we do not overlook the particular words used, or their sequence, as set forth in the McChord act. Even if

section 816 of the Kentucky Statutes did not survive the decision in Louisville & Nashville Railroad Co. v. Commonwealth, before cited, in the sense that as there stated (99 Ky. 140, 35 S. W. 131 [33 L. R. A. 209, 59 Am. St. Rep. 457]) "the statute may be invoked as merely declaratory of the common law" respecting the legislative meaning intended to be attached to the word "extortion" in its relation to railroad rates—that is, that any charge of "more than a just and reasonable rate" was "extortion"—still one of the accepted meanings of the word "extortion" is to overcharge, and the word could not have been used in any other sense in the McChord act, because the penalties embraced by that statute are not inflicted for practicing extortion through exaction of the old rates, but for exacting "a greater or higher rate, toll or compensation, for like service thereafter rendered than that made and fixed by said Commission." The established common-law meaning of reasonable rates and inhibition of unreasonable rates must then have been in the minds of the lawmakers when using the phrases "fix a just and reasonable rate for freight or passengers" and "guilty of extortion." It should be noted that in Siler v. Louisville & Nashville R. R. Co., 213 U. S. 175, 197, 29 Sup. Ct. 451, 457, 53 L. Ed. 753, Justice Peckham did not seem to observe any vice in the use of the word "extortion." He said:

"The statute, it will be remembered, gives no power to the Commission to fix rates, unless it has already determined that the rates complained of, or which it has investigated upon its own information, are extortionate, after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate, there can be no fixing of rates in that particular."

That this Railroad Commission was not exercising judicial power, within the inhibited sense of the state Constitution, is shown, we think, by the decision of the Supreme Court in *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150. The suits there involved were brought to enjoin the Virginia State Corporation Commission from publishing or enforcing its order fixing passenger rates to be charged on railroads operating in the state of Virginia. One of the grounds averred was that the rates were confiscatory. The Commission was created by the state Constitution, and its powers were defined by that instrument and certain statutes passed in pursuance of it. It was invested with legislative, judicial, and executive powers. It was contended that the proceedings before the Commission were proceedings in a court of the state, which the federal courts were by Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), forbidden to enjoin, and that the decision of the Commission made the legality of the rates res adjudicata. The contentions made under the demurrers and pleas necessarily put to the test the nature of the power the Commission was exercising when issuing the orders, receiving and considering the evidence offered, and finally fixing the disputed passenger rates. Speaking for the court in respect of these proceedings, Mr. Justice Holmes said (211 U. S. 226, 29 Sup. Ct. 69 [53 L. Ed. 150]):

"But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which at another moment, or in its principal or dominant

aspect, is a court such as is meant by section 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future, and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind. * * *

Again (211 U. S. 227, 29 Sup. Ct. 70 [53 L. Ed. 150]):

"And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision made upon it, is determined by the nature of the act to which the inquiry and decision lead up. * * * So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case."

We do not fail to observe the fact that the Virginia Commission does not seem expressly to have been required, as the Kentucky Commission is, to find the existence of extortionate rates as a condition to the right to fix and supplant them by new ones. But, apart from the practical necessity for the Virginia Commission to look into and consider the existing rates, no perceivable distinction is to be found between the nature of the power exercised at the hearing and investigation into evidence of facts upon which the new rates must of necessity be based, and that of the power to pass upon the question of extortionate rates then existing. All such matters are but preliminary and inducive to the exercise of the main power—the legislative rate-making power—and are as certainly mere incidents as are any other facts leading up to the making of the legislative rate; for it must constantly be borne in mind that everything found in such investigation is in effect but collateral to the new rule which is thereafter to be formulated and applied.

This, of course, suggests and we feel keenly the force of the statement made by the late Justice Brewer in *Interstate Commerce Commission v. Railway Co.*, 167 U. S. 479, 499, 17 Sup. Ct. 896, 900 (42 L. Ed. 243):

"It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

It is to be noticed that the question with which the learned justice was then confronted was whether the Interstate Commerce Commission was possessed of the rate-making power. He was not considering a question like the one we are now endeavoring to solve. He was dealing with a claim that the rate-making power was to be implied from other powers with which the Commission was expressly clothed. It might well have been that an order of the federal Commission finding that any given rates were unreasonable and ordering the railroad company to cease and desist from further exacting such rates, which order would become *prima facie* evidence of the fact of unreasonableness in any proceeding brought in a court to enforce it, was judicial

in its nature; but if we rightly interpret the decision in *Prentis v. Atlantic Coast Line*, we are unable to see why a finding of the same character respecting particular rates made by a commission having express power to fix, and with a purpose to fix, new and reasonable rates for future enforcement and operation, should not be regarded as merged in the new rule, and treated as part of the legislative power exercised in adopting the rule. *Southern Pac. Co. v. Bartine*, 170 Fed. 725, 775. Indeed, Justice Brewer must have had in mind, when using the language before quoted, a principle similar to that expressed in *Prentis v. Atlantic Coast Line*; for at an earlier stage of his opinion in *Interstate Com. Commission v. Railway Co.*, he said (167 U. S. 494, 17 Sup. Ct. 898 [42 L. Ed. 243]):

"Congress might itself prescribe the rates; it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable."

While it is true, as before stated, that the Kentucky Court of Appeals has not passed upon the question now under consideration, yet it has decided one or two questions which are so far kindred as in some degree to disclose that court's views of the powers of the Commission. *Louisville & Nashville Railroad Co. v. Commonwealth*, 106 Ky. 633, 51 S. W. 164, 1012, 90 Am. St. Rep. 236, decided less than a year before the passage of the McChord act, was an appeal by the railroad company from a judgment of conviction under an indictment for violating the long and short haul clause provision of the statute of the state. The statute was enacted in pursuance of section 218 of the state Constitution, which forbids a railroad company to charge greater compensation for transporting passengers or property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, subject, however, to a proviso that upon application to the Railroad Commission the carrier may after an investigation by the Commission be authorized to charge less for longer than for shorter distances, and the Commission may from time to time prescribe the extent to which such carrier may be relieved from the operation of the section. To carry this into effect, the statute was enacted making a violation of a provision similar to one contained in the section an offense, and imposing a fine of not less than \$100 nor more than \$300, to be recoverable by indictment in a named circuit court. The matter in controversy concerned the transportation of coal; the company charging a greater sum for a shorter distance than it charged for longer distances. The company justified the difference in rates on the ground that it was necessitated by competition. The matter had pursuant to the statute been submitted to the Railroad Commission, and after investigation had upon notice and hearing that body made an order in writing "declining to exonerate the company from the operation of the provisions" of the statute, and thereafter, at its suggestion, appellant was indicted, found guilty and fined. In the course of the opinion of the court it was said (106 Ky. 638, 51 S. W. 166 [90 Am. St. Rep. 236]):

"To hold that only railroad men understand rates, or that they shall be allowed alone to fix the rates, and that no tribunal can review their decision as to what rates are reasonable, is to put in their hands a power dangerous to the welfare of the community. * * * It was the aim of the Constitution to require the railroads in the state to treat all localities fairly and with equality; but, as differences of conditions ever varying would constantly arise, it prescribed no fixed rule, but created a tribunal to act as umpire between the railroads and the people, and decide when and to what extent a greater charge might be made for a short than for a long haul under like circumstances and conditions. * * *

Again (106 Ky. 640, 51 S. W. 166 [90 Am. St. Rep. 236]):

"The power to determine this matter must be vested somewhere, and, the Constitution having created a special tribunal for this purpose, we cannot see that its provisions are subject to any of the objections raised by appellant."

It is true that no new rates were in that case fixed by the Commission; but since the Constitution and statute forbade exaction of the charges if the transportation in both instances was furnished "under substantially similar circumstances and conditions," the Commission necessarily passed upon that question when adopting its order or refusal as certainly as it would have decided it if the order had been to exonerate. The inevitable effect of its conclusion was that the company's rates were unreasonable. In principle nothing more than this respecting the exercise of judicial power was done in the present case. The case was taken to the Supreme Court of the United States (*Louisville & Nash. Rd. Co. v. Kentucky*, 183 U. S. 503, 515, 22 Sup. Ct. 95, 46 L. Ed. 298), and that tribunal, in spite of the existing federal rule respecting long and short hauls, felt itself bound to accept the meaning of the state enactment as construed by the state court, and, passing upon the federal questions presented, affirmed the Court of Appeals.

Still another order of the Railroad Commission was upheld by the Court of Appeals in *Commonwealth v. Louisville & Nashville Railroad Co.*, 120 Ky. 91, 85 S. W. 712. The action was one to compel the railroad company through mandatory process to furnish greater facilities for the transportation of passengers and freight between points named in the state. It appeared that a proceeding was begun before the Railroad Commission against the railroad company, and upon due notice a hearing was had by the Commission upon evidence. The Commission decided that the public had a right to the use of "local passenger and freight train service over the railroad from Shelbyville to Christiansburg as demanded." The company refused to comply with the Commission's order. One of the defenses was that the expense of compliance would entail upon the railroad company a heavy and continuous loss. Under certain statutory provisions railroad companies were required to run at least one passenger train each way on every day of the year, Sundays excepted. It was said in the opinion (120 Ky. 104, 85 S. W. 715):

"The power to regulate the relative rights and duties of the railroads and the public in this state has, in large measure, been delegated by the Legislature to the Railroad Commission, and, the provisions of the statute under which the commissioners acted in this case being reasonable, we can but conclude from the facts disclosed by the record that their determination of

the questions presented by the complaint upon which they acted was proper, and for the convenience of the public. Therefore the recommendation made by them should have been obeyed by the railroad companies; but, they having failed to do so, appellant could but resort to the courts for relief."

See, also, Pennington v. Wolfolk, 79 Ky. 13, which sanctioned the vesting of power not judicial in the county court. That was done under an earlier Constitution, but apparently not differing materially from the present one touching distribution of powers.

It is not disputed that the rate-making power is legislative in character (McChord v. Louisville & Nashville Rd. Co. [before cited] 183 U. S. 483, 495, 22 Sup. Ct. 165, 46 L. Ed. 289; Prentis v. Atlantic Coast Line [before cited] 211 U. S. 210, 226, 29 Sup. Ct. 67, 53 L. Ed. 150; Louisville & Nashville Rd. Co. v. Interstate Commerce Commission [decided April 10, 1910, by the Circuit Judges of the Sixth Circuit, Judge Severens announcing the opinion] 184 Fed. 118); nor that the power may be delegated (Louisville & Nashville Rd. Co. v. Interstate Commerce Commission, *supra*; Atlantic Coast Line v. N. C. Corp. Com., 206 U. S. 1, 19, 27 Sup. Ct. 585, 51 L. Ed. 933; Vil. of Saratoga Spgs. v. Saratoga G. Co., 191 N. Y. 123, 132-140, 146, 83 N. E. 693, 18 L. R. A. [N. S.] 713, presenting a review of New York and federal decisions concerning doctrine of delegated authority, and as to delegated power to fix rates). We are therefore constrained to hold that the McChord act is not violative of the judicial clauses of the Constitution of the state of Kentucky.

Another objection made to the constitutional validity of the McChord act is that neither that act nor any other contains a provision for appeal to any court from a final order of the Commission declaring an existing rate extortionate. This objection may be considered in connection with a still further one that is made on account of the penalties prescribed by the act. Both of these objections are in terms founded upon averments of the bill as amended and claims urged in argument, that the absence of the right of appeal and the severity of the penalties imposed are alike violative of the due process and equal protection clauses of section 1 of the fourteenth amendment.

As regards the claim that the constitutional guaranty of due process is violated by the rate order, the inquiry is whether the bill and affidavits show that complainant would through enforcement of the new rates be deprived of property. No averment is made either in terms or effect that the new rates would not yield a profit to the carrier; much less that the entire business would not do so. In the absence of a showing that property is taken, the protection of this guaranty cannot be invoked. What may be a reasonable rate or return, as a matter of legal policy, having due regard to encouraging the investment of capital in railroad enterprises is one question; but when the inquiry becomes a judicial problem, to be considered as involving the taking or not taking of the railroad's property, it is essentially a different question. The lawmakers, dealing with the legislative problem, might think that in successful business years a maximum return, for example, of 10 per cent. upon the investment would be reasonable. The courts, dealing with the judicial problem, are affected by locality

and attending risks and circumstances involved in the particular case, and apparently insist only upon a minimum return to the owner of property devoted to public use which will be reasonable (say, for example, 6 per cent.) upon the properly computed investment. An illustration of this rule may be found in the announcement made by Justice Peckham in *Willcox v. Consolidated Gas Co.*, 212 U. S. 19, 20, 29 Sup. Ct. 192, 53 L. Ed. 382:

"There is no rule as to any particular rate which any corporation subject to legislative control in the matter has a right to obtain without legislative interference. It depends upon circumstances and locality. In this particular case with reference to the risk attending the business and the locality where it is carried on, the complainant is entitled to a return, if it is possible, of 6 per cent. upon the fair value of its property actually used in its business of supplying gas."

In *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 174 Fed. 739, 747, 99 C. C. A. 1, 9, it was said by the present Mr. Justice Lurton respecting certain rates in dispute:

"It is plain that the rates of such a company may not be reduced to a point below a rate which will pay operating expenses, maintain the plant, and return a fair profit upon the capital actually invested."

It is to be observed of the decisions in those cases that the justices were speaking of the entire property and earnings of the companies involved. But there seems to be a distinction made between cases "in which a public service is distinctly intended and rendered," and cases "in which, without any intent of public service, the owners have placed their property in such a position that the public has an interest in its use." *Cotting v. Kansas City Stockyards Co.*, 183 U. S. 79, 93, 22 Sup. Ct. 30, 36, 46 L. Ed. 92. Thus, as respects the former class, in *Minneapolis & St. Louis Rd. v. Minnesota*, 186 U. S. 257, 267, 22 Sup. Ct. 900, 904, 46 L. Ed. 1151, where certain coal rates as fixed by a state railroad commission were involved, and one of the questions was "whether the tariff fixed by the Commission is wholly inadequate and not compensatory," Mr. Justice Brown said:

"While we have never decided that the Commission may compel such reductions, we do not think it beyond the power of the state Commission to reduce the freight upon a particular article, provided the companies are able to earn a fair profit upon their entire business, and that the burden is upon them to impeach the action of the Commission in this particular."

See, also, *San Diego Land Company v. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154.

There is, then, manifest room for vagueness and ambiguity in employing a word like "unreasonable" to characterize a rate. What might be regarded by a carrier as unreasonable might be considered by a court as just and reasonable.

Now, turning to the bill and affidavits in the present case, we find general averments that the new rates are unreasonable and absurdly low, etc. But the bill does not clearly tender an issue that can be said to involve confiscatory rates, and complainant's counsel state in their brief that complainant is not bound in this case to allege or prove that the new rates are confiscatory, and upon an oral argument the same counsel expressly disclaimed a purpose to rely upon any

contention that the new rates are confiscatory. This concession, we think, was but natural, in view of the history of the rates which the railroad company voluntarily maintained for years prior to March 25, 1910, as before pointed out. No averment is made touching the proportions in volume of distillers' traffic and of nondistillers' traffic, and it could not be assumed that the company had been carrying distillers' supplies and products at confiscatory rates, nor that the extension of those rates to all similar traffic on the lines in question would amount to the confiscation of property. In view, therefore, of the bill and the disclaimer of counsel, we think that argumentative statements like those contained in the form of affidavits should be, for the purposes of this preliminary injunction, disregarded. The result is that the rates in dispute must, so far, at least, as they are applicable to traffic originating and carried wholly within the state, be treated at this stage of the case as not unreasonable, in the sense of being confiscatory, but, on the contrary, as just and reasonable, and consequently as within the power of the Commission.

The issue, then, if any can be said to arise on this branch of the case, under the due process clause, is not presented through averment of facts, but by argument based on the legislative failure, through the McChord act or other statute, to provide for a judicial review of a rate-making order. It must be borne in mind, however, that the McChord act in terms provides for notice to the railroad company and a hearing, and a hearing before any rate-making order can be made, and that complainant was notified of the complaint and given opportunity to be heard upon it, and was in fact heard both by evidence and argument before the order was adopted, and, moreover, that the act further provides that no such order shall take effect until a copy of it is mailed to a representative of the railroad company, and until the expiration of 10 days thereafter. Was it necessary to provide both of the remedies mentioned, or at least the one for judicial review after the passage of a rate-making order, to avoid violation of the guaranty of due process?

In Cin., N. O. & Texas Pac. R. R. v. Commonwealth, 81 Ky. 492, 498, 502, 504, 505, complaint was made against an order of the Railroad Commission of Kentucky equalizing and increasing taxes laid upon railroad property. The companies were required through specified officers to make annual return under oath to the Auditor of Public Accounts of the mileage and average value per mile of the railroads, etc. Lack of due process was urged on the theory that there was no provision for notice and hearing before the order was made, or for revising or reviewing the order after it was made. It was not that the railroad companies did not have actual notice, or that they were not in truth heard, or even that the valuation placed was too high (pages 498, 502, 504, 505). After speaking of the term "due process of law" (page 509), Judge Pryor, in announcing the opinion of the court, said of the Commission (page 512):

"The time and place of the meeting, having been fixed by law, is notice to all, and if the reports of the chief officers of these corporations are to be regarded as an assessment and the commissioners a board of review, the act provides that they shall assemble at the Auditor's office in Frankfort, on

the 1st day of September in each year, for the purpose of fixing valuations, and with that view are required to examine the reports made by the officers of the roads. This is notice to the companies, and to require actual notice to every one interested, if this board has supervisory power over all property in state, would be altogether impracticable; nor will it answer to say that, because there are only a few lines of railroad within the state, actual notice could be readily given, for the courts would then be determining the constitutionality of the act by the extent of their supervisory power. As we construe the act, although in the nature of an original assessment, the parties had the right to be heard, and were in fact heard, before the board passing on the question of valuation."

The decision was affirmed in Kentucky Railroad Tax Cases, 115 U. S. 321, 333, 6 Sup. Ct. 57, 61, 29 L. Ed. 414. Justice Matthews, speaking for the court and of the annual return above mentioned, said:

"This return, made by the corporation through its officers in the statement of its own case, in all the particulars that entered into the question of the value of its taxable property, may be verified and fortified by such explanations and proofs as it may see fit to insert."

The learned Justice at a later portion of the opinion (115 U. S. 335, 6 Sup. Ct. 57 [29 L. Ed. 414]) disposed of a claim that there was no security against the arbitrary action of the Commission by stating that the possibility of such a result was but the necessary imperfection of all human institutions, which admits of no remedy. He also alluded to the fact that the tax had ultimately to be enforced by judicial proceedings. These decisions met with approval in San Diego Land Co. v. National City, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154, upon grounds which we regard as controlling. The decision in the San Diego Case involved the validity of constitutional, statutory, and municipal provisions for the regulation of water rates. One ground of objection was that those provisions did not furnish due process of law. One thing to be observed of the relevancy of the decision to the present case is the comment there made upon decisions involving railroad rate-making power. After distinguishing the case of Chicago, Milwaukee, etc., Railway v. Minnesota, 134 U. S. 418, 10 Sup. Ct. 462, 702, 33 L. Ed. 970, on the grounds that the Supreme Court of Minnesota had held that the state statute in question made the action of the Commission final and conclusive as to railroad rates and that the railroad companies were not at liberty in any form or at any time to question them (174 U. S. 748, 19 Sup. Ct. 809 [43 L. Ed. 1154]), Mr. Justice Harlan, in delivering the opinion of the court and speaking of the necessity of notice to appellant before fixing the water rates, said (174 U. S. 752, 19 Sup. Ct. 809 [43 L. Ed. 1154]):

"Was the appellant entitled to formal notice as to the precise day upon which the water rates would be fixed by ordinance? We think not. The Constitution itself was notice of the fact that ordinances or resolutions fixing rates would be passed annually in the month of February in each year and would take effect on the 1st day of July thereafter. It was made by statute the duty of the appellee at least 30 days prior to the 15th day of January in each year to obtain from the appellant a detailed statement showing the names of water rate payers, the amount paid by each during the preceding year, and 'all revenue derived from all sources,' and the 'expenditures made for supplying water during said time.' It was the right and duty of appellant in January of each month [year] to make a detailed statement, under oath, showing every fact necessary to a proper conclusion as to the

rates that should be allowed by ordinance. * * * Provision was thus made for a hearing in an appropriate way. The defendant's board could not have refused to receive the statement referred to in the statute, or to have duly considered it and given it proper weight in determining rates."

Allusion to the Kentucky Railroad Tax Cases, *supra*, follows, and then the learned Justice proceeds (174 U. S. 753, 19 Sup. Ct. 809 [43 L. Ed. 1154]):

"There is no ground to say that the appellant did not in fact have or was denied an opportunity to be heard upon the question of rates. On the contrary, it appears in evidence that the subject of rates was considered in conferences between the local authorities and the officers of the appellant. Those officers may not have been present at the final meeting of the city board, when the ordinance complained of was passed."

In view of the provisions made by the McChord act for notice and hearing, and the actual hearing and trial had upon evidence and argument in the instant case, we think it falls fairly within the decisions in the Kentucky Railroad Tax Cases and the San Diego Case. It can make no difference that the order so made upon notice and trial was final. As said by Justice Shiras respecting an order of this very Commission in Louisville & Nash. Rd. Co. v. Kentucky, 183 U. S. 503, 515, 22 Sup. Ct. 95, 100, 46 L. Ed. 298:

"Finality is a characteristic of the judgment of all tribunals, unless the laws provide for a review. Nothing is more common than the appointment of juries or commissioners to find the value of land taken for public use, or to assess damages to them, whose findings are deemed final."

Hence the present case does not fall within the ban of those decisions which deal with statutes or with orders of subordinate bodies denying both notice and hearing, or with rates either admittedly or manifestly confiscatory.

As regards the penalties fixed by the McChord act, the most that can be claimed is that through their excessive character the officers and agents of complainant, and also its property, would be imperiled by resort to judicial proceedings for the purpose of contesting the validity of the order fixing new rates. It is true that these penalties are severe. The provision is:

"And should said railroad company or corporation, or any officer, agent or employé thereof charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent or employé shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars, nor more than two thousand dollars, and for the third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars."

It is claimed in behalf of the Commission that under certain decisions of the Court of Appeals there can be but one offense, and one penalty of \$1,000 for that offense; but on behalf of complainant these decisions are sought to be distinguished on the ground that the statutes there involved related only to a single person or company, while here the act relates, not only to the carrier, but to each of its officers,

agents, and employés, in the sense that each could be prosecuted for committing the first, second, third, and subsequent offenses. It is also urged by the Commission that the penalties clause could be held void, and the rest of the act valid. Further, the Commission has presented affidavits disavowing any purpose to try to enforce the order through the penalties, at least until the validity of the order has been passed upon in a civil suit. It would seem that an order fixing just rates could be enforced in Kentucky by civil action. *Commonwealth v. Louisville & Nashville R. R.*, 120 Ky. 91, 85 S. W. 712; section 273 of the Civil Code of Kentucky.

If, then, the order fixing new rates is within the power of the Commission, a court cannot rightfully pass upon the wisdom of the penalties or the right to impose them. The question comes to be whether the railroad company is entitled to complain of the amount of fines, where it cannot aver and maintain that the rates to be violated are confiscatory. Surely this case is not like that of *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932. There the charge was that the rates were confiscatory, and the very drastic nature of the penalties, involving imprisonment, was calculated to deter the representatives of the railroad companies from attempting by judicial proceedings to protect the property against confiscation. In the course of the opinion Justice Peckham said (209 U. S. 147, 28 Sup. Ct. 449 [52 L. Ed. 714, 13 L. R. A. (N. S.) 932]):

"In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state) and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."

What we have said in respect of due process concerning new rates and the effect of the penalties applies in large measure to the claim respecting the additional guaranty of equal protection of the laws. If the rates in dispute are reasonable in the sense before pointed out, the complainant is manifestly accorded, both by the order and the statute, the same rights and privileges that are rightfully granted to every other railroad carrier. This is equally true as to the penalties. It is only when a particular person or class of persons (including corporations) is denied equal privileges, on comparison with those extended to others similarly situated, that the equal protection guaranteed by the fourteenth amendment applies. It cannot be necessary to comment upon the class of well-known decisions, which recognize and declare this rule. We, however, cite *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 335, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Louisville & Nashville R. R. Co. v. Melton*, 218 U. S. 36, 52, 30 Sup. Ct. 676, 54 L. Ed. 921; *Mobile, Jackson & Kansas City R.*

R. Co. v. Turnipseed, Adm'r (decided December 10, 1910) 219 U. S. 35, 31 Sup. Ct. 136, 55 L. Ed. —.

Complainant urges that its own rate-making power and its maximum rates were fixed by a special charter granted by the state prior to the date of the present Constitution, and are so far contractual as to prevent either the state or its Commission from interfering with the company's rights in this regard. The claim is that the railroad's rates, which were supplanted by the Commission's rates, were lower than those authorized to be exacted by the charter, and that the supplanted rates cannot, therefore, be said to be unreasonable, or the new rates reasonable. The contention, of course, is that the order of the Commission impairs the obligation of the charter contract, within the meaning of the inhibiting clause in that respect of the federal Constitution.

It is provided by section 3 of the Kentucky Bill of Rights that:

"Every grant of a franchise, privilege or exemption shall remain subject to revocation, alteration or amendment."

By section 59 of the state Constitution the General Assembly is forbidden to pass a local or special act giving to "any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes." And by section 190:

"No corporation in existence at the time of the adoption of this Constitution shall have the benefit of future legislation without first filing in the office of the Secretary of State an acceptance of the provisions of this Constitution."

It is averred in the bill that by a resolution of its board of directors, adopted July 11, 1902, complainant accepted the provisions of the present Constitution, and also the provisions of chapter 32 of the Kentucky Statutes, enacted April 5, 1893. That chapter applies to private corporations, including railroad companies and the Railroad Commission. The first article of the chapter relates to "General Provisions" and includes section 573 (Russell's St. § 2160):

"The provisions of all charters and articles of incorporation, whether granted by special act of the General Assembly or obtained under any general incorporation law, which are inconsistent with the provisions of this chapter concerning similar corporations to the extent of such conflict, and all powers, privileges or immunities of any such corporation which could not be obtained under the provisions of this chapter, shall stand repealed on September 28, 1897. * * *

Section 816, to which we have alluded as having been involved in the decision of Louisville & Nashville R. R. Co. v. Commonwealth, 99 Ky. 132; 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, was embraced in article 5, tit. "Railroads," of chapter 32 (Russell's St. §§ 5320-5418), and nearly two years prior to the acceptance by complainant of the Constitution the McCord act was passed. Even if complainant's right to maintain its charter rates was not repealed by section 573 in connection with 816, it is clear that such right was repealed through enactment of the McCord law and complainant's subsequent acceptance of the provisions of the Constitution. It cannot be either that complainant's charter rates or its rate-making power could survive and remain paramount to the rate-making power cre-

ated by the McCord act. The absolute inconsistency of such powers is apparent. Further, it is stated in the bill:

"That the contract between the complainant * * * and the commonwealth of Kentucky became and is no longer irrevocable or irrepealable."

But it is averred that the contract remains intact, and has never been repealed or revoked by any act of the Legislature, and the obligation thereof at the date of making the order in question was still in full force and effect. The argument in substance is that there has been no express repeal, and that none can be implied. But we think a complete answer to all this is to be found in the decision announced by Mr. Justice White in *Mo. Pac. Ry. Co. v. Kansas*, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472. It was claimed in that case that the Railroad Commission of Kansas could not by order require the company to run trains over the portion of its line which was maintained in the state of Kansas, because of its charter provision vesting in it the right to determine the time and manner of operating such trains. One of the reasons assigned was that:

"As the Legislature had not expressly amended or repealed the right, such a result should not be made to flow from the section conferring powers upon the Commission, as repeals by implication were not favored." 216 U. S. 272, 30 Sup. Ct. 334 (54 L. Ed. 472).

After referring to certain propositions stated and of a purpose to consider them, the learned Chief Justice said (216 U. S. 274, 30 Sup. Ct. 334 [54 L. Ed. 472]):

"Before doing so, however, we dispose of the question concerning the alleged impairment of a contract right, protected by the Constitution of the United States, which is formulated in the fourth proposition, by pointing out the twofold contradiction upon which the proposition is based. As it is not denied that the asserted charter right was held subject to the power of the state to repeal, alter, or amend, it follows that the proposition amounts simply to saying that an irrepealable contract right arose from a contract which was repealable. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 345 [29 Sup. Ct. 370, 53 L. Ed. 530]. Stating the contention in a different form, the same contradiction becomes apparent. As the argument concedes the existence of the legislative power to repeal, alter, or amend, and as it is impossible to assume that a legislative act had impaired a contract, without by the same token declaring that such act has either repealed, altered, or amended, hence the proposition relied upon really contends that the contract has been unlawfully impaired by the exercise of a power which it is conceded could lawfully repeal the contract."

A principle for finally testing the validity of the order now in question is stated in *Louisville & Nashville Railroad Co. v. Interstate Commerce Commission*, supra, where, respecting the reasonableness or not of an order, Judge Severens said:

"It is at this point that the judicial power over the subject may be invoked. And the rule by which it is exercised is that it will not interfere with the action of the Commission, unless it clearly appears that it is beyond its authority and injuriously affects some substantial right of the complainant—is confiscatory, to use that term in its broad sense. Whether it is so or not is the test of reasonableness in such a controversy."

This principle was announced by Mr. Justice White in *Interstate Com. Comm. v. Ill. Cent. R. R. Co.*, 215 U. S. 452, 470, 30 Sup. Ct. 155, 160 (54 L. Ed. 280):

"Power to make the order, and not the more expediency or wisdom of having made it, is the question."

We have thus far considered the new rates with respect to transportation commencing and ending at points within the state of Kentucky. But they must be subjected to a still further test. It is insisted by complainant's counsel that the order of the Commission reducing the rates on certain commodities directly and necessarily affects interstate commerce, and is in conflict with the act to regulate commerce. The averments in this behalf of the bill as amended are made up rather of conclusions of counsel than of definite statements of fact. As stated by Justice Peckham in *Equitable Life Assurance Co. v. Brown*, 213 U. S. 25, 43, 29 Sup. Ct. 404, 409, 53 L. Ed. 682:

"We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill," etc.

As an example, see *Southern Railway v. King*, 217 U. S. 524, 536, 30 Sup. Ct. 594, 54 L. Ed. 868. However, it may be that some of the averments are sufficient to warrant the introduction of evidence in their support.

One averment in form is that the McChord act "is in express and direct interference with and regulation of interstate commerce" (paragraph 9 of bill). We have no hesitancy in saying that the act is not open to any such interpretation, nor in affirming that nothing is to be found in the rate order in dispute, or in any fact either averred or shown, tending to disclose a design on the part of the Commission to interfere with or to regulate interstate commerce. When we consider the bill and affidavits, in connection with assertions made in the brief of complainant, we infer that it is intended to set up general classes of facts and specific facts as follows: A certain volume of interstate traffic, in corn, rye, barley, malt, and other brewers' supplies, is constantly moving from points north of the Ohio river, through Covington or Newport, to some of the interior points named in the order. Some of this originates at Cincinnati, some further north. The existing through rate from Cincinnati is and has been the same as from Covington or Newport, and the through rate from points north of and beyond Cincinnati is and has been the same as the rate from those points to the Ohio river plus the rate south of the river. A car of rye from Cincinnati to Bardstown, Ky., is typical of this through traffic, and upon this car (minimum) the present rate from Cincinnati would be \$38.40, and the new rate from Covington would be \$24. The fair and reasonable charge for transporting this car from Cincinnati to Covington would not exceed (for example) \$5. Under the new rates, this car load could be shipped from Cincinnati to Bardstown for not to exceed \$29. As a matter of fact, we infer it is meant to say, all through shipments of such cars from Cincinnati to Bardstown would cease, unless complainant should, as it would for business reasons, reduce the through rates to (for example) \$29. A substantially similar state of facts exists at the Louisville gateway with reference to Louisville and Jeffersonville. (This state of facts is made to appear by tables set out in the brief.) It is averred that

the enforcement of the new rates will cause an annual loss of \$15,600 to complainant in its rates on local shipments, and a further annual loss of \$3,000 in its rates on interstate shipments; and it is stated by affidavit that there are no through rates on the articles in question from points outside the state to points within the state; such charges being assessed by combining the rates from points of origin to Louisville, to Covington, or to Newport (at which points such shipments enter the state), with the rates from those points to the points of destination in Kentucky.

Since it is to the interest of both parties to this case that the actual facts should be made to appear by proper pleadings, we have concluded to say that the complainant may, if it sees fit, amend its bill so far as it truthfully can aver the facts just recited, and which we infer from the sources of information before pointed out to exist.

Assuming, for present purposes, that such or a similar state of facts as those indicated were averred and could be proved, could it be rightly concluded that putting the new rates into effect would operate as a direct interference with and regulation of interstate commerce? If it would, it needs no argument to show that such enforcement would be violative of the federal commerce clause. It is plain enough that reduction in receipts would be one of the results of enforcement of the new rates; but it does not seem to us to follow that any of the figures adduced show direct interference with interstate rates, any more than they show unreasonable or confiscatory local rates. Such a depletion of revenue would seem rather to be an indirect result of a proper exercise of purely state power. The alleged loss of \$3,000, to be suffered, it is said, on the through traffic, we cannot accept as a statement of necessary legal consequence, because to do so would be to assume the direct effect which is in question. The loss alleged is apparently the same in principle as would be a loss or expense resulting from a due exercise of the universally recognized police power residing in the state. It is to be observed that the railroad company has made up its interstate rates by uniting its local rates with rates charged either by itself or by other companies for transportation outside of Kentucky; the bill averring that the full amount of complainant's "existing local rates in Kentucky enters into and forms a part, in most instances, of its through rates (set forth in its tariff filed with the Interstate Commerce Commission on or about March 25, 1910 * * *) on such interstate shipments of freight belonging to the same classes." Can it be that such combining and filing of local rates as interstate rates remove such local rates altogether from the jurisdiction of the state for purely state purposes?

Surely Congress did not intend, by the interstate commerce acts, that interstate rates, made and filed as plaintiff's have been, should thereafter operate, not merely as interstate rates, but also as intrastate rates. To say that Congress so meant is to ascribe to that body the purpose to take over to itself the whole rate-making power, both federal and state. The only theory upon which such a claim can be urged is that Congress has provided that interstate rates shall be filed with the Interstate Commerce Commission, and shall not thereafter be

changed, except in a prescribed time and manner; and so the rates thus filed amount to an adoption by Congress or its Commission, in the sense that the rates exist and must be enforced as federal-made rates. But it is expressly provided in each of the interstate commerce acts, that the act shall not apply to the transportation of passengers or property "wholly within one state, and not shipped to or from a foreign country from or to any state or territory." Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154); Act June 29, 1906, c. 3591, § 1, 34 Stat. 584 (U. S. Comp. St. Supp. 1909, p. 1149); Act June 18, 1910, c. 309, § 6, 36 Stat. 544. Moreover, although the interstate rates of complainant from Jeffersonville, Ind., or from Cincinnati, Ohio, to Bardstown, Ky., are the same as the rates charged from Louisville, Covington, and Newport, Ky., still complainant's adherence to its interstate rates, and its observance of the new local rates in dispute, would not, under the interstate commerce act, be regarded as an intent to discriminate against localities like Jeffersonville or Cincinnati. *Saunders v. Southern Express Co.*, 18 Interst. Com. Com'n R., 415, 421. Again, the state-made rates are not regarded by the Interstate Commerce Commission as binding "as a necessary measure of the interstate rate." *Saunders v. Southern Express Co.*, supra (421); *Hope Cotton Oil Co. v. Tex. & Pac. Ry. Co.*, 12 Interst. Com. Com'n R. 265, 269. Conversely, under these decisions it is difficult to see why the state should be bound to adopt interstate rates; for, although the federal power is supreme respecting interstate rates, that would leave the state with no power at all in regard to local rates.

What is claimed is that conditions existing in Kentucky do not warrant a greater charge for the carriage of freight within Kentucky as interstate freight than for the carriage of purely local freight; and the averment that the company will make a reduction of its interstate rates to correspond with the rates in dispute states nothing more than that it will do this for strictly business reasons. The question, then, comes at last to this: Whether a business or economic policy of a railroad company, as distinguished from a legal duty, to change its interstate rates to correspond with just and reasonable local rates imposed by the state for the transportation of traffic originating and ending wholly within the state, can be said to be a direct, and not merely an indirect, effect of the state's action. Thus, in distinguishing direct from indirect effect, can such conditions be made the basis of a presumption of fact, equivalent to a rule of law, such as a federal statute forbidding interstate rates from exceeding the sum of the local rates between given interstate points? One difference between such presumption and rule is the uncertainty whether the railroad company in the end, at its election, will not decline to yield to the conditions created by the two sets of rates—interstate and local rates—and so defeat any presumption of fact that might be indulged in its favor by the courts, while the rule of law may always be certainly enforced through judicial decision. Another difference is that any election by the company to change the interstate rates would seem to be an intervening cause, and consequently render such change an

indirect result. Without deciding whether there may be facts attending the administration of a state law which show a result so inevitable, for business reasons, that the result should be held to be the direct effect of the law, though not specified in the law, yet as applied to this case the fallacy of ascribing equality to the presumption of fact and rule of law in both conclusive and permanent effect may, we think, be further tested by the consequences. The logic of the company's argument would release its local rates from governmental regulation altogether; for the United States could not fix the local rates, because they are local, and the state could not change them, because it would thereby cast a direct burden on interstate commerce. The inevitable effect would be that, so far as rate-making is concerned, the State Railroad Commission would have no reason to exist, and state regulation of state rates would become simply historic. Before accepting such a doctrine, let us briefly recall the views of the court of last resort touching the power of the state to regulate commerce carried on exclusively within its borders.

In *Gibbons v. Ogden*, 9 Wheat. 1, 194, 6 L. Ed. 23, Chief Justice Marshall, after defining the meaning of the words of the commerce clause, said:

"It is not intended to say that those words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states."

This rule has ever since been recognized as sound. As late as the decision rendered in the Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, Mr. Justice White, in announcing the opinion of the court, accepted the doctrine, both as to the United States and the states, as laid down by Chief Justice Marshall in *Gibbons v. Ogden*. After setting out the rule concerning the power of the United States, he said (207 U. S. 493, 28 Sup. Ct. 143 [52 L. Ed. 297]):

"Accepting, as we now do and as has always been done, this comprehensive statement of the power of Congress, we also adopt and reiterate the per-spurious statement made in the same case (9 Wheat. 194 [6 L. Ed. 23]), of those matters of state control which are not embraced in the grant of authority to Congress to regulate commerce" (setting out the portion of the decision in *Gibbons v. Ogden* above quoted).

We may call attention, also, to the language of Justice Miller in *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 565, 7 Sup. Ct. 4, 30 L. Ed. 244; also of the same learned Justice in *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 459, 10 Sup. Ct. 462, 703, 33 L. Ed. 970, "In regard to the business of common carriers limited to points within a single state, that state has the legislative power to establish the rates of compensation for such carriage;" and also the language of Mr. Justice Harlan in *Northern Securities Co. v. United States*, 193 U. S. 197, 350, 24 Sup. Ct. 436, 48 L. Ed. 679.

Must this long-established power be now so construed as to eliminate the local rate-making power? We have seen that Congress has not so enacted. It has expressly provided that it shall not be. True, that body has not recognized any right in a state directly to hamper

or burden interstate commerce; and all courts recognize the supremacy of the federal power to regulate commerce among the states. Whether Congress has the power to forbid indirect interference with commerce among the states we need not consider; for we do not discover any attempt on its part to exercise such a power. We may now turn to the consideration of some decisions which we think present features of analogy to the present question.

In *Louisville & Nashville Rd. Co. v. Eubank*, 184 U. S. 27, 33, 22 Sup. Ct. 277, 279 (46 L. Ed. 416) the validity of section 218 of the Constitution of Kentucky was reaffirmed by the Supreme Court:

"We have already held, in the case of *Louisville & Nashville Railroad Company v. Kentucky*, 183 U. S. 503, 518 [22 Sup. Ct. 95, 46 L. Ed. 298], that the section of the Kentucky Constitution above set forth, as applied to places all of which are within the state, violates no provision of the federal Constitution."

The action of the Commission failed, because it attempted to employ an interstate rate between Nashville and Louisville as a standard for determining whether a local rate between points within Kentucky over the same road as that over which the interstate rate prevailed was a violation of the long and short haul clause of section 218. It was in effect held that the act of the Commission was a direct attempt to regulate interstate commerce. But in answer to a case, assumed in argument, which supposed several states to have fixed local rates within their respective borders and Congress to have fixed their sum as the rate for interstate commerce, claiming that this did not regulate or interfere with the state rates already, or from time to time adopted by the states, Justice Peckham said (184 U. S. 42, 22 Sup. Ct. 282 [46 L. Ed. 416]):

"In thus fixing the interstate rate, Congress may most seriously interfere with or regulate interstate commerce, but that it has the right to do; and, on the other hand, the state by such a statute regulates the local rate, but that it has the right to do. Congress does not, directly or indirectly, interfere with local rates, by adopting their sum in the interstate rate."

We take it that we may with propriety say that we do not observe anything laid down in the opinion of the court in that case which is inconsistent with the following language of Justice Brewer, who announced the minority opinion (184 U. S. 48, 22 Sup. Ct. 285 [46 L. Ed. 416]):

"I do not suppose it will be seriously contended that the defendant can invalidate all the local rates which the Legislature of Kentucky may see fit to enforce, by simply saying that outside of the state it somewhere touches a competitive point, and is forced to reduce its interstate rates by reason of the competition there existing."

It will not escape notice that in the present case the Commission fixed the new local rates without reference to any interstate rate or traffic whatever. Its action was based solely upon local conditions and local traffic, and was in substantial part a restoration of old local rates, which the company itself had created and had for years recognized as just and reasonable.

The company, in the exercise of its rate-making power, changed the local rates which it had previously maintained, and included and

made them a part of its through rates. Treating the Commission as representing the state in the exercise of its power to prescribe local rates, it is clear that certain of the principles laid down in the opinion of the court in the Eubank Case, and before quoted in part, tend to sustain the order in dispute.

In Louisville & Nashville Rd. Co. v. Kentucky, *supra*, Justice Shiras said (183 U. S. 518, 22 Sup. Ct. 102 [46 L. Ed. 298]):

"It may be that the enforcement of state regulation forbidding discrimination in rates in the case of articles of a like kind carried for different distances over the same line may somewhat affect commerce generally; but we have frequently held that such a result is too remote and indirect to be regarded as an interference with interstate commerce, and that the interference with the commercial power of the general government to be unlawful must be direct, and not merely the incidental effect of enforcing the police power of a state."

In Mo. Pac. Ry. Co. v. Kansas (before cited) 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472, the question was presented whether the railroad company could be compelled, by mandamus issued by the state court, to obey an order of the Kansas Board of Railroad Commissioners requiring it to operate a passenger train between a point within the state and the state line. The road in question was built originally as a branch line within the state of Kansas, but was operated as a part of a road in Missouri, so that the line in question extended from Madison, Kan., to Monteith Junction, Mo.; 89 miles being in Kansas and 19 miles in Missouri. There were no terminal facilities at Monteith Junction, and the trains did not remain over at that point, but were run as far as Butler Station, where terminal facilities exist. Among the defenses set up was one that the road was an interstate line, and could be operated only as such, and was not subject to the jurisdiction of the state Railroad Commission for that reason, and also that the burden of furnishing such passenger train service would be confiscatory. Two questions were considered by the court—one the alleged arbitrary and unreasonable character of the order, and the other that the order operated as a direct burden upon interstate commerce. Both of these questions were resolved against the company. The order there made was found to be within the power of the Commission, and in that feature is analogous to the present order, and, furthermore, the holding that the order did not place a direct burden upon interstate commerce has an important bearing upon the question now under consideration. The contention respecting the effect of the order upon interstate commerce was disposed of by the present Chief Justice (216 U. S. 283, 30 Sup. Ct. 337 [54 L. Ed. 472]):

"But this simply confounds the distinction between state control over local traffic and federal control over interstate traffic. To sustain the proposition would require it to be held that the local traffic of the road was free from all governmental regulation. * * *

Further, speaking of the effect of interstate commerce, the learned Chief Justice said (216 U. S. 284, 30 Sup. Ct. 338 [54 L. Ed. 472]):

"The order cannot be said to be an unreasonable exertion of authority, because the power manifested was made operative to the limit of the right

to do so. Besides, the proposition erroneously assumes that the effect of the order is to direct the stoppage at the state line of an interstate train, when in fact the order does not deal with an interstate train, or put any burden upon such train, but simply requires the operating within the state of a local train, the duty to operate which arises from a charter obligation."

Again, answering a claim that, as there were no terminal facilities at the state line, the train would have to be operated, not only to the state line, but 20 miles beyond, to Butler, it was said:

"But under the hypothesis upon which the contention rests the operation of the train to Butler would be at the mere election of the corporation, and, besides, even if the performance of the duty of furnishing adequate local facilities in some respects affected interstate commerce, it does not necessarily result that thereby a direct burden on interstate commerce would be imposed."

Now, when it is recalled that one of the claims made here is that the reduction of the local rates between points on the south side of the Ohio river (like Louisville, Covington, and Newport) and Bardstown will for business or economic reasons necessitate a corresponding reduction of the Jeffersonville and Cincinnati rates to Bardstown, not to speak of points north of those cities, it is hard to distinguish such a claim from that urged by the railroad company in the Kansas case in regard to the absence of terminal facilities at the state line and the consequent necessity to operate 20 miles further, to Butler. This latter claim was based alone upon a business or economic reason, but the answer of the Chief Justice was that this "would be at the mere election of the corporation." This answer is equally applicable to the complaint made here. This right of election signifies choice between alternatives, in the sense that either or any one of them may be rightfully selected. The choice is to be exercised by the company. It follows that the burden on interstate rates complained of here is one that may or may not be assumed by the company, according to its financial interests. It does not follow that its averment of a present intent to assume the burden will practically be either a necessary or wise choice of alternatives, much less that the company will continue to carry the burden. The important point, however, is that the Supreme Court has declared that such a burden is not in its effect direct.

We do not pass upon the validity of the second order of the Commission. We think that the persons and companies in whose favor awards of reparation appear by the order to have been made are necessary parties in interest. They have not been brought into the suit.

It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant, pursuant to the special provision for such review found in section 17 of the act of June 18, 1910. If the Supreme Court, on such review, shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremediable injury, on account of failure to preserve the status quo. Applying the reasons of the rule stated in *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct.

136, 27 L. Ed. 888, and further stated in *Cotting v. Kansas City Stockyards Co.*, *supra*, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92, we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to conditions which will be prescribed in the order to be entered.

In order that the right of appeal directly to the Supreme Court from our decision upon the motion for an interlocutory injunction may not be embarrassed, we refrain at the present time from passing upon the demurrers.

HENRY L. DOHERTY & CO. v. RICE et al.

(Circuit Court, M. D. Alabama, N. D. September 6, 1910.)

In Equity, No. 291.

1. MONOPOLIES (§ 20*)—CONSOLIDATION OF CORPORATIONS—CONTRACTS—VALIDITY.

Under Code Ala. 1907, §§ 3481, 3640, authorizing domestic and foreign corporations to acquire and own the stock of any domestic corporation, a domestic corporation supplying electricity for light and power in a city subject to municipal regulations, as authorized by section 1260, may acquire the stock of a competing corporation without thereby creating a monopoly at common law, or within sections 7579 and 7580, prohibiting monopolies, and a contract for the purchase by such corporation of the stock of a competing corporation is not contrary to public policy.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 20.*]

2. MONOPOLIES (§ 20*)—REGULATION—STATUTORY POWER.

As the Legislature may modify the common law governing combinations restricting production, controlling prices, and stifling competition, where it authorizes the consolidation of corporations, or the holding by one corporation of the stock in a competing corporation, the court may not impute to the Legislature an intent to condemn such consolidation or such holding of stock, because it may lead to the destruction of competition.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 20.*]

3. CONTRACTS (§ 121*)—VALIDITY—PUBLIC POLICY.

A contract by persons owning a majority of the stock of a corporation supplying electricity for light and power in a city for the purchase of a majority of the stock of a competing corporation is not violative of the public policy of Alabama, as evidenced by Code Ala. 1907, §§ 3481, 3640, authorizing corporations to acquire and own stock in other corporations.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 504; Dec. Dig. § 121.*]

4. CORPORATIONS (§ 180*)—RIGHTS OF SHAREHOLDERS.

In equity, the shareholders of a corporation are the owners of the corporate property, and on the dissolution of the corporation and payment of its debts the corporate property belongs to them as individuals, and while the corporation exists and does business, they are entitled to control its affairs, in the proportion to the number of their shares, through the instrumentalities provided by law.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 665-673; Dec. Dig. § 180.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. SPECIFIC PERFORMANCE (§ 70*)—CONTRACTS ENFORCEABLE—CONTRACTS FOR THE SALE AND PURCHASE OF CORPORATE STOCK.

A bona fide contract for the sale of actual corporate stock is enforceable in equity where it would decree specific performance of a similar contract relating to any other kind of personal property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

6. SPECIFIC PERFORMANCE (§ 70*)—CONTRACTS ENFORCEABLE—CONTRACTS FOR THE SALE AND PURCHASE OF CORPORATE STOCK.

Where a contract for the sale and purchase of corporate stock was made on a valuable consideration and without mistake or fraud, and it was fair on its face, and specific performance which could be compelled by a single decree would not be oppressive to the seller, the buyer, who performed or tendered performance of the conditions required of him, could sue for the specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

7. SPECIFIC PERFORMANCE (§ 126*)—DECREE—SCOPE OF RELIEF.

Where one contracting to buy corporate stock offers, on seeking specific performance, to perform on his part, and submits himself to the court to decree what may be proper in enforcing the rights of the seller, enforcement of the legal and equitable rights of the parties may be effected by one decree, if the seller either accepts the offer, so that the buyer may not afterwards retract it, or refuses the offer, and unsuccessfully resists specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 401–405; Dec. Dig. § 126.*]

8. SPECIFIC PERFORMANCE (§ 97*)—CONTRACTS—TENDER OF PERFORMANCE—SUFFICIENCY.

Where a seller in a contract for the sale and purchase of corporate stock on specified conditions left the jurisdiction and withdrew the power of his attorney to act for him, so that immediate tender to him became impossible, the buyer suing for specific performance of the contract, and asking and tendering performance on his part, and submitting himself to the jurisdiction of the court, thereby did all in his power to perform and to protect his rights, entitling him to maintain the suit and to be regarded, pending final decree, as the equitable owner of the stock entitled to protection as such.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286–298; Dec. Dig. § 97.*]

9. SPECIFIC PERFORMANCE (§ 108*)—TEMPORARY INJUNCTION—STATUS QUO.

Complainant contracted to buy 800 out of a total outstanding 1,000 shares of stock of a corporation owned or controlled by defendant with power of sale. A third person, with notice of complainant's rights, acquired from defendant the legal title to the identical stock, and he proceeded to exercise his rights as such owner in the management of the corporation. *Held*, that the third person was the holder of the naked legal title of the stock, the equitable title to which was in complainant, and equity, pending a suit by complainant for the specific performance of the contract of sale, would restrain the third person from using the stock for his own advantage, or to the detriment of complainant.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

10. SPECIFIC PERFORMANCE (§ 70*)—CONTRACTS ENFORCEABLE.

Where the holder, who had power of sale of corporate stock, contracted to sell the same to a buyer on specified conditions, and then subsequently transferred the legal title to a third person having notice of the sale, the fact that the voting of the stock was vested in trustees did not prevent equity from decreeing specific performance of the contract in

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

favor of the buyer, after first annulling the transfer of the legal title to the third person.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 203; Dec. Dig. § 70.*]

11. SPECIFIC PERFORMANCE (§ 108*)—TEMPORARY INJUNCTION.

Defendant, who owned or controlled with power of sale 800 of the 1,000 outstanding shares of a corporation supplying electricity to a city, contracted to sell to complainant 800 shares, and to endeavor to deliver to him the remainder. Trustees were entitled to vote the stock. Subsequently a third person, with knowledge of the contract, acquired from defendant the legal title to the 800 shares, and exercised his rights as owner by controlling the corporation, which entered into contracts for the extension of its plant and for the issuing of additional stock and bonds. The business of the corporation had not been successful, but it had constantly incurred debts. The public interests would not be prejudiced by maintaining the status quo, pending a suit by complainant for the specific performance of the contract of sale, and the corporation could continue its business as it had done in the past, without disturbing a single consumer. *Held*, that the court was authorized to issue a temporary injunction maintaining the status quo pending the disposition of the suit.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 353; Dec. Dig. § 108.*]

12. CORPORATIONS (§ 310*)—POWERS OF DIRECTORS.

The board of directors of a corporation must manage the corporate affairs solely in the interest of the corporation, regardless of the effect of the policies and management on the fortunes of individual stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352–1362; Dec. Dig. § 310.*]

Suit by Henry L. Doherty & Co. against Alex. Rice and others. Preliminary injunction granted.

This is a suit in equity for the specific performance of a contract for the sale of corporate stock having no market rating.

In May, 1910, the defendant Rice, of the city of Montgomery, contracted with Henry L. Doherty & Co., of the city of New York, to sell and deliver to the latter 800 out of a total outstanding 1,000 shares of the capital stock of the Citizens' Light, Heat & Power Company, which he in the contract represented were owned or controlled by him, with power of sale. The price agreed upon was on the basis of \$75,000 for the entire outstanding stock, the purchaser agreeing to assume the floating indebtedness of the company, not exceeding the sum of \$75,000, and to accept the property subject to a bonded indebtedness of \$50,000. Rice guaranteed that the floating indebtedness would not exceed \$75,000, and agreed to assume any amount in excess of that sum. He further stipulated that he would use his best endeavors to secure and deliver to the purchasers the remaining 200 shares of the stock of the corporation, procure the resignation of its officers and directors, and to put the nominees of the purchaser in charge in so far as the amount of stock thus owned and controlled by them would permit. By a separate agreement made at the same time between the same parties, it was stipulated that in consideration of the personal indemnity assumed by the defendant Rice in the first-mentioned agreement, and because of certain other items of expense incurred by the corporation in the way of personal services and attorney's fees, and to compensate Rice and certain officers and employés of the corporation for their good will and efforts in behalf of the purchaser, the latter would pay to Rice in installments the sum of \$35,000.

The Citizens' Light, Heat & Power Company is a quasi public corporation, engaging in generating and distributing electricity for heating and power purposes in the city of Montgomery. Rice having failed to deliver the stock,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Doherty & Co. filed their original bill against him for specific performance of the contract, and thereupon obtained a temporary restraining order forbidding the sale or assignment by him of the stock and preserving its status pending the litigation. Subsequently a supplemental bill was filed against one Richard Tillis and others, alleging that, as the result of secret negotiations between him and the defendant Rice, the said Tillis, subsequent to the filing of the original bill and with full notice of complainant's prior equity, had acquired the identical stock which Rice had contracted to sell to complainants. It was further alleged that, as the result of this transaction, the property of the corporation was being loaded down with unwarranted and ill advised contract obligations, and that the board of directors and officers in charge of the corporation had no pecuniary or real interest in the enterprise, and that they were dominated and controlled by the said Tillis. A temporary restraining order was sought, and obtained, preserving the status of the stock with respect to the claim of the defendant Tillis, and also forbidding certain proposed extensions or additions to the plant of the corporation.

The cause is submitted on motion of complainants for an injunction pendente lite, as prayed in the original and supplemental bills. The objections of the respondents thereto, which are addressed mainly to the equity of the bills, are stated in the opinion of the court.

On the submission of the cause for preliminary injunction on the original and supplemental bills, many affidavits were introduced by the parties; but the objections of the respondents were addressed mainly to the equity of the bills. The substance of the affidavits and objections are fully stated in the opinion of the court.

Steiner, Crum & Weil, Charles A. Frueauff, and Jno. R. Tyson, for complainants.

Ray Rushton, Horace Stringfellow, J. M. Chilton, and Ball & Samford, for respondents.

JONES, District Judge (after stating the facts as above). While the affidavits submitted on this hearing cover a wide range, and counsel have earnestly and ably urged many legal principles on the issues thus raised, the refusal or granting of a preliminary injunction depends upon two controlling questions: First, whether Rice's contract with complainants is such an one as a court of equity can and ought to enforce by decreeing specific performance; and, second, how far, if specific performance be allowed, can the court properly go for the relief of complainants, in view of the quasi public nature of the two defendant corporations, in restraining issuance of stock and bonds, and the contemplated improvements of their plant. The Citizens' Light, Heat & Power Company is a domestic corporation, chartered on July 2, 1903. Its original capital stock was \$30,000, which, by amendment to its charter, was increased to \$50,000, and afterwards, by proper proceedings in the probate court, on May 22, 1907, was authorized to be increased to \$200,000. The total outstanding issue at the time of the filing of the bill was \$50,000, divided into 500 shares of \$100 each. The Citizens' Light & Power Company is also a domestic corporation, and what is known as a "holding company." It does no business itself, but votes and controls the stock in the first company, and has a capital stock of \$100,000. The owners of the stock of the Citizens' Light, Heat & Power Company transferred their stock in that company to the Citizens' Light & Power Company in payment of subscriptions to the capital stock of the company, and received stock

two for one. The holders of the stock transferred it to certain individuals as trustees, and received, in return, trustees' certificates from them. The trustees were to exercise exclusively all the powers and privileges that could be exercised by the owners of the stock, with certain exceptions not here material; the instrument creating the trust further required the stock in the hands of the trustees to be voted as a unit by them on all questions, to be decided by a majority of the trustees. The trust can be dissolved at any time by a majority vote of the trustees, if concurred in by a vote of a majority of the owners of the trustees' certificates, which represent the stock placed in the trust. The trust is to continue for five years, with the privilege on the part of the trustees to extend it for an additional five years.

Alex. Rice, who owned and controlled 800 out of a total of 1,000 shares or the trustees' certificates representing them, contracted to sell these shares and stock certificates to Doherty & Co. on certain terms and conditions. Differences arose as to performance, and Rice declined to consummate the contract. Thereupon Doherty & Co. filed their bill against him to compel specific performance, and an injunction issued forbidding him to transfer the stock or trust certificates, and also against the two light companies forbidding them to permit any transfer of the stock to be made upon their books until the further order of the court.

After the injunction had been served upon the manager of the light companies, but not upon Rice, who evaded the service, Tillis, by aid of Rice's attorney and the officers and directors of the light company and the trustees who issued the certificates representing the stock, consummated the sale by transfer of the stock on the stock books, and had trustees' certificates issued to himself. Tillis not only took with notice of Rice's contract with complainants, but indemnified him against damage for its breach. The bill was amended, making Tillis a party, and a restraining order issued forbidding him, in substance, from doing anything to disturb the status which the court by its restraining order against Rice had decreed was proper to be maintained regarding the stock and trustees' certificates pending final decree. As the light companies, of which Tillis had obtained control by the transfer to him of the stock owned and controlled by Rice, are the instrumentalities by which he could effect his purpose as alleged in the bill, those corporations which were defendants to the original and amended bills were also restrained in substance from doing anything which could disturb the status. Before this restraining order was served, Tillis, by virtue of his control of the directorate of the Citizens' Light, Heat & Power Company, had that corporation issue 800 more shares of the capital stock, for which he subscribed, thus making him the owner, including the certificates gotten from Rice representing 917 shares in the Citizens' Light & Power Company, and half that number in the Citizens' Light, Heat & Power Company, and also of 800 additional shares out of a total issue of 1,300 shares by the latter company, and, as the bills allege, the light company now proposes a further issue of bonds, which had been authorized before this controversy arose, and very heavy expenditures to enlarge the plant and equipment.

Tillis is the owner and controller of the great majority of the capital stock of the Montgomery Traction Company, the largest consumer of electric current in this city, which is now furnished by the Montgomery Light & Water Power Company. That company has been doing business in Montgomery for 15 years past, and is and has long been a competitor of the light company in furnishing electric light and power in the city and suburbs. Doherty & Co. own the majority of its stock and control its operations. Tillis states in his affidavit that, not being able to attend personally to the negotiations, he authorized a friend, in the event there was an opportunity to do so, to purchase for him "the absolute control" of the Citizens' Light, Heat & Power Company, and that, so far as he knows or believes, no one besides Doherty & Co. or the Montgomery Light & Water Power Company want the stock of the Citizens' Light, Heat & Power Company; "that he knew, when he bought it, there was no general market value for the shares, and that, if he should ever want to sell them, probably the only one who would purchase them would be Doherty & Co. or the Montgomery Light & Water Power Company, and that they would only purchase it in order to get rid of said company as its competitor."

It is quite evident, therefore, that the struggle here is in reality between Tillis under the form of the light company and the Montgomery Light & Water Power Company under the form of Doherty & Co., whether or not the contract with Rice shall be effectually enforced. Doherty & Co. control the Montgomery Light & Water Power Company, and expect to make it the ultimate beneficiary of the contract with Rice, if they enforce it. We may lay aside all questions as to the motives or intentions of the disputants, and confine the controversy to the legal and equitable rights of the parties under the circumstances disclosed under the evidence in the case as now presented.

Strenuous insistence is made by counsel for the respondents that Rice's contract with Doherty & Co., in view of the fact that the latter are owners of most of the shares of stock and controllers of the Montgomery Light & Water Power Company, is contrary to public policy and void, as tending to create an unlawful monopoly and stifle competition, and is therefore forbidden by the laws of this state.

[1] We must look to the Constitution and laws of Alabama to solve this contention. Code of Alabama 1907, § 3481, subd. 10, authorizes domestic corporations to "subscribe for, acquire, hold and dispose of stocks, bonds or other evidence of indebtedness of any other corporation of this or any other state, or foreign countries, and while owners thereof to exercise the rights, privileges and powers of ownership, including the right to vote," etc., and under subdivision 11 of the same section they may also consolidate before or after the completion of their works and plants with any other corporation or corporations under certain conditions hereafter noted. Under section 3640, any foreign corporation "may acquire by subscription to the capital stock or by purchase or otherwise, and hold, own and vote shares of the capital stock of any corporation organized and existing under the laws of this state." Section 1260 of the Code authorizes cities and towns to regulate the manner and rates for furnishing gas, electricity, and water, and prescribe the quality of the gas and electricity furnished the in-

habitants by any person or corporation. They may prescribe penalties for violation of their ordinances upon the subject. The only limitation placed upon the right of domestic corporations to consolidate with one another is that telegraph and telephone companies shall not do so, and that banking and railroad companies shall not consolidate with any other than like kinds of corporations. Large latitude is given mining and manufacturing companies, street railroads, and railroads to hold stock in other like enterprises and to consolidate with them. The legislation of the state authorizes consolidations between corporations like those here involved, and allows foreign corporations to purchase stock in them, although the Legislature well knew that light and power corporations are always competitors, if there be more than one in the locality where the business of the corporation is carried on.

It is thus manifest that the Legislature, in view of the industrial and business conditions of our people, believed the good from such combinations would outweigh the evil that might result, and relied upon the exercise of the power to regulate their rates, which is vested in the state and its subordinate municipal agencies, as ample safeguard for the public weal against all combinations which its laws allowed. It did not and does not view such combinations or holdings of stock as evils, but rather as promotive of the public weal. As said in the *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007:

"When the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

This court in the face of these laws and the policy thus declared cannot refuse to enforce the contract here involved, on the ground that it would be contrary to public policy, without exercising the legislative power of the state and undertaking to police its domestic affairs.

It is earnestly insisted, however, that this is not the proper construction of our statutes in view of sections 7579, 7580, and 7581 of the Criminal Code, and qualifications of the power given by section 3640 to a foreign corporation to acquire and vote stock in a domestic corporation, to the effect that it should "not be construed as authorizing any monopoly or trust or unlawful combination in the nature of a trust or monopoly." In *Citizens' Light, Heat & Power Company v. Montgomery Light & Water Power Company* (C. C.) 171 Fed. 553, this court had occasion to consider section 103 of the Constitution, which was adopted subsequently to those sections, and held they must be read in the light of the Constitution, which necessarily limited their meaning and operation.

[2] It will not be questioned that the common law regarding combinations or restrictions of production and attempts to control prices or stifle competition can be changed at the pleasure of the Legislature. It may relax or tighten the stringency of the common-law rule, making lawful that which was unlawful at the common law, and condemning that which the common law authorized, as in its wisdom seems best. Neither on reason nor authority is it permissible to im-

pute to the Legislature the intent to condemn the holding of stock or the consolidation of interests in competing corporations, because it may lead to the diminishing or destruction of competition, when the Legislature has expressly authorized the making of such consolidations, or the holding of stock by one corporation in another corporation of which it is a competitor. The Legislature is judge of what is "reasonable" or "unreasonable" in these matters, and what shall be condemned as an unlawful combination or monopoly under its laws.

The Alabama statutes leveled at certain combinations of capital is quite different from the Sherman act, which strikes at all restraint of interstate commerce, whether "reasonable" or "unreasonable," where the restraint is direct and the result of combination. Indeed, in view of the grounds on which Mr. Justice Brewer, one of the five judges, concurred in the judgment in the Northern Securities, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the exact scope of that decision is yet to be marked out and defined by the Supreme Court of the United States. We are not concerned here with interstate commerce, and the Legislature has not power, as Congress had, regarding the subject upon which it acted, to strike down all restraint, whether reasonable or unreasonable, or whether the effect be direct or indirect. The corporation laws of New York provide:

"No domestic stock corporation, and no foreign corporation doing business in this state, shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade, or the prevention of competition in any necessary of life."

The Attorney General sought to forfeit the charter of the Consolidated Gas Company because it had purchased the majority of the stock in other competing corporations, insisting, in substance, that the authority given under other laws to buy and hold such shares could not be exercised when it would contravene the section of the Code quoted. The Appellate Division of the Supreme Court of New York (Attorney General v. Consolidated Gas Co., 124 App. Div. 401, 108 N. Y. Supp. 823) refused to allow quo warranto to be filed, because the transactions assailed were not violative of the laws of New York. In its opinion fortified by numerous decisions of the Court of Appeals of the state the court said:

"The Consolidated Gas Company cannot as a result of its control of the business of furnishing gas either limit the production or increase the prices and maintain them because these matters are within the control of the Legislature. It is within the power of that body, and it has frequently used the power, to fix the maximum rates which may be charged to consumers, and it is well settled that any person within the territory served by gas or electric companies is entitled to be furnished such gas or electricity as he requires upon the payment of the statutory price therefor and to compel the company to so furnish it. That a single company, if thus regulated by law as to prices of production, does not offend against the anti-monopoly laws, even though its field of operation extend over the whole city, seems quite clear."

Light and power companies are incorporated under the general laws, and derive their powers and franchises from the state, and, though a consolidation between them might result in exclusive business control of a particular territory, it does not give any monopoly

there in the legal sense, since any one is free to obtain a charter for a like purpose, and can compete with them there, if the municipal authorities, to whose control the whole matter is really committed, think it to the public interest to allow the use of the streets and roads for that purpose. Consolidation of enterprises thus engaged, authorized by the Legislature, or the control of two corporations so engaged by the same individual, when permitted by the law does not constitute such a monopoly as is condemned by the common law, even were our statutes controlling that matter here out of the way.

We concluded that the contract here would not violate the public policy of the state, if it had been for a purchase by the Montgomery Light & Water Power Company, instead of Doherty & Co. of the shares of the Citizens' Light, Heat & Power Company.

[3] But this is not the case. Doherty & Co. are natural persons, and there is no law of Alabama which prevents, if it be within legislative competency to prevent, the same person from purchasing and holding stock in two or more corporations at the same time, and thus controlling them, though such corporations compete with each other.

[4] The shareholders are the owners of the corporate property in equity. When the corporation is dissolved and its debts paid, the former corporate property belongs to them as individuals, and, while the corporation exists and does business, the shareholders are entitled to control its affairs, in the proportion to the number of their shares, through the instrumentalities which the laws provide for their management. The investment in corporate property in the United States amounts to billions of dollars. The shares in them form the basis of a great proportion of the banking and financial operations of the country. The sale or the hypothecation of shares is the only mode by which stockholders can avail themselves of their interest in the corporation to obtain money or credit on them. These shares are property in the fullest sense of the term. Contracts concerning them are protected by all the sanctions which the Constitution throws around other contracts.

[5] A court of equity cannot refuse to enforce a bona fide contract for the sale of actual stock, where it would decree specific performance if the contract related to any other kind of personal property, without turning its back on one of its most conservative and ancient remedies, and shaking confidence in the value of investments in corporate stock. Property rights, public and private morality and liberty itself, are insecure when the law fails to give effective remedy for the enforcement of a contract obligation.

The doctrine that a contract for the sale of corporate shares of stock will not be enforced if the purchaser desires thereby to gain control of a corporation, whether or not competition is involved, has received recognition in only two or three states of the Union. All these cases are based on Foll's Appeal, 91 Pa. 434, 36 Am. Rep. 671, which has since been repudiated in the state which gave birth to the doctrine. See Carpenter's Estate, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765; Bald Eagle R. R. Co. v. Nittany R. R. Co., 171 Pa. 294, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. Rep. 807. Foll's

Case is distinctly and finally repudiated in Northern Central R. R. Co. v. Walworth, 193 Pa. 207, 44 Atl. 253, 74 Am. St. Rep. 683. This last case is on all fours in principle with this case, and a strong authority in behalf of complainants' right to have specific performance of the contract here.

The contract here not being illegal or offensive to public policy, it remains to consider whether for any other reason it is such a contract as ought not to be specifically enforced under the settled rules of equity.

[6] The contract has been concluded, and is certain and unambiguous in its terms. It is not shown that the complainants have breached it. It is not alleged that it was induced by mistake or fraud. It was made upon a valuable consideration, and, for aught that appears now, is fair in all its parts, and is not a hard bargain. Coercing performance would not be oppressive to defendants, and it is capable of enforcement by a single decree. The contract possessing these conditions and incidents, the right of the complainants in equity to the stock is perfect, as the case is now presented, after their tender of performance, and the court has no discretion to refuse the remedy of specific performance. The objection of want of mutuality of remedy in the sense in which equity uses those terms no longer exists.

[7] Complainants seeking specific performance offer to perform on their part and unreservedly submit themselves to the court to decree whatever may be proper in enforcing the rights of the other party to the contract. If defendants accept their offer, complainants cannot afterwards retract it, and thus escape a decree in favor of the defendants. If, on the other hand, defendants refuse the offer, and unsuccessfully resist specific performance, they cannot be compelled to perform unless performance of every stipulation of the contract for their benefit is likewise coerced from complainants. In either event complete enforcement of the legal and equitable rights of the parties will be effected by one comprehensive decree, and the defendant cannot be remitted to a court of law for the enforcement of any of their rights. Jenkins v. Harrison, 66 Ala. 345; Hooper v. S. & N. A. R. R. Co., 69 Ala. 529; 6 Pomeroy's Equity Jur. §§ 769, 770; Miller v. L. & N. R. R. Co., 83 Ala. 278, 4 South. 842, 3 Am. St. Rep. 722. The ability of Doherty & Co. to pay the consideration named in the contract is denied in some of the affidavits, but on the whole proof the court has no doubt whatever of their ability to perform. If the defendants have anxiety on that account, acceptance of the offer to perform and the failure of the complainants within due time to perform would speedily result in a decree against them, or, at the option of the defendants a decree that the contract had been rescinded by their default, and a consequent dismissal of the complainants' bill.

[8] The conduct of Rice in leaving the jurisdiction and withdrawing power from his attorney to act for him rendered immediate tender to Rice impossible. Complainants, asking and tendering performance and submitting themselves unreservedly to the jurisdiction of the court, did all in their power to perform and to perfect their right and title to the stock in dispute. They became the equitable own-

ers of the stock, and, until final decree, they must be so regarded in measuring their rights in the various stages of the litigation, unless, meantime, defendants regain their right to the stock by offering to accept performance, and complainants then fail to perform. It necessarily follows that in gauging the relative rights of the parties against each other in the present stages of the litigation the stock in dispute must be treated in equity and good conscience as the property of complainants, and not of Tillis.

[9] Tillis holds the naked, legal title, the whole equitable estate being in the complainants, and, as trustee for them of the stock, he is bound as are all other trustees not to use it for his own gain or advantage, or to the detriment of the interests of his cestuis que trust. More than that, he is trustee in his own wrong, obtaining the legal title to the stock with full knowledge of the contract with complainants by combination with Rice to defeat the consummation of that contract, and has indemnified him against damage for breach of it in order to get the transfer of the stock to himself. He thus volunteered to meddle with trust property and stepped in Rice's shoes, and, as far as he could, became his substitute. In discussing his rights we may for the present well leave out of sight the transfer to Tillis, and treat him just as though he were Rice; for certainly Tillis cannot assert any right against complainants which Rice cannot. Both are trustees for complainants, and equity charges their consciences not to deal with the stock, save to transfer the legal title to the real owner on the stock books of the company which issued it, and forbade their use of the corporate power of the light companies in such a manner as to impede the consummation of the contract with the complainants or to deprive them of its fruits.

Complainants bargained with Rice for eight-tenths of the outstanding stock of the corporations, whose debts were not supposed to exceed \$75,000, which complainants contracted to pay subject to a bonded indebtedness of \$50,000. Complainants did not bargain with Rice for eight-eighteenths of the stock in a corporation whose property they as minority stockholders could not keep from being loaded down with the issue of nine times more bonds than were outstanding at the time of the purchase. It is too plain to be disputed that a court of equity can never permit Rice himself to use the stock he sold complainants to defeat performance by Rice of that contract, or as the means of introducing new stockholders by issuing new stock to pay debts which complainants had already contracted to pay, in order that complainants would be minority stockholders. Tillis has with Rice's connivance, and for purposes of his own, substituted himself in the place of Rice in the litigation and stands in his shoes here. Any decree which may be proper against Rice will be proper against Tillis, save as to the details concerning the new stock.

[10] Regarding the contention of respondents that as the voting of the shares which complainants bargained for was vested in the trustees, and therefore complainants could not vote the shares of stock themselves, even if they obtained a decree of specific performance, little need be said at this time. The depositaries of the power to vote

this stock are trustees in the strictest sense. If decree should go annulling the sale to Tillis and directing the corporation to transfer the shares to complainants on the stock book, and these trustees should afterwards use their voting power to the detriment or in hostility to the interest of the persons adjudged to be the owners of the shares, the trustees would commit a breach of trust, for which a court of equity would remove them, and, as a court of equity never allows a trust to fail for the want of a trustee, it would appoint others in their stead. This feature of the case presents no obstacle to an effective decree of specific performance, if it be proper on final hearing. As to it, we may well quote the language of the Chief Justice in *Union Pacific R. R. Co. v. Chicago, etc., R. R. Co.*, 163 U. S. 600, 16 Sup. Ct. 1187, 41 L. Ed. 265:

"The jurisdiction of courts of equity to decree the specific performance of agreements is of a very ancient date, and rests on grounds of inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damage for the breach. It must not be forgotten that in the increasing complexities of modern business equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies so that they should correspond both to the primary rights of the injured party and to the wrong by which that right has been violated, and has always preserved elements of flexibility and expansiveness so that new ones may be invented or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed."

It must be borne in mind in measuring the rights of the parties at this stage of the proceedings that this is in no proper sense a struggle between factions of stockholders of a corporation to control its policies, but in its last analysis is nothing but an effort on the part of the real owner of the stock, as the case is now presented, to prevent one who is not the owner of the stock, and who volunteered to thrust himself in between Rice and the complainants, to defeat complainants' rights from depriving the true owners by the aid of a hostile board of directors of recognition as shareholders, ignoring their rights as such in the management of the corporate property, and frustrating the orders which the court made for the preservation of the status of the stock as it existed before Rice transferred it. Tillis is not in any position to complain of any order which the court may make restricting the use of the shares purchased from Rice, or those subsequently acquired by the new issue, or restraining the acts of the light corporation pending final decree. His present attitude is inequitable, and it is meet that he should do equity. Complainants cannot wrest the disputed stock from him except upon payment to him of the amount they contracted to pay Rice, which is a much greater sum than his advances and subscription to stock. By thrusting himself into the controversy between Rice and the complainants and directing the corporate powers of the light company, he can wage his contention with complainants, secure against loss if he fails; and yet be in position, if complainants finally succeed, to use the powers of the corporate organizations meanwhile to impede enforcement of complainants'

rights and burden the value of the interest complainants purchased by making unnecessary and reckless contracts which the corporations would be bound to carry out even at a loss, no matter who is finally decreed to be owner of the stock, and thus inflict injury on complainants without risk of loss to himself if he is defeated in the suit, and by such methods so to change the situation and the value of complainants' investment as to induce them finally to abandon insistence for specific performance, and thereby effect his purpose to nullify complainants' contract with Rice. Complainants earnestly insist that such is his purpose, and cite as one of the proofs of it that the light company has recently contracted to pay its manager who has heretofore served for \$1,800 a year a salary of \$6,000 per annum in the future for practically the same duties as performed in the past; while the respondents insist the amount of the salary was but proper provision for an officer who had rendered faithful service in the past at an inadequate compensation, in view of the contemplated enlargement of its operations. The court does not find it necessary now to consider this and other acts which complainants insist show a studied purpose to prevent complainants if they finally succeed from obtaining the legitimate fruits of their contract.

[11] It is urged, however, that in enforcing to the extent prayed here, as against Tillis, the rights complainants might have against Rice, in whose shoes Tillis stands, the court will transgress the rights of the light company and usurp the discretion of its board of directors and harm the public interest by the stoppage pendente lite of the contemplated improvements. But what is the situation as to which this contention is made? Complainants were the equitable owners of the majority of the stock when Rice combined with Tillis to defeat complainants' acquisition of the legal title. Some of the directors of the light company were put in office for the very purpose of defeating the rights of complainants. Tillis according to his own affidavit, sought to acquire "absolute control," and the facts show that he has obtained it. One of the six directors now in office is the trusted friend, to whom Tillis confided his plans and purposes, and who conducted his negotiations for him. Another is Rice's attorney, who for two weeks before the date set for the performance of the contract with complainants was seeking to break it and negotiating with Tillis to induce him to become the purchaser of the very stock. Another is an important officer of the light company, who was so anxious to break the contract with complainants and have Tillis to acquire the stock that, notwithstanding an injunction was served upon him preventing the transfer of the stock by Rice, before it was transferred, did everything in his power afterwards to consummate it, as he says, "on the advice of counsel." Another is an employé of the light company. The remaining directors have long been associates of Rice. They sympathized in his trials in the conduct of the light company, and participate in his antipathy to complainants, who were charged with instigating litigation against the light company and seeking its ruin. Although they knew that Rice had sold the stock, their own included by their authority, they participated in the meeting on the night of the 16th of June, and elected two new directors whom Tillis desired. None of the di-

rectors have paid or are expected to pay anything for the one share of stock which stands in each of their names on the stock books with an indorsement in blank on the back of it.

The proof shows that on June 15th last the light company was on the verge of collapse, and its credit entirely gone. That enterprise had been conducted for several years under fierce competition, and it had incurred debts, including its bonded debt, of a much larger amount than the total capital paid into the enterprise. It had never declared a dividend. Some of the directors had strained their credit in carrying paper for it in the banks. The evidence strongly tends to show that after Tillis paid his subscription for \$80,000 of stock, and made some further advances, that the business under the new management has not made any profit. The Citizens' Light, Heat & Power Company has now sold all of its authorized capital stock with the exception of \$70,000, which has no market value, and which Mr. Tillis testified nobody wanted but himself or the complainants. The proposed issue of bonds would further reduce its value, and it can hardly be counted as an asset for raising money. The only other resource is the issue of mortgage bonds upon the property. Tillis says he proposes to aid the company in financing these bonds, but whether he does or not, or whether he takes the bonds himself or they are sold to another, the debts thus incurred will more than treble the present value of the corporate property. It is matter of common knowledge in this community that, wherever the two companies have heretofore come in contact, there has been little, if any, profit, in the venture, and frequently the business has been done far below cost. It is not reasonable to expect different results if the enlargement of the plant be made and consequent broadening of contact, and, if the venture is unprofitable, the value of the stock will be destroyed. The competitor of the light company from whom the business must be wrested upon terms which would make the enlargement of the plant at all profitable generates electrical current by water power, which the weight of the expert testimony shows can be produced considerably cheaper than the current produced by steam power, as is the case with the present and contemplated plant of the respondent company. The traction company is the largest consumer of power in this city, and the contract for it is with the Montgomery Light & Water Power Company and does not expire for some years. The latter company has also the light contract with the city, which does not expire for two years or more. There has not been much increase in the demand for light and power this year, and it is not probable that the demand will increase for months to come.

The Montgomery Light & Water Power Company has an invested capital in the light and power business of nearly \$1,500,000, and supplies about three-fourths of the demand for light and power in the community, while the operations of the respondent companies thus far have been restricted to a comparatively narrow area in the city. It would be years before respondent companies, if they succeeded in the end, could derive any profit from business, owing to the enlarged competition, which is the justification for the proposed enlargement of the plant. In view of these considerations, the contemplated en-

largement of the plant and consequent increase of respondent's indebtedness to raise the money is a very reckless speculation. Upon the case as it now stands, we repeat, complainants must be treated as the owners of the stock, and not Tillis. A board of directors which he controls ignores the interest of those who may be the owners of the shares, refuses to recognize them as stockholders, and, though the question who owns this stock will be speedily decided in the courts, insists upon making an enlargement regardless of its effect upon the interest of the true owner who may turn out to be the complainants, and not Tillis.

[12] It is the duty of the board of directors to manage the corporate affairs solely in the interest of the corporation, quite regardless of the effect of its policies and management upon the fortunes of individual stockholders in the corporation. The determination under these circumstances to enlarge the plant with the ruinous consequences it may involve to stockholders displays such recklessness and indifference to the interest of the true owners as is the equivalent of willful breach of trust. As said in Kessler & Co. v. Ensley Co. et al. (C. C.) 129 Fed. 408:

"Although equity will not remove a director who is a statutory fiduciary, as it would an ordinary trustee, it will not hesitate in a proper case to enjoin a director or to set aside acts of misconduct, amounting to a breach of trust, which oppress stockholders and militate against the well-being of the corporation."

It was further said in that case:

"That when all disinterested and fair men upon the facts upon which the directors' action is challenged would reach the conclusion that their decision was improper and prejudicial to corporate interest, and was not the result of their unbiased judgment, which had been deflected for some extraneous reason, the court cannot refuse to intervene, although the directors may have been honest."

The ordinary man with a reasonable sense of fairness, finding himself in charge of property to which different individuals lay claim of ownership, would not generally resist the justice of an appeal by a claimant who was out of possession not to deal with the property as though it were the property of the other claimant, and enforce his policies, it may be, to the ruin of his adversary, when there was no pressing necessity to act, when the rights of the parties in and to the property were before the court, and would be speedily decided, and no great harm could come to the property from managing it in the immediate future as it had been managed in the past. No man can read the record before the court in view of the history of this transaction, as thus disclosed, and avoid the conclusion that the directory is a partisan of Tillis, and hostile to complainants, and is doing what it can to defeat their success in this suit. Its judgment is not unbiased. Their acts amount to a settlement by Tillis himself of the conflicting rights which the complainants are seeking to enforce. In this complexion of the situation the determination of the board of directors does not commend itself to the conscience of the chancellor, and the court must view the question according to its own independent judgment.

As observed in Pomeroy's Equity Jurisprudence (Ed. 1892) § 1079:

"It is well settled that every violation of a duty by a trustee which equity lays upon him, whether willful or fraudulent, or done through negligence or arising through mere oversight or forgetfulness, is a breach of trust. The term furthermore includes every omission or commission which violates in any manner either of the three great obligations already described of carrying out the trust according to its terms of care and diligence in protecting and investing the trust property, and of using perfect good faith. This broad conception of breach of trust and the liabilities created thereby are not confined to trustees regularly and legally appointed. They extend to all persons who are acting trustees or who meddle with trust property."

Leaving aside the question whether the public is benefited in the end by seasons of fierce competition which always result in the stronger enterprise swallowing the weaker, or at least a combination between them whereby the business is continued under one management, which invariably recoups the losses sustained in the struggle by exacting higher rates in the future, there is nothing in the situation which would imperil or harm the public interest from the court's maintaining the status quo as fixed by the orders heretofore made, and by those which will be made on awarding a preliminary injunction. The light company is left entirely free to continue its business as it has in the past, and not a single consumer now served by it will be disturbed nor the area of its business curtailed. The evidence shows that its present plant generates a considerably larger supply of electric current than is needed to supply its present customers, and it is free to use it in gaining new customers or meeting enlarged demands. The orders will not disturb its operations as they have been conducted for the last four years. No contracts have been made for supplying anything for the contemplated enlargement of the plant. The details of the plans concerning it have yet to be determined and passed upon by an engineer, and specifications made, and not till then could orders be given, even if the court did not prevent the incurring of expenditures for that purpose. Long before any order could be placed the case will be passed upon in the Court of Appeals, and waiting until then will not entail delay at all harmful. The only contract so far made regarding the enlargement of the plant is with a civil engineer, who contracts to advise and supervise plans upon a commission whenever entrusted with the duty, and respondents are not even bound under that contract to undertake the improvements. According to the testimony, the only thing done under it has been a visit of one or two gentlemen for a day to look into the situation. Preventing the placing of the orders pendente lite will not harm the respondents, and, if they are inconvenienced thereby, it is the unavoidable result of Tillis thrusting himself into the litigation and controlling and shaping the policy of the directory to defeat the rights of complainants.

It is a gratification to know, if the court errs in holding that complainants are entitled to a preliminary injunction, its error can be corrected in less than 90 days by the Court of Appeals which meets here next month. If it decides that the contract here is not such a one as can or ought to be enforced in equity, the confusion in the affairs of the light company, which would not have occurred but for the intervention of Tillis in its affairs, will be speedily ended. If, on the

other hand, the Court of Appeals should hold that complainants' contract should be enforced in equity, it would manifestly be most inequitable to allow the light company or its board of directors, which is controlled by Tillis, and who are hostile to the rights of complainants, to direct its affairs pending the litigation so as to deprive the complainants of the fruits of their contract or jeopardize them.

A preliminary injunction will issue in accordance with this opinion. Counsel for complainants may prepare a draft of the order and submit it to counsel for respondents, and the court will then settle its terms.

In re MONONGAHELA DISTILLERY CO.

(District Court, E. D. Michigan, S. D. April 18, 1910.)

No. 1,724.

1. BANKRUPTCY (§ 140*)—RECLAMATION OF GOODS IN POSSESSION OF BANKRUPT—CONTRACTS—VALIDITY.

A local wholesale liquor dealer without a license between May 1st and May 28th following made a contract on April 24th with a foreign liquor dealer looking to the shipment and sale of liquor to and by the former as factor for the latter. Goods were shipped before May 1st and payments made in July and August following. On May 10th a new contract was made under which the foreign dealer, before and after May 28th, shipped liquor to the local dealer as a factor, and payments were made in July and August, and in August a large amount of goods were returned to the foreign dealer. *Held*, that the court on the petition of the foreign dealer to reclaim goods in the possession of the bankrupt local dealer would presume in the absence of anything to the contrary that the goods were the product of transactions subsequent to May 28th, so that such transactions were not invalid on the ground that the local dealer had no liquor license, and the absence of a license when the goods were shipped and received did not prevent the contemplated relations of principal and factor from coming into force as soon as the local dealer obtained a license, and the foreign dealer could reclaim liquor in possession of the local dealer.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

2. BANKRUPTCY (§ 140*)—RECLAMATION OF GOODS IN POSSESSION OF BANKRUPT—CONTRACTS—VALIDITY.

Where a foreign liquor dealer shipped goods to an unlicensed local liquor dealer for sale as a factor without knowledge that the local dealer did not have a license to sell liquor, the foreign dealer could reclaim goods in the possession of the local dealer on it being adjudged a bankrupt, for, if the contract was invalid, the title to the liquors did not pass, and the liquors and their proceeds belonged as against the trustee in bankruptcy to the foreign dealer.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

3. COURTS (§ 371*)—FEDERAL COURTS—STATE LAWS—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS.

The prohibition in a state statute prohibiting a foreign corporation from doing business in the state without complying with the statute will be observed by the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 972-976; Dec. Dig. § 371.*]

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

4. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—TRANSACTION BUSINESS IN STATE.

Where a foreign corporation and a domestic corporation had dealt with each other for years on the basis of the foreign corporation selling goods to the domestic corporation, and such basis was changed only because of the poor financial standing of the domestic corporation so that regular sales on credit were not safe, and the foreign corporation adopted the form of consigning goods to the domestic corporation for sale as a factor, to avoid the risk of loss in making a sale on credit, the arrangement was not objectionable as a subterfuge for the establishment by the foreign corporation of a warehouse and distributing sales agency within the state, without complying with the laws of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

Foreign corporations doing business in state, see notes to Wagner v. J. & G. Meakin, 33 C. C. A. 585; Ammons v. Brunswick-Balke-Collender Co., 72 C. C. A. 622.]

5. COURTS (§ 361*)—DECISIONS—CONTROLLING DECISIONS.

The question of what is interstate commerce is a federal question, and a decision of a state Supreme Court does not control.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 954; Dec. Dig. § 361.*]

6. CORPORATIONS (§ 642*)—FOREIGN CORPORATIONS—TRANSACTION BUSINESS IN STATE—"DOING BUSINESS."

A foreign corporation shipped liquors without the state to a factor within Michigan, retaining title thereto and contemplating that the factor should make sales to its customers within Michigan. The foreign corporation sent a man to supervise the keeping of the books and the handling of the funds by the factor, and the factor paid him. It was agreed that the book accounts should belong to the foreign corporation. *Held*, that the foreign corporation did not transact business in Michigan within the laws regulating the doing of business by foreign corporations, but the transactions partook of the character of interstate commerce.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520-2527; Dec. Dig. § 642.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

7. BANKRUPTCY (§ 140*)—RECLAMATION OF GOODS AND ACCOUNTS IN POSSESSION OF BANKRUPT.

Where a contract for the shipment of goods to the consignee for sale as factor of the consignor was void, accounts for goods sold by the consignee who became a bankrupt must be turned over to the consignor on his petition therefor.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

8. BANKRUPTCY (§ 228*)—REVIEW OF ORDER OF REFEREE—ASSIGNMENTS OF ERROR—NECESSITY.

Where the undisputed proof on a petition for the reclamation of goods and book accounts for sales in the possession of a bankrupt show that the bankrupt was entitled to a commission on sales, the court on petition to review the order of the referee directing the return of the accounts without deduction for commissions will protect the bankrupt's rights to a commission, though there is no specific assignment of error.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. § 228.*]

In the Matter of the Monongahela Distillery Company, a bankrupt. Petition for review of the order granting the petition of the Schufeldt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company for reclamation of goods and for book accounts. Modified and affirmed.

Sloman & Sloman, for trustee in bankruptcy.

Bernard B. Selling and Arthur E. Fixel, for Monongahela Distillery Co.

Miller, Smith, Paddock & Perry, for Henry H. Schufeldt Co.

DENISON, District Judge. Upon the petition of the Schufeldt Company for reclamation of goods, and the supplemental petition of the same company claiming the book accounts which accrued from the sale of goods disposed of before the adjudication, the referee found in favor of the petitioner and ordered the return to the Schufeldt Company of about 200 gallons of liquors which had been shipped by it to the bankrupt, awarded to the Schufeldt Company \$114.13 in the hands of the trustee as the proceeds of other similar goods, and further awarded to the Schufeldt Company book accounts which had accrued to the bankrupt by the sale of other similar goods and which were uncollected at the date of the adjudication, and which had a face value of about \$3,600. This finding was upon the theory that in the transactions in question the bankrupt had been factor and the Schufeldt Company had been consignor, and that the goods, until sold, and then the substituted accounts, belonged to the consignor.

The trustee brings this petition for review and assigns several errors, which can be grouped as follows:

(1) The dealings between the Schufeldt Company and the Monongahela Company contemplated the sale by the latter in Michigan, and as a wholesale liquor dealer, of the liquors furnished for that purpose by the former, and that, because the bankrupt at the date of the arrangement had no license under Michigan laws, to do this business, the contract was invalid, and neither party is entitled to any legal remedy.

(2) The transactions amounted to a doing of business within the state of Michigan by the Schufeldt Company, and it cannot ask any aid from the courts, because it had not qualified itself, under Michigan laws, to do business, as a foreign corporation, within that state.

1. The Liquor License.

The annual license of the Monongahela Company as a wholesale liquor dealer expired May 1, 1909. A contract between the parties, looking to the shipment and sale of liquors to and by the Monongahela Company, as the factor for the Schufeldt Company, was made April 24th, and under that contract goods were shipped, before May 1st, amounting to about \$1,500. Payments on account were made in July and August amounting to about \$1,200, and a large amount of goods was returned. It does not appear whether any of the goods shipped or received before May 1st entered in their original form or in the form of substituted accounts into the award made by the referee; and the proofs furnish no means of determining this question.

The original arrangement of April 24th did not extend to any particular amount, and the Schufeldt Company was under no obligation

on May 1st to ship any more than it had already shipped. More goods being asked for, the Schufeldt Company's representatives came to Detroit, were unwilling to ship without more definite and exact arrangements, and entered into a further contract of the same nature, but giving it additional safeguards, and the shipments thereafter were made under and pursuant to the contract of May 10th. From May 15th to May 21st, shipments were made amounting to about \$8,000. On May 28th the Monongahela Company took out its regular license, and no question exists of its authority to do business after that date. In August a large amount of the goods was returned to the Schufeldt Company. There is no proof from which it is possible to determine whether any of the goods shipped from May 1st to May 21st were received and sold before May 28th, or whether any such goods remained on hand in their original form when this petition was filed, or whether the book accounts on hand represented any such goods. If either this question or the one just above stated becomes material, it must be decided upon some theory of presumption.

I think the lack of license by the Monongahela Company until May 28th is immaterial for these reasons:

[1] First. It does not appear that any of the subject-matter now in controversy arose out of shipments before May 28th, and I find no presumption to that effect; on the contrary, the ordinary presumption is that the remaining portion of an account is the product of the transactions of latest date, and goods consigned at over \$3,200 were shipped after May 28th.

Second. Even if some shipments are involved, which were made before May 28th, it is even less probable that those sales by the consignee to its customers which remain unpaid for were made before that date; and I do not see how the absence of a license when the goods were shipped and received, although it might involve the immediate relations of the parties, would prevent the contemplated relations from coming into force as soon as the consignee was legally qualified to do the expected business. In the case of Niagara Falls Co. v. Wall, 98 Mich. 158, 57 N. W. 99, relied upon by counsel for the trustee, it appeared that the impediment preventing the consignee from lawfully doing the expected business continued until the contract had been rescinded by one party for a breach by the other; manifestly, a different situation from one where both parties continue after the temporary impediment is removed.

[2] Third. Even if the contract of May 10th was wholly void, the trustee would not be helped in his present position, the title to the liquors would not have passed, and both the liquors and their proceeds would belong to petitioner, nor would petitioner, in that event, be barred from relief on the ground that both parties were in equal wrong, since there is nothing tending to show that petitioner doubted or had any reason to doubt the consignee's full, legal capacity to continue to carry on the business in which it had been for several years engaged.

2. The Foreign Corporation.

[3] The question whether the carrying out of the arrangement of May 10th amounted to a doing of business by the Shufeldt Company

within the state of Michigan is perhaps not free from doubt. If this was doing business within the state, it was prohibited by that statute, any suit based upon such contract is likewise prohibited, and such prohibition will be observed by the federal courts as well as by the state courts. See Judge Lurton's opinion in *Oakland Co. v. Wolf Co.*, 118 Fed. 239, 55 C. C. A. 93.

It is argued that this arrangement was a mere subterfuge for a warehouse and distributing sales agency, and should be treated accordingly. Whatever the rule as to an ordinary consignment for sale by a factor, it may very well be that if a nominal consignment account was in fact a subterfuge for such an agency, and was adopted to evade a statute regulating or taxing doing business within the state, the form might be overlooked, and the relation might be treated according to its substance; but in this case there is no evidence tending to show any such subterfuge.

[4] On the contrary, the parties had been dealing for years on the ordinary basis of selling and buying, and such basis was changed only because the buyer's financial standing became so poor that regular sales on credit were not safe. The seller, the Schufeldt Company, adopted this form only for the purpose of avoiding the risk of loss in making a sale on credit, and took no precautions not adapted to that end. Obviously, when a consignor without the state ships goods to a factor within the state, retaining the title thereto, and contemplating sales by the factor to its customers within the state, the entire transaction partakes of the character of both interstate commerce and of doing business by the consignor within the state. Under the rule stated in *Higgins v. McCrea*, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764, to the effect that the contracts of sale made by a factor in his own name are in law the contracts of the consignor, it would seem that sales so made were sales by the consignor at the selling point, and that when, as in this case, the transaction was not a single instance, but both parties contemplated a permanent arrangement, disposing of a large amount of goods, it constituted doing business at that point; but such conclusion is only argumentative, and the contrary result is reached by the Circuit Court of Appeals of the Eighth Circuit, in a very elaborate opinion in *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 Fed. 1, 84 C. C. A. 167. This decision was made in 1907. A writ of certiorari was denied by the Supreme Court, 212 U. S. 577, 29 Sup. Ct. 686, 53 L. Ed. 658. It has been cited and followed by the U. S. District Court in the Western District of Wisconsin (*Atlas Engine Works v. Parkinson* [D. C.] 161 Fed. 229), and I cannot find that it has been in any way questioned. I therefore accept the rule there stated, and think that there are no circumstances in the present case distinguishing it from the *Butler Bros.* Case.

[5] The question of what is interstate commerce is a federal question, and the decision of the Supreme Court of Michigan in *Neyens v. Worthington*, 150 Mich. 580, 114 N. W. 404, 18 L. R. A. (N. S.) 142, would not control, even if parallel; but the circumstances, 1, 2, 3, and 4, pointed out on page 586 of 150 Mich., on page 404 of 114 N. W., on page 142 of 18 L. R. A. (N. S.), fully distinguish the two cases on their facts.

[6] It appears, also, that a Mr. Beck was sent practically at the dictation of the petitioner to supervise the keeping of the books and handling of the funds relating to these goods; but he was employed and paid by the consignee, and the fact that he was selected by the consignor and owed some allegiance to it is not controlling. It is also urged that the special contract that the book accounts should belong to the Schufeldt Company is important; but such ownership of the resulting debts or securities is typical of the factor's relation, the general title being in the principal and the factor having a special interest in aid of his lien. *Brander v. Phillips*, 16 Pet. 121, 10 L. Ed. 909; *U. S. v. Villalonga*, 23 Wall. 35, 23 L. Ed. 64; *Beckwith v. Sibley*, 11 Pick. (Mass.) 482; *Bank v. Heilbronner*, 108 N. Y. 439, 15 N. E. 701.

The trustee's counsel especially urges that the Wilson act (26 Stat. L. 313 [U. S. Comp. St. 1901, p. 3177]) takes the liquor traffic outside the rule of the Butler Bros. Case, and he relies on the Delamater-South Dakota Case, 205 U. S. 93, 27 Sup. Ct. 447, 51 L. Ed. 724. I do not so understand the force of this Delamater Case. The substantial matter now involved is whether the dealings in question come within the established definition of interstate commerce. The Wilson act did not, in the least, modify this definition. It only yielded to the states the right to make police regulations which, except for such permission, would have remained within the exclusive power of Congress; and, since the Wilson act and prior to this controversy, Michigan had not legislated under such permission. Hence in April or July, 1909, the right of a foreign corporation to act in Michigan as a part of interstate transactions was the same whether its business was in liquors or in rubber boots.

[7] There is the further consideration that, if the special contract of May 10th was void, then the title to the goods never passed, and the Schufeldt Company would be the owner of the goods on hand, and entitled to their return. I see no reason why the same principle would not cover the accounts, though Judge Hallett, upon the trial of the Butler Case (C. C.) 132 Fed. 398, refused to go to that extent. It would seem that it is the trustee who must rely upon the special contract in order to enforce the factor's lien, if, in fact, any reliance thereon is necessary by either party. It follows that the referee's conclusions must be approved, except so far as they disregard the factor's lien upon the accounts.

[8] There is no assignment of error on this point; but the proofs show without dispute that the Monongahela Company was entitled, upon such sale, to a commission equal in difference between the consignment price and the final selling price. This commission must be a considerable fraction of the amount of each final sale; and the accounts must have included amounts *prima facie* belonging to the bankrupt. There is no proof of any shortage or any countercharge. It therefore appears that the absolute assignment of the entire accounts to the Schufeldt Company without protecting the factor's lien was erroneous; and I do not think this should be overlooked merely for the technical cause that the assignments of error do not specify this particular reason why the challenged result was wrong. It may

be that, in strictness, the Shufeldt Company was not entitled to a transfer of the accounts until it had satisfied any lien which in fact existed in favor of the trustee, but it makes no substantial difference which party does the collecting of the accounts; the rights of the other being preserved.

Perhaps no further accounting will be actually necessary because it may be apparent from the facts not now before me that there is a sufficient general balance in the account against the bankrupt to exhaust its interest in the unpaid accounts, in which case it will have no lien. 12 Am. & Eng. Encyc. (2d Ed.) 679; McGraft v. Rugee, 60 Wis. 406, 19 N. W. 530, 50 Am. Rep. 378.

The assignment of accounts will be modified so as not to prejudice any existing lien, and, if necessary, an accounting will be had pursuant to the order filed herewith. It goes without saying that counsel will not go to the expense of such accounting, unless it seems that there is a substantial amount coming to the trustee, and that the Schufeldt Company will make a full statement of the condition of the accounts transferred to it so that the trustee can determine whether to proceed formally.

There is no occasion for awarding any costs to either party.

UNITED STATES v. DOUGHTEN et al.

(Circuit Court, E. D. Washington, E. D. April 15, 1911.)

No. 1,519.

**1. CONSPIRACY (§ 33*)—FRAUD AGAINST UNITED STATES—COAL LAND ENTRIES
—INDICTMENT.**

Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of them do any act to effect the object of the conspiracy, all shall be liable to a penalty, etc. *Held*, that an indictment charging a conspiracy by defendants to defraud the United States by obtaining title to upwards of 5,000 acres of coal lands in Alaska of the value of \$2,000,000 by means of 39 false, fraudulent, and fictitious entries made by as many different persons, ostensibly for their own benefit, but in fact for the benefit of the defendants, whereby the defendants would be enabled to receive and enjoy the benefit of a greater number of coal entries and locations and a greater quantity of coal lands than was permissible under the law, charged a crime.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. § 33.*]

2. MINES AND MINERALS (§ 35*)—COAL LANDS—ENTRY—STATUTES—APPLICATION.

Rev. St. § 2347 (U. S. Comp. St. 1901, p. 1440), authorizes citizens to enter vacant coal lands in amount not exceeding 160 acres to any one person and 320 acres by an association of persons. Section 2349 provides the method of entry, and section 2350 (page 1441) declares that the three preceding sections shall authorize only one entry by the same person or association of persons, and that no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

any other lands under the provisions thereof, etc. Act Cong. April 28, 1904, c. 1772, 33 Stat. 525 (U. S. Comp. St. Supp. 1909, p. 556), provides that any person or association qualified to enter coal lands of the United States who shall have opened or improved a coal mine or mines in any of the unsurveyed lands of the United States in the district of Alaska may locate the lands on which the mine or mines are situated in rectangular tracts containing 40, 80, or 160 acres by marking the corners with permanent monuments, etc., and then declares the mode for obtaining title, and provides (section 4) that "all the provisions of the coal land laws of the United States not in conflict with the provisions of the act shall continue and be in force in the district of Alaska." Held, that section 4 of the act of 1904 did not limit the continuation of the coal land laws of the United States made applicable to the district of Alaska to such laws as applied to surveyed lands only, but included the provisions of the Revised Statutes limiting the quantity subject to entry by individuals or associations, though the act of 1904 did not in itself limit the number of entries or locations a person or association might make.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 87; Dec. Dig. § 35.*]

Charles H. Doughten and others were indicted for conspiracy to defraud the United States in connection with certain coal land claims in Alaska. On demurrer to the indictment by defendant McKenzie. Overruled.

B. D. Townsend, Special Asst. Atty. Gen., Oscar Cain, U. S. Atty., and E. C. MacDonald, Asst. U. S. Atty.

James E. Fenton, for defendants Doughten and Brown.

James E. Fenton and Frank H. Graves, for defendant White.

J. W. Roberts (E. C. Hughes, of counsel), for defendants Charles A. McKenzie and Donald A. McKenzie.

RUDKIN, District Judge. The act of March 3, 1873, relating to the entry and sale of coal lands, is embodied in sections 2347 to 2352, inclusive, of the Revised Statutes (U. S. Comp. St. 1901, pp. 1440-1441), which read as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: Provided, that when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

"Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period the same shall be subject to entry by any other qualified applicant.

"Sec. 2351. In case of conflicting claims upon coal lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

"Sec. 2352. Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper."

The act of June 6, 1900 (31 Stat. 658 [U. S. Comp. St. 1901, p. 1441]), extended the provisions of the foregoing sections to the District of Alaska.

The act of April 28, 1904 (33 Stat. 525 [U. S. Comp. St. Supp. 1909, p. 556]), which by its title purports to amend the act of June 6, 1900, provides as follows:

"That any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this act, or within one year from making such locations, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat of survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal land laws: Provided, that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"Sec. 4. That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska."

The act of May 28, 1908 (35 Stat. 424 [U. S. Comp. St. Supp. 1909, p. 557]), contains these further provisions:

"That all persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or locations by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated, and for this purpose such persons, their heirs, or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, that no corporation shall be permitted to consolidate its claims under this act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska.

"Sec. 2. That the United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this act as may be necessary for the use of the army and navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase.

"Sec. 3. That if any of the lands or deposits purchased under the provisions of this act shall be owned, leased, trusted, possessed, or controlled

by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in any wise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by proceedings instituted by the Attorney General of the United States in the courts for that purpose.

"Sec. 4. That every patent issued under this act shall expressly recite the terms and conditions prescribed in sections two and three hereof."

The indictment in this case was returned under section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which declares:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

On his arraignment the defendant Charles A. McKenzie interposed a demurrer to the indictment, and the questions raised by the demur-
rer are now presented for decision. Inasmuch as the demurrer goes to the substance of the charge and not to mere matters of form, it is deemed sufficient for our present purposes to state in general terms that the indictment charges a conspiracy on the part of the defendants to defraud the United States by obtaining title to upwards of 5,000 acres of coal land in the district of Alaska, of the value of upwards of \$2,000,000, by means of 39 false, fraudulent, and fictitious entries, made by as many different persons, ostensibly for their own use and benefit, but in truth and in fact for the use and benefit of the defendants, whereby the defendants will be enabled to receive and enjoy the benefit of a greater number of coal entries and locations and a greater quantity of coal land than is permissible under the law. I understand counsel for the demurring defendant to concede that the indictment charges a crime, if the prohibitions and limitations contained in section 2350 of the Revised Statutes apply to coal entries made in the district of Alaska under the Act of April 28, 1904, but, if this concession be not made, the question is no longer an open one. *United States v. Trinidad Coal Co.*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; *United States v. Keitel*, 211 U. S. 370, 29 Sup. Ct. 123, 53 L. Ed. 230; *United States v. Portland Coal & Coke Co.* (C. C.) 173 Fed. 566.

The position of the defendants, as I gather it from the briefs and arguments of counsel, is this: They contend that the act of 1904 is complete within itself, and bears a close analogy to the mineral land act; that under its provisions there is no limit to the number of entries or locations a person may make, or to the number of assignments he may take; that the provision of section 4, continuing the nonconflicting provision of the coal land laws of the United States in full force in the district of Alaska, continues such laws in force as to surveyed lands only; in fine, that the act is a new departure in coal land legislation, and was enacted by Congress in recognition of the well-

known fact that the existing laws were not adapted to local conditions in that distant territory. This argument is engaging and plausible, but to my mind it is neither convincing nor controlling. The supposed analogy to the mineral land act is found, first, in the requirement of section 1 of the act that the lands shall be located in rectangular tracts, containing 40, 80, or 160 acres, with north and south boundary lines run according to the true meridian, by marking the four corners with permanent monuments, and that the location notice shall be filed for record in the recording district, as well as with the register and receiver of the district land office; second, in the provision of section 2 of the act recognizing assignments and prescribing the mode of making proof; and, third, in the provision of section 3 of the act prescribing the mode and place of trial of adverse claims. I find nothing in these several provisions to indicate a general change of policy on the part of the government. These coal claims are located on unsurveyed lands. They cannot be described by reference to the public surveys, and the only thing left is to tie the descriptions to permanent monuments on the ground. The local land offices in Alaska are inaccessible, and in this fact I find a sufficient explanation and justification for the requirement that the location notices shall be filed in the recording district, and adverse claims tried out in the civil courts, which are accessible to the people. The provision of section 2 in relation to assignments is but the legislative recognition of a right which the department had rightfully or wrongfully accorded to entrymen under the act of 1873 for a period of 30 years prior to the passage of the act of 1904. The argument that the act of 1873 is not adapted to local conditions in Alaska tends equally to show that it is not adapted to conditions in any other section of the country. It may be that the act tends to promote fraud and perjury, and that 40, 80, or 160 acres of coal land is of little or no value to the individual, but this argument should be addressed to Congress, and not to the courts. It is a matter of familiar history that at the time of the passage of the act of 1873 the great coal fields of the western part of the United States were as far removed from civilization and from transportation facilities as are the coal fields of Alaska to-day, yet the policy of the government to confer a right upon the individual and to prevent monopoly has never been departed from in the nearly 40 years that have elapsed since the date of its passage. Furthermore, questions of general governmental policy such as this must be determined by Congress, and not by the courts. The question here presented is one purely of statutory construction; and, however firmly a court might disbelieve in the past coal land policy of the government, it would usurp authority not conferred upon it, should it attempt to establish a policy in defiance of the will of Congress. That body, acting within its constitutional authority, is the final arbiter of the public policy of the nation, and while the courts, unaided by legislative declaration, and applying the principles of the common law, may uphold or condemn contracts in the light of what is conceived to be public policy, their determination as a rule for future conduct must yield to the legislative will when expressed in the mode prescribed by the fundamental law. Turning

now to the legislation in question, what was the legislative intent as evidenced by the act of 1904? The original act of 1873 did not by its own terms extend to the district of Alaska. In 1900 Congress extended its provisions to that district, and there is not a word or a line in the extending act to indicate any change of policy on the part of the government at that time. It was later discovered that the act was not adapted to conditions there, not because a person could not make a sufficient number of coal entries, nor because he could not take a sufficient number of assignments, but because he could not acquire title at all until the public surveys were extended. It is true that under section 2 of the act of 1873 a person might acquire a preference right of purchase on unsurveyed lands, but he could not acquire title until the public surveys were extended. The mere preference right was therefore a barren one, unless there was a reasonable expectation that the public surveys would be extended so that the locator could obtain title at some time in the near future. It was to remedy this defect, and not to enlarge the rights of the entryman, that the act of 1904 was passed. Its sole purpose in my opinion was to enable locators to acquire title to coal lands on unsurveyed public lands. There is nothing in the act inconsistent with this view, nor is there anything in the act, so far as I can discover, inconsistent or in conflict with the provisions of section 2350 of the Revised Statutes, prohibiting more than a single entry by a single individual. The conflicting provisions in the act of 1904 relate to the mode of location, the time and manner of making final proof, and the manner of trial of adverse claims, and I find no other conflict between the two acts. The fact that section 2350 of the Revised Statutes limits its operation to entries made under the three preceding sections is to my mind of no moment. The original act used the expression, "this act," instead of "the three preceding sections," and in its last analysis the provision meant only that no more than one coal land entry by a single individual was permissible. This conclusion is fortified by the act of 1908. This latter act, as clearly appears from its title and subject-matter, is an enabling statute, and was intended to extend and enlarge the rights of locators in Alaska. Yet, if we accept the views of the defendants such an enactment was wholly unnecessary, for locators possessed far greater rights under the act of 1904 than are accorded to them under the later enactment. While the act of 1908 was passed long after the commission of the acts charged in the indictment and cannot render criminal, acts which were innocent at the time of their commission, it may nevertheless be looked to for the purpose of ascertaining the legislative intent. The act of 1900, the act of 1904, and the act of 1908 are all in pari materia, and must be construed together. "All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively, and construed together, as though they constituted one act. This is true, whether the acts relating to the same subject are passed at different dates, separated by long or short intervals at the same session, or on the same day. They are all to be compared, harmonized, if possible, and, if not susceptible to

a construction which will make all of their provisions harmonious, they are made to operate together, so far as possible, consistently with the evident intent of the legislative enactment." Sutherland, Stat. Cons. 283. "Where there are earlier acts relating to the same subject, the survey must extend to them. They all are, for the purpose of construction, considered as forming one homogeneous and consistent body of law, and each of which may explain and elucidate every other part of the common system to which it applies." Endlich, Interpretation of Stat. § 43.

Thus, in *United States v. Moore*, 161 Fed. 513, 88 C. C. A. 455, the Circuit Court of Appeals for this circuit held that the Act of July 4, 1884, 23 Stat. 79, the Act of March 3, 1905, 33 Stat. 1064, and the Act of March 8, 1906, 34 Stat. 55, relating to certain Indian lands, were in pari materia, and the two later acts were examined and considered by the court in determining the validity of a conveyance made years before their passage. When these several coal land acts are construed together, I am convinced that Congress never intended that an association of individuals should be able to acquire title to vast areas of coal land in the district of Alaska or elsewhere by means and devices such as are set forth in this indictment.

It was urged in argument that criminal statutes must be strictly construed, and this rule is elementary, but it has no application to the coal land laws of Alaska. If the means employed by these defendants to acquire title to the coal lands in question are illegal and a fraud upon the United States, it must be so declared in every court in which the question arises, whether that court is exercising civil or criminal jurisdiction. On the trial of the action questions of criminal intent and other like questions peculiar to penal laws may arise, but they are not presented at this stage of the case, and do not appear on the face of the indictment. I reach this conclusion with some hesitation for two reasons: First, because able counsel who have argued the case on behalf of the defendants do not deem the question even a debatable one; and, second, because the Circuit Court of the United States for the Western District of Washington has reached a contrary conclusion on the same state of facts. Nevertheless I am so firmly convinced of the correctness of the conclusions here announced that my judgment will yield only to the mandate of some court of superior jurisdiction.

The demurrer is overruled.

WASHINGTON STATE SUGAR CO. v. SHEPPARD et al.

(Circuit Court, D. Idaho, N. D. February 21, 1911.)

1. **WATERS AND WATER COURSES (§ 152*)—DETERMINATION OF WATER RIGHTS—PARTIES—“INDISPENSABLE PARTIES.”**

The right of a claimant to use the waters of a natural stream for beneficial purposes, where the same has been acquired by compliance with the law governing the appropriation of water in the arid region, is several, and it may be protected from interference by any one or all of the other

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

several claimants of similar rights, and all of such several claimants are not "indispensable parties," in the sense that without their presence the court may not grant any relief.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

2. WATERS AND WATER COURSES (§ 152*)—DETERMINATION OF WATER RIGHTS—PARTIES.

Under the rule that equity aims to settle in a single suit the rights of all the persons interested in the subject-matter, it is important that all claimants to the right to divert the waters of a natural stream for beneficial purposes shall be brought into the same court in a single action and therein required to wage their claims, so that such claims necessarily more or less interdependent and conditioned on one another may be settled by a single decree.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

3. EQUITY (§ 115*)—JURISDICTION—PARTIES.

Under general equity rule No. 47, authorizing the court in its discretion to proceed without making persons parties which if joined would oust the jurisdiction of the court, the court in a suit to enjoin defendants from interfering with complainant's diversion of water from a stream for irrigation purposes will in its discretion require complainant, who has commenced a suit in a state court to enjoin interference by others to make all parties interested parties to the suit, though the court will be ousted of jurisdiction thereby.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 280–283; Dec. Dig. § 115.*]

4. WATERS AND WATER COURSES (§ 152*)—INTERFERING WITH DIVERSION OF WATER—ACTIONS.

Where a bill to enjoin defendants from interfering with complainant's diversion of water from a natural stream for irrigation purposes, and to determine the several rights of the parties to the waters of the stream, alleges facts apparently sufficient to warrant the relief demanded, the fact that the bill also prays for a permanent injunction restraining defendants from interfering with complainant's ditch and works and physically injuring the same merely makes such relief incidental, and all the parties interested in the waters of the stream must be made parties.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

5. WATERS AND WATER COURSES (§ 152*)—INTERFERING WITH DIVERSION OF WATER—ACTIONS.

Where, in a suit to enjoin defendants from interfering with complainant's diversion of water from a natural stream for irrigation purposes, and to determine the several rights of the parties to the waters of the stream, it appeared that third persons not made parties claimed the right to use the waters of the stream, and that their use diminished the supply available for other purposes, and it was difficult, if not impossible, to determine how much water complainant should be required to permit to pass through its dam to supply the rights of the defendants without also determining the rights of the third persons, the third persons were necessary parties to a complete adjudication.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 152.*]

Suit by the Washington State Sugar Company against Samuel Sheppard and others. Pleas presenting the question of defect of parties allowed, with leave to amend the bill, or to join issue on the pleas.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Allen & Allen and F. D. Allen, for complainant.
Edwin McBee, F. M. Curtis, A. C. Remele, E. N. La Veine, and
M. C. King, for defendants.

DIETRICH, District Judge. The amended pleas to the complaint present the question whether or not in a suit brought by the plaintiff against several defendants to enjoin them from interfering with the plaintiff's diversion of water from a natural stream for irrigation purposes, and to determine the several rights of the parties to the waters of the stream, the plaintiff should be required, by amendment, to bring in all parties asserting similar claims; it appearing that substantial, if not the principal, claimants to the right to use the waters of the stream involved are not parties. The requisite diversity of citizenship between the present parties to confer jurisdiction upon this court exists, and objection to the pleas is based largely upon the fact that, if the other claimants who are residents of the state of Washington are made parties defendant, jurisdiction would necessarily be lost.

Upon behalf of the defendants who interpose the pleas, it is urged that the other claimants are "indispensable" parties. Accepting the term in its technical sense as being descriptive of a party without the presence of whom the court cannot grant any relief, the contention is not thought to be well taken. [1] The right of a claimant to use the waters of a natural stream for beneficial purposes, where the same has been acquired by compliance with the laws governing the appropriation of water in the arid region, is several, and it may be protected from interference by any one or all of the other several claimants of similar rights. If the position of the defendants were well taken, it would follow that no court could adjudicate a suit of such character without first acquiring jurisdiction over the persons of all of the claimants, or at least jurisdiction over all of the claims, and, if that were true, many cases would arise where an injured party would be without remedy because of the lack of a tribunal of competent jurisdiction. Streams not infrequently arise in one state and flow into, and perhaps pass through, another. In such case it may well happen that one group of claimants resides in one state and diverts water from a given stream in that state for the irrigation of land situate therein, whereas another group, residing in an adjoining state, diverts water in such adjoining state for the irrigation of lands situate therein. Under such conditions, it would be impossible for one of the claimants to force all of the others into any tribunal in a single suit.

But, while a claimant is not an indispensable party, he is, upon the other hand, not merely a formal party. He is a "necessary" party. [2] It is a familiar principle that a court of equity delights to do complete justice, and that it constantly aims to settle the rights of all persons interested in the subject-matter, not in piecemeal, but in a single suit, in order that individuals may not be harassed by a multiplicity of actions, and that there may be uniformity and unity of adjudication. To this end, it is highly important that all claimants to the right to divert the waters of a natural stream for beneficial purposes should

be brought into the same court in a single action, and therein required to wage their claims, in order that such claims, necessarily more or less interdependent and conditioned one upon the other, may be settled and defined by a single decree. The cogency of the reasons for such course is so thoroughly appreciated that almost invariably the state courts in the arid region, where the doctrine of appropriation prevails, have shown solicitude, and have exercised great care, in requiring that all claimants be made parties in suits of this character.

[3] General equity rule No. 47 provides that:

"In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in their discretion, proceed in the case without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

Under this rule, if the view I have taken be correct, namely, that the other claimants are "necessary" parties, it is discretionary whether or not the plaintiff shall be required to bring them in, and, under the circumstances of the case, I am inclined to think that such requirement should be made, even though by so doing the court should lose jurisdiction. It is not a case where, if this court relinquishes jurisdiction, the plaintiff is left without a remedy or access to a competent tribunal. If I read the pleadings correctly, the stream in controversy, and all of the lands to be irrigated therefrom are situate in Kootenai county, Idaho, where most of the parties reside. In order to protect itself against certain claimants, complainant has already been compelled to commence a suit in the state court to enjoin interference by some of those whom it has failed to make parties to the present action. By amendment of the complaint in that case all of the claimants, including the defendants here, could be made parties, and by pursuing such a course instead of having at least two suits, in two distinct jurisdictions, resulting in two different decrees, each adjudicating a part of the same general subject-matter, the plaintiff could obtain a single decree adjudicating the entire controversy.

[4] It is suggested by counsel for the complainant that perhaps the principal relief sought by the bill is a permanent injunction restraining the defendants from interfering with its ditch and works, and physically injuring the same. But while such relief is prayed for, as the present bill is framed, it appears to me to be incidental only, and to depend upon an adjudication of the several rights of the claimants. It is very easy to imagine a case where all of the claimants of the waters of a natural stream would not be necessary, or even proper, parties to a suit brought by one to enjoin another from trespassing upon and injuring his ditch or other diverting works. Such controversy might not in any real sense involve a determination of the rights of any of the parties except the owner of the ditch and the alleged trespasser. But here the averments of the bill are apparently sufficient to warrant the relief demanded, and the prayer is that the right of the complainant to eleven cubic feet of water per second be

quieted, except as to the right of one of the defendants to receive one-half of a cubic foot per second, and the right of some of the other defendants also to receive one-half of a cubic foot per second. Plaintiff also prays that the defendants John Ford and wife be enjoined from preventing any water turned loose by the plaintiff from flowing down the channel to supply the needs of certain other defendants, and also from diverting any water of the stream except when there is sufficient flowing down the stream below the plaintiff's headgate to supply the parties entitled thereto below the point of diversion of the ditch belonging to John Ford. In short, the prayer in all substantial respects embraces the relief usually prayed for in what is commonly called a water suit, an action brought to adjudicate the rights of several claimants to the use of the waters of a natural stream, for beneficial purposes.

[5] It is also suggested that the parties whom the defendants now ask to have the plaintiff bring in were not in any manner interfering with the rights of the complainant at the time the suit was commenced, but it is abundantly shown that they were claiming the right to use water from the stream, and it is also obvious that their use diminishes the supply available for other persons, and that it is extremely difficult, if not impossible, to determine how much water the plaintiff should be required to permit to pass through or over its dam in order to supply the rights of the defendants, without also determining the measure of the rights of the other claimants lower down on the stream who are not made parties defendant. And, if I rightly comprehend the facts, sooner or later, before any decree rendered by this court could be made practically effective, it would be necessary to have an adjudication of the rights of the other claimants who are not made parties to this suit, for, until such rights have been judicially determined, this court would have no means of knowing what amount of water it should compel the plaintiff to permit to pass over its dam as a condition to an injunction restraining the defendants from interfering with its diversion from the stream.

The pleas will therefore be allowed, with leave to the plaintiff either to amend its bill or to join issue and go to proof upon the pleas, the amended bill or the replication to the pleas to be filed within 15 days from the date hereof.

LANGDON et al. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. February 24, 1911.)

No. 282.

1. COMMERCE (§ 85*)—INTERSTATE COMMERCE ACT—AMENDMENTS—EFFECT.

The Hepburn amendment of 1906 (Act June 29, 1906, c. 3591, 34 Stat. 584 [U. S. Comp. St. Supp. 1909, p. 1149]) to the Interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) materially restricted the jurisdiction of the courts, and the primary jurisdiction of the Interstate Commerce Commission, particularly under section

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

10 of Act March 2, 1889, c. 382, 25 Stat. 862 (U. S. Comp. St. 1901, p. 3172), has been considerably extended.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

2. COMMERCE (§ 85*)—INTERSTATE COMMERCE ACT—JURISDICTION OF COURTS.

The original jurisdiction of the federal courts under section 9 of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) has not been entirely destroyed, and they still may redress such wrongs as can consistently with the act be redressed without previous action by the Interstate Commerce Commission, and, when one sues for discrimination by a carrier, it is necessary in the first instance to determine whether the wrong can be redressed by the courts.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 85.*]

Jurisdiction of federal courts of suits under interstate commerce act, see note to 11 C. C. A. 318.]

Consolidated actions by John Langdon and by others against the Pennsylvania Railroad Company. On defendant's motion to dismiss. Motion overruled.

J. W. M. Newlin, for plaintiffs.

John Hampton Barnes, for defendant.

HOLLAND, District Judge. This is a motion by the defendant to dismiss these suits against the plaintiffs for want of jurisdiction, for the following reasons:

"The plaintiffs, as will appear by reference to the record in each of the said cases and to the testimony and proceedings in the trial thereof, are seeking to recover damages from the defendant upon the ground that certain of its regulations and practices were of a discriminatory character and subjected the plaintiffs to loss and damage. The loss and damage so sustained is claimed to have resulted from payments made by the defendant to certain shippers of coal as follows: To the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, and the Berwind White Coal Company, for services rendered by these shippers and to the Berwind White Coal Company for the amount of freight charges paid by it at the rate in force when the shipments were made in excess of the rate of freight in force at the time the contracts were made for the sale of the coal. The payments to the Altoona Coal & Coke Company, the Glen White Coal & Lumber Company, and the Berwind White Coal Company for services are alleged as discriminatory in all of the cases, and were made during the entire period covered thereby. The payments made upon overlapping contracts were alleged as discriminatory in three cases only, namely, John Langdon, American Union Coal Company, and Huntingdon Coal Company. All of the payments complained of were of such a character that, if they operated to secure preference in favor of those to whom they were made, such preference affected not only the plaintiffs, but all shippers generally as a class, whose mines were located in the district or region in which the mines of the plaintiffs in the said several cases were located, and these shippers comprised a very large number. Under these circumstances, your petitioner is advised, and therefore avers, that the question whether its regulation or practice in making these payments was or was not contrary to the provisions of the interstate commerce act, which is the underlying issue in these actions, is one which, having regard to the principles determined by this court and the Circuit Court of Appeals for this circuit and by the Supreme Court of the United States, must be determined primarily by the Interstate Commerce Commission, and that, therefore, this court is without jurisdiction to pass upon and to determine the issues involved in these actions."

The answer (1) denies that the questions involved must primarily be determined by the Interstate Commerce Commission, and asserts

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

jurisdiction in this court under section 9 of the interstate commerce act; (2) claims that, if it be held that any preliminary inquiry by the Interstate Commerce Commission was necessary, such inquiry has been made by the Interstate Commerce Commission, as appears by its report of January 25, 1907, which report is made part of the answer; and (3) it is urged that the pleadings and evidence in the several causes make it clear that the allowances in question were plain, secret rebates and discriminations. To which answer a rejoinder is filed by the defendant denying the averment in the answer that this court has jurisdiction under the ninth section of the interstate commerce act, and insists that the jurisdiction rests primarily in the Interstate Commerce Commission under the provisions of the thirteenth, fifteenth, and sixteenth sections of the act to regulate commerce, and in the Circuit Court only under section 16 of the commerce act to enforce any order the Interstate Commission might see fit to make in regard to the alleged discriminatory payments made by the defendant, and further rejoins that the inquiry by the Interstate Commerce Commission in regard to these payments in question was an inquiry directed by Congress and simply a finding of fact and no finding of illegality of any practices described in the report, and that there was no order made that the carrier should desist therefrom, and, further, that these actions are not brought upon any such order as is required by section 16 of the interstate commerce act.

Prior to the enactment of the Hepburn amendment of June 29, 1906, it was held that "the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act conferred by the ninth section must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by the courts without previous action by the commission, and therefore does not imply the power in a court to primarily hear complaints concerning wrongs" arising out of alleged "unjust discriminations and undue preferences resulting from a published tariff schedule, in accordance with the provisions of the commerce act," but "that the shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule." *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 442-448, 27 Sup. Ct. 356, 51 L. Ed. 553.

[1] There is no doubt but that by the enactment of the amendments of 1906 the jurisdiction of the courts has been materially restricted, and the primary jurisdiction of the Interstate Commerce Commission, particularly under section 10, Act of 1889 (Act March 2, 1889, c. 382, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172]), has been considerably extended. *Baltimore & Ohio Railroad Co. v. United States of America ex rel. Pitcairn Coal Co. et al.*, 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 164-171.

The Supreme Court, in the Pitcairn Case, *supra*, held that:

"Grievances produced by regulations adopted by a railway company for the distribution of coal cars, * * *, which are alleged to violate the pro-

visions of the act to regulate commerce, * * * prohibiting unjust preferences, * * * cannot be redressed [in the courts] in advance of the action of the Interstate Commerce Commission by mandamus to prohibit the acts complained of and prescribe a rule for the future, since the provisions of the act of March 2, 1889 (section 10), authorizing mandamus to compel the furnishing of cars and other facilities for transportation, must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the commission as not to require a pre-requisite exertion of power by that body," etc.

In the Circuit Court of Appeals of the Third Circuit, in *Morrisdale Coal Company v. Pennsylvania Railroad Company*, 183 Fed. 929, Judge Lanning, after a careful consideration of the cases decided by the commission and the courts, involving these and analogous questions, said:

"These cases conclusively establish the doctrine that the Interstate Commerce Commission alone has original jurisdiction to determine whether an existing rate schedule, or an existing regulation or practice affecting rates, or an existing regulation or practice of any other kind affecting matters sought to be regulated by the act, is unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial."

This broad and comprehensive summary of the cases, while not exactly a repetition of the provisions of the commerce act as found in the fifteenth section as amended by the fourth section of the act of June 29, 1906, it is not more helpful in the determination of whether or not the wrongs in these cases at bar sought to be redressed can or cannot, "consistently with the context of the act, be redressed by the courts without previous action by the commission." The statement by the court can give it no broader or comprehensive meaning than it gets from the amendatory act of 1906, and does not enlarge the scope of the court's decision in the Morrisdale Case beyond the question considered, which is concisely stated to be that:

"A party claiming to be injured by a discriminatory rule for the distribution of coal cars cannot maintain in a court of law an action for the recovery of damages before the Interstate Commerce Commission has investigated the case and determined by its report that the rule is or was discriminatory. The determination of that question, at least, involves only the performance of administrative functions which, under the act, are to be performed by the commission, and not by the court."

In this we have a determination in the Third Circuit that a suit for damages resulting from an alleged discriminatory distribution of coal cars under a general regulation is such wrong as cannot, consistently with the context of the act, be redressed by courts without previous action by the commission. The comprehensive language of this amendment, used by Judge Lanning, must be read in connection with the statement of the Supreme Court as to the original jurisdiction still remaining in the courts under section 9, as stated in the *Abilene Case*, and under section 10 of the act of March 2, 1889, as set forth in the *Pitcairn Case*.

[2] The original jurisdiction of the federal court under section 9 has not been entirely destroyed, but it still may redress "such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the commission," and, whenever a complainant comes into the courts to redress a wrong which he alleges has

resulted from some discriminatory act of a common carrier, it will always be necessary in the first instance to determine whether or not it is a wrong which can be redressed by the courts. In cases where the wrong complained of is alleged to result, not from a regulation, but from a secret practice, applicable only to a few favored shippers along the line, the question as to whether the commission must first pass upon the illegality of the practice has not been decided.

We have it definitely determined that such alleged violations of the act as were considered in the Abilene Case, the Pitcairn Case, and the Morrisdale Coal Company Case are such as must be primarily considered by the Interstate Commerce Commission; but there is no appellate adjudication of the question as to whether or not alleged discriminatory acts producing injury, such as these set forth in the plaintiffs' statements of claim, must primarily be investigated by the Interstate Commerce Commission. There is some evidence submitted which tends to show that these payments are secret payments to particular shippers, and not general in their character; and whether or not such complaints must first be considered by the Interstate Commerce Commission will not now be determined. These cases in my judgment are close to the dividing line, and I deem it my duty to defer passing upon the question of jurisdiction until there has been a determination of the cases upon the merits.

There are some questions of fact yet to be developed, which I think may be material, and that is the evidence of the precise nature of these payments and practices involved, whether they are general to all owners of lateral roads, or whether they have been simply made to particular shippers. It is also a matter of considerable importance that these cases have been submitted to the jury thus far at great labor and expense. It will require comparatively little more work to complete the trial before the jury, and this question of jurisdiction can more appropriately be considered under all the circumstances after the verdict.

The court declines now to pass upon the question of jurisdiction, and reserves a determination thereof until after a trial of the cases upon the merits.

WM. A. ROGERS, Limited, v. COHANNET SILVER CO.

(Circuit Court, D. Massachusetts. November 23, 1910.)

No. 718.

TRADE-MARKS AND TRADE-NAMES (§ 95*)—MISUSE—DECEPTION OF PUBLIC.

Where defendant silver company, without color of right, used the name "Rogers" on the silver-plated ware of its manufacture, and had acquired no right to use the name, derived either from the original Rogers companies, or the subsequent legitimate users of the name, but used it solely to mislead and defraud the public, complainants, having a qualified property right therein, were entitled to a preliminary injunction to restrain such use.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 108; Dec. Dig. § 95.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
186 F.—16

In Equity. Suit by William A. Rogers, Limited, against the Cohan-net Silver Company, to restrain defendant's use of the word "Rogers" on silver-plated ware. Motion for preliminary injunction granted.

F. P. Warfield, Holland S. Duell, and Duell, Warfield & Duell, for complainant.

Albert P. Worthen and George A. Rockwell, for defendant.

COLT, Circuit Judge. There can be no question that the right to the use of the name "Rogers" upon silver-plated ware is regarded as a valuable property right. This is shown by the history of the prior litigation involving this right and by the proofs in the case at bar.

The complainant has a qualified property right in such use. This was decided by the Circuit Court of Appeals for the Second Circuit in 1895 in the case of *Rogers v. Wm. Rogers Manufacturing Company*, 70 Fed. 1019, 17 C. C. A. 575.

The defendant has no color of right to the use of the name "Rogers" upon the silver-plated ware which it manufactures. It has no right to use the name, derived from the original Rogers companies or the subsequent legitimate users of the name. Nor has any one by the name of Rogers any interest in the defendant company.

The use of the name "Rogers" by the defendant is deceptive and untrue. It leads the public to believe that its silver-plated ware is manufactured by a legitimate Rogers Company, or by a company entitled to the use of the name, which is contrary to the fact. The sole purpose of the defendant's use of this name seems to be to convey a false impression to the public.

Since the use of this name by the defendant is misleading, and since its selection was for the purpose of illegitimate competition, its use should be enjoined.

The motion for a preliminary injunction is granted.

In re KAPLAN.

(District Court, S. D. Mississippi, Jackson Division. June, 1910.)

BANKRUPTCY (§ 395*)—EXEMPTIONS—MISSISSIPPI STATUTE.

The exemption allowed by Code Miss. 1906, § 2147, which provides that "every citizen of this state, male or female, being a householder and having a family residing in any city, town or village, shall be entitled to hold * * * personal property to be selected by him not to exceed in value \$250," cannot be claimed by a bankrupt who is not a citizen of the United States nor of the state.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 656-658; Dec. Dig. § 395.*]

In the matter of J. H. Kaplan, bankrupt. On certificate of referee. Order affirmed.

The following is the report of West, Referee:

During the progress and administration of the above matter the following question arose: The bankrupt filed his petition and schedules in bankruptcy

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on December 25, 1909, and on said day he was duly adjudged a bankrupt. The bankrupt claimed in his said schedules the following property as exempted to him under the state laws: "Household and kitchen furniture and wearing apparel (section 2139, Code Miss. 1906), \$100.00. One cow (same section as above). Two hundred and fifty dollars in personal property, to wit, money (section 2147, Code Miss. 1906), \$250.00."

All of the said property, except the sum of \$250, was allowed to the bankrupt as exempted, and delivered to him by the trustee; and from the order disallowing said \$250 a petition for review has been filed, and the matter is certified to you for decision on appeal from said order. The testimony showed that the bankrupt was a Russian, who had not been naturalized as a citizen of the United States and of the state of Mississippi. He testified that he had filed his declaration of intention to become a citizen, but that the matter had not been consummated at the time of his bankruptcy, so that he was not, at the time of the bankruptcy, nor yet, for that matter, a citizen of the United States of America and of the state of Mississippi.

My contention is that the exemption laws of this state have made three classes of exemptionists, as follows:

The first paragraph of section 2139 of the Code of 1906 is as follows: "Personal Property Exempt.—The following property shall be exempt from seizure under execution or attachment, to wit." And it then enumerates the items, such as tools of a mechanic, etc. This exemption is allowed, regardless of citizenship or head of family, so that the mechanic, regardless of the fact as to whether he be a citizen of Mississippi or head of a family, is entitled to the exemption.

The ninth clause of said section is as follows: "The following property of each head of a family, to be selected by the debtor, to wit: * * *" And then the items are enumerated, such as work horses, household goods, etc. As is readily seen, the exemption here is given only to the head of a family. The bankrupt, being the head of a family, was allowed his cow and his household goods, and that exemption was allowed regardless of whether the claimant be a resident of a city, town, or village, or a rural resident, since no limitation clause is found in the section; but I take it that it may be inferred the Legislature intended such an exemption in the interest of the husbandman, especially from the many items enumerated. It was under this section that I allowed the bankrupt his exemptions.

Section 2147 of the Code of 1906 allows certain exemptions to the resident of a city, town, or village, and is in the following language: "Every citizen of this state, male or female, being a householder and having a family residing in any city, town or village, shall be entitled to hold," etc., "the land and buildings," etc., "and personal property to be selected by him not to exceed in value two hundred and fifty dollars, or the articles specified as exempt to the head of a family." It is quite evident to my mind that the Legislature intended a distinction between this section and 2139, supra. It is under section 2147 that the bankrupt claimed the \$250 of personal property (money), and which I denied him.

Since it is rather difficult for the urban resident to conveniently, and economically, I might say, own horses, cows, sheep, fodder, rye, corn, potatoes, oats, hogs, chickens, farming implements, and the numerous other things listed in section 2139, which make rural life so attractive to the urban inhabitant, the Legislature, in its effort to recompense the city resident for the deprivation of the good things above mentioned, gave to him, not only his land and buildings resided upon as a homestead, but allowed him \$250 of personal property to be selected by him, or the articles specified as exempted to the head of a family. The word "or" is important in this connection, since it shows that the exemptionist must make a selection, if he be a resident, as was the bankrupt in this case, of a city, town, or village. In other words, if he desires to select \$250 worth of personality, instead of the articles exempted to the head of a family under section 2139, supra, he may do so, and this selection may be made from the stock of merchandise on hand; but, if he selects \$250 worth of merchandise, he cannot select any of the articles mentioned as exempted to the head of a family under section 2139.

Since the exemption laws are to be liberally construed, I think that, since

Kaplan was unable to make up his selection from his household goods and his cow, I would have allowed him to make up the balance from the stock of goods, had he been a citizen of the United States and of the state of Mississippi. This matter has been up before me quite frequently, and my ruling has been in accordance with that in this case, and no appeal has been heretofore had. I think the Legislature intended the word "citizen" in section 2147 to mean something; and the Supreme Court of this state seems to have had the same idea, since it decided in the case of *Vignaud v. Dean*, 77 Miss. 860, 27 South. 881, that only a person who is both a resident and a citizen of this state is entitled to homestead exemption under the section. I do not think that an alien is entitled to the exemption mentioned in 2147.

Another reason why the exemption is not allowable is that the court will notice the bankrupt claims as exempted \$250 in money, and makes no mention that he claims goods from the stock to the value of \$250. Without burdening the court with citations, I beg to say that I have found the bankrupt law to be as follows: At the time the bankrupt files his schedules, he must, in that schedule, make his claim for such exemptions as he may be entitled to receive under the state law. This exemption must be claimed out of the property of the bankrupt. The bankrupt had no cash on hand when he went into bankruptcy, so that he could claim no \$250 in money, since the cash drawer was empty and certainly he could not claim it. It is also the law that the bankrupt though making his selection from the stock of goods, may, in order that the rest of the stock may bring a fair value, allow his selection to remain with the rest of the assets, and thus add to the value of the sum total, and when the sale is made have the trustees pay to him his exemptions in money. If the sale should bring dollar for dollar of the appraised value, then the trustee would pay to the bankrupt the sum of \$250 in cash; but, if the sale did not bring a dollar for dollar appraisement, then the bankrupt would receive in money the percentage the appraisement bore to the sale. In other words, if the bankrupt had selected goods of the appraised value of \$250, and those same goods had brought \$200 in money, then the trustee would pay the bankrupt that sum in lieu of the goods. This is done only, as I say, when the bankrupt is desirous of having the money instead of the articles selected. No action or petition of this kind was had by the bankrupt; his claim for exemption being simply \$250 in money, which he never had.

The bankrupt also claims that the referee exceeded his right in denying his exemptions, and says that only after the trustee has set aside the exemptions to the bankrupt could the referee, on objection by some creditor to the setting aside of such exemptions, have any right to pass upon the question. To state this proposition is to answer it. To hold any other way than I did would amount to saying that the referee could not pass an order disallowing the exemption until the trustee had actually set aside the same to the bankrupt, who might, before a creditor could object to such allowance, "fold his tents and silently steal away." Where, manifestly, in the opinion of the referee, the bankrupt is not entitled to the exemption claimed, I can see no good reason why such officer should stand idly by, so that such "red tape" may be gone through with before he could legally pass upon the question.

S. L. Dodd, for claimant.
Tackett & Elmore, opposed.

NILES, District Judge. After a careful consideration of the record in this case, I am of the opinion that the action of the referee should not be disturbed. Kaplan was not a citizen of the United States, nor of the state of Mississippi, and could not claim the \$250 exemption. See *Vignaud v. Dean*, 77 Miss. 860, 27 South. 881.

The action of the referee is therefore affirmed.

MINARD et al. v. WATTS.

(Circuit Court, D. Kansas, Third Division. January 29, 1910.)

No. 588, Equity:

BANKS AND BANKING (§ 80*)—INSOLVENCY—GENERAL OR SPECIAL DEPOSIT—TRUST FUND.

Complainants being in litigation concerning the title to certain lands in the possession of a tenant, it was agreed that the landlord's share of the rentals accruing pendente lite should be deposited in a bank to abide the final determination of the controversy, pursuant to which agreement various sums were so deposited, there being at no time any agreement or understanding between any of the parties and the bank that the deposits were to be held or kept separate from the general funds of the bank. *Held*, that such deposit was general in its nature, and did not constitute a trust fund, so that, on the failure of the bank, complainants were only entitled to share in the bank's assets as general creditors.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 184-196; Dec. Dig. § 80.*]

In Equity. Bill by Henry Minard and the Garrett Biblical Institute against John Watts, as receiver of the First National Bank of Ft. Scott, Kan. Bill dismissed.

W. P. Dillard and W. W. Padgett, for complainants.

F. F. Oldham and Keene & Gates, for defendant.

POLLOCK, District Judge. By the bill filed and presented in this case, complainants seek to recover from defendant the sum of \$450, on the theory this sum constitutes a trust fund in the possession of the defendant as receiver of the First National Bank of Ft. Scott, this state (hereinafter called the "Bank"), to which complainants, in equity, have a right superior to the general creditors of the Bank. The case has been submitted for final decree on agreed facts and briefs of solicitors for the respective parties. The facts are:

Complainants, being involved in litigation pending in the courts of the state between themselves, arising over the question of title and ownership of a quarter section of land, the possession of which was held by one Fowler as tenant, agreed the money representing the landlord's share of the rentals arising from the land during the pendency of the litigation should be deposited in the Bank, to abide the final decision of the controversy over the title to the land, then received by the successful party. In pursuance of this agreement, on February 12, 1907, Fowler deposited with the Bank the sum of \$180; September 9, 1907, the sum of \$90; December 31, 1907, the sum of \$90; and September 30, 1908, the sum of \$90. These sums so deposited make up the fund in dispute in this controversy.

[1] The question presented for decision is: Have complainants such a superior right to the funds in dispute as in equity will enable them to follow and recover the entire amount so deposited from defendant, receiver of the estate of the insolvent Bank, in liquidation in his hands, or will they be required to prorate with the general creditors of the Bank?

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

This question must depend for its decision on the legal relation of complainants to the Bank. From the facts it is clear Fowler, the tenant, was by agreement of complainants constituted their joint agent to deposit the landlord's share of rental money arising from the land in controversy in the Bank, to be by it retained until it should be determined which of complainants should succeed in the litigation arising over the land from which the funds deposited arose, and then pay over the amount of the deposits made to the successful party.

While out of the great variety of transactions that may be had between a banking institution and those dealing with it there may arise many different relations, depending for their legal effect on the precise facts which characterize the particular transaction, yet in this case the facts leave no room for doubt, and the parties have stipulated the transaction between complainants and the Bank was one of deposit, in the following language:

"It is agreed by the parties hereto that there was not, at any time, any expressed agreement or understanding between Henry Minard, or the Garrett Biblical Institute, or either of them, on the one part, and the First National Bank of Ft. Scott, Kan., on the other part, that the deposits, or any of them, referred to in the bill of complaint in this case, were to be held or kept separate and distinct from the general funds of the Bank."

Therefore, the transaction here involved being one of deposit, the legal status of the parties thus created must be either that of bailor and bailee, or of creditor and debtor; for no other legal relation can arise out of the act of one depositing money with a bank.

The question, therefore, is: Was the deposit in this case general or special? If general, complainants parted with their title to the funds deposited, the relation of debtor and creditor was by the act of deposit created between complainants and the Bank, and the obligation undertaken by the Bank was to pay over the amount of the deposit to the successful complainant in the litigation between them which occasioned its making, and, the Bank having failed meanwhile, complainants are now entitled only to prorate with the general creditors of the Bank. If, however, the deposit was special, complainants did not by the act of deposit part with the title to the particular funds deposited, the Bank had no right to mingle the moneys deposited with its own property, or to use the same, and must return the identical funds deposited; for it then occupies the position and assumed the obligation of a bailee and not a debtor.

Mr. Justice Miller, delivering the opinion of the court in *Marine Bank v. Fulton Bank*, 2 Wall. 252, 17 L. Ed. 785, said:

"All deposits made with banks may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter, and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter."

Mr. Justice Brewer, delivering the opinion of the court in *Commercial Bank of Penn. v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533,

37 L. Ed. 363, after quoting the foregoing language with approval, said:

"That reasoning is applicable here. Bearing in mind the custom of banks, it cannot be that the parties understood that the collections made by the Fidelity, during the intervals between the days of remitting, were to be made special deposits; but, on the contrary, it is clear that they intended that the moneys thus received should pass into the general funds of the bank, and be used by it as other funds, and that, when the day for remitting came, the remittance should be made out of such general funds."

It is the business of a bank, and one of the purposes for which it was created, to receive the money of its depositors on the implied agreement to return a like amount on demand or in a stipulated length of time, with or without interest, as the case may be, and to loan such money to its customers, receiving compensation by way of interest charged. Banks are not created for the purpose of acting as bailees of the property of others, either with or without hire. While a national bank by contract may possibly bind itself to such legal relation, it is quite clear this may be done only either by express contract or the transaction of deposit must, from its very nature, be of such character as to imply such obligation and relation. Mr. Morse, in his work on Banks and Banking (2d Ed. p. 69), says:

"Ordinarily, a deposit of money, at least if it be the current money of the country or state where the deposit is made, will be assumed to be a general deposit, unless the contrary is at the time directly notified, or in some shape distinctly implied, so that the bank could not reasonably misunderstand the depositor's intent."

As it is stipulated by the parties, there was no express agreement or understanding between the parties in this case that the deposit made should be considered as special, and, as there was nothing in the character of the transaction had in this case from which there may be found an implied agreement or understanding between the parties to that effect, it must be held the deposits made were general, and not special.

Much reliance is placed by complainants on the case of Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769. However, an examination of that case will disclose it is not in point. The facts in that case were these: Hopkins, being indebted to his bankers, A. T. Stewart & Co., on a promissory note secured by a real estate mortgage, forwarded certain drafts, with directions to credit as payment on his note, on receipt of which Stewart & Co., in violation of the express direction of Hopkins to credit as payment on his note, gave him credit on open account with the bank. In that case no question of deposit arose for decision, for the reason Hopkins did not consent to become a depositor with the bank. On the contrary, that was a case of misapplication of the remittance received by Stewart & Co. from Hopkins, by giving credit instead of making payment. Stewart & Co., on account of such misapplication of the funds of Hopkins, was held at the suit of his trustee in bankruptcy a trustee *ex maleficio*. To like effect is the case of People v. City Bank of Rochester, 96 N. Y. 32.

It follows complainants in this case in equity may be accorded at the hands of defendant, as receiver of the Bank, the rights of a general

creditor of the estate of the Bank in his hands, and receive payment therefrom pro rata with the general creditors therein.

A decree will enter in conformity with the views expressed in this opinion.

UNITED STATES v. J. LINDSAY WELLS CO.

(District Court, W. D. Tennessee. October 22, 1910.)

1. INDICTMENT AND INFORMATION (§ 3*)—NATURE OF OFFENSE—"INFAMOUS CRIME."

An "infamous crime" is one the punishment for which may be confinement in the penitentiary, with or without hard labor.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9-23; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3573-3577.]

2. INDICTMENT AND INFORMATION (§ 3*)—ADULTERATED FOOD—NATURE OF OFFENSE—INFORMATION.

Rev. St. § 1022 (U. S. Comp. St. 1901, p. 720), provides that "all crimes and offenses committed against the provisions of chapter 7, title "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by a district attorney. Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), prohibits the shipping of adulterated food in interstate commerce, and provides on conviction a fine not exceeding \$200 for the first offense, and for each subsequent offense a fine not exceeding \$300, or imprisonment not exceeding one year, or both, in the discretion of the court. Held that, since a defendant may not be imprisoned in the penitentiary unless sentenced to confinement for more than a year, no imprisonment in the penitentiary can be imposed for violation of such act; and hence the institution of proceedings thereunder by information of the district attorney was not a violation of Const. U. S. Amend. 5, providing that no person shall be held to answer for an infamous crime, except on presentment or indictment of a grand jury.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9-23; Dec. Dig. § 3.*]

Information by the United States against the J. Lindsay Wells Company for violation of the food and drugs act. On motion to quash. Denied.

On or about March 23, 1909, the J. Lindsay Wells Company, a corporation of Memphis, Tenn., shipped from the state of Tennessee into the state of Indiana a consignment of cotton seed meal. Samples from this shipment were procured and examined by the Bureau of Chemistry, United States Department of Agriculture, and the product was found to be a mixture of cotton seed meal and cotton seed hulls. As it appeared from the above examination and report thereon that the product was adulterated and misbranded, within the meaning of the food and drugs act of June 30, 1906, the Secretary of Agriculture afforded the said J. Lindsay Wells Company, Incorporated, and the party from whom the samples were procured, opportunities for hearings. As it appeared after hearings held that the shipment was made in violation of the act, the Secretary of Agriculture reported the facts to the Attorney General, with a statement of the evidence upon which to base a prosecution.

In due course a criminal information was filed in the District Court of the United States for the Western District of Tennessee against the said J. Lindsay Wells Company, Incorporated, charging the above shipment, and alleging that the product so shipped was adulterated, in that a substance,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to wit, cotton seed hulls, had been mixed and packed with the said cotton seed meal, so as to reduce, lower, and injuriously affect its quality, and in that said cotton seed hulls had been substituted in part for the said cotton seed meal. The information also alleged that the product so shipped was misbranded, in that said article was offered for sale and sold upon the representation that the same was choice cotton seed meal, thereby causing the purchaser to believe the same to be pure cotton seed meal, whereas in truth and in fact the same was a mixture of cotton seed meal and cotton seed hulls, and that the statement that said article was cotton seed meal was false and untrue.

Whereupon the said J. Lindsay Wells Company, Incorporated, moved to quash the above information upon the ground that the same violated that part of the fifth amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

Casey Todd, for the United States.

Maiden & McAdoo, for defendant.

McCALL, District Judge. This is an action brought by the United States against J. Lindsay Wells Company under section 2 of the act of June 30, 1906, on the charge of shipping from Memphis, in the state of Tennessee, to Attica, in the state of Indiana, 30 tons of cotton seed meal, which article of food at Memphis, Tenn., was adulterated. The suit is brought upon information made by the United States District Attorney. The defendants move to quash the information, upon the ground that the same violates that part of the fifth amendment of the Constitution of the United States which provides that no person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a grand jury.

The question presented is whether or not the offense alleged to have been committed by the defendant is a capital or otherwise infamous crime. It is, of course, not a capital crime, and, if it is otherwise an infamous crime, the motion to quash must be allowed, since, under the authorities, it is well settled that a prosecution cannot be maintained upon information made by the District Attorney for such a crime. *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, 29 L. Ed. 89.

[1] As I understand the authorities, they hold that any offense, the punishment for which may be imprisonment in the penitentiary, with or without hard labor, is an infamous crime. *Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777, 29 L. Ed. 909; *Parkinson v. U. S.*, 121 U. S. 281, 7 Sup. Ct. 896, 30 L. Ed. 959; *In re Claasen*, 140 U. S. 204, 11 Sup. Ct. 735, 35 L. Ed. 409. On an examination of the act under which this suit is instituted, I find that the punishment therefor is a fine not exceeding \$200 for the first offense, and, upon conviction for each subsequent offense, not exceeding \$300, or by imprisonment not exceeding one year, or both, in the discretion of the court.

[2] Under the authorities above cited, it is held that a defendant cannot be imprisoned in the penitentiary, unless the time for which he is sentenced shall be more than one year. Under the act of June 30, 1906, the imprisonment cannot exceed one year. Therefore the court has no power to sentence the defendant to imprisonment in the penitentiary, because that would be in excess of the maximum time which the court is authorized to imprison a party for such offense. As I un-

derstand the authorities, they hold in substance that, where the court may imprison the accused for more than one year, the confinement must be in the penitentiary, and that fact, with or without labor, makes the offense for the commission of which the accused is imprisoned an infamous crime. Upon the other hand, where the period of imprisonment is for one year or less, the court must imprison in a county jail, and in such case the crime is not infamous. If the court may imprison for more than one year, the crime is infamous. If for a year or less, it is not infamous.

Under section 1022 of the Revised Statutes (U. S. Comp. St. 1901, p. 720), it is provided that all crimes and offenses committed against the provisions of chapter 7, entitled "Crimes," which are not infamous, may be prosecuted either by indictment or by information filed by the district attorney. It appearing from the foregoing that the crime for which the defendant is charged is not infamous, I am of the opinion that this suit can be maintained upon the information filed, and the motion to quash will be disallowed.

In re CITY BANK OF DOWAGIAC.

(District Court, W. D. Michigan, S. D. May 21, 1910.)

BANKRUPTCY (§ 188*)—CLAIMS—LIENS.

Before becoming bankrupt a Dowagiac bank collected a check payable to a Chicago bank, and later drew a draft for the amount on its New York correspondent, payable to the Chicago bank. The proceeds of the check were mingled with the Dowagiac bank's general funds. That bank having closed when the draft was presented, its New York correspondent refused to pay, though having sufficient funds, which were later transferred to the trustee. *Held*, that there was a lien on such funds to the amount of the draft.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 188.*]

In the matter of the City Bank of Dowagiac, bankrupt. From an order of the referee disallowing his claim as a lien against a particular fund, Karl H. Nelson appeals. Modified.

Clyde W. Ketcham, for claimant.

Charles E. Sweet, for trustee.

DENISON, District Judge. Prior to February 8, 1908, there were two banks doing business in Dowagiac—the City Bank, now bankrupt, and the Bank of Lee Bros. Mr. Nelson carried an account with Lee Bros., and also with the Harris Bank, at Chicago. Desiring to transfer some of his funds from the former to the latter bank, he drew his check, January 31st, for \$500 upon his account at Lee Bros.' Bank, payable to the Harris Bank, and sent the check to the payee. The Harris Bank, having received this check, sent it, for collection, to its correspondent, the City Bank of Dowagiac. On February 3d, the City Bank presented the check to the Lee Bros. Bank, and at the end of that day the amount of the check was included in a draft given by the Lee Bros. Bank to the City Bank, and drawn against the Detroit de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

positary of Lee Bros. The specific fund here disappears from sight. The City Bank used this Detroit draft and mingled the proceeds with its general funds.

Instead of remitting, on that day, the \$500 of Mr. Nelson's money, of which the City Bank thus obtained possession, it did nothing until February 5th, on which day it drew its draft for the net proceeds, \$499.50, against its New York depositary, the National City Bank; and this draft, payable to the Harris Bank, it mailed to the payee. The Harris Bank forwarded this draft, for collection, to New York; but before it could, in due course, be presented to, and paid by, the National City Bank, the City Bank of Dowagiac had, on February 8th, closed its doors, and thereupon the National City Bank of New York refused to pay this draft.

On February 5th, when the City Bank thus drew against its New York depositary, it actually had, to its credit, in that depositary, after the payment of outstanding drafts, only about \$100; but it either had, at that time, funds in transit to its New York depositary, or afterwards transmitted such funds, so that, on February 8th, or 10th, when the draft was presented at New York, there was, in this depositary, as a credit to the City Bank, a fund of a little over \$2,000. This fund was sufficient to pay all drafts which had been made against it, including the one in question, and this fund has been paid, by the National City Bank of New York, to the trustee.

It is clear beyond dispute that Nelson is not a general creditor, but that this money, when received by the City Bank, was a trust fund, belonging to Nelson; and the only question in controversy is the selection of the property to which Nelson's lien attaches. The referee gave him a lien only upon the general balance of cash on hand in the vaults of the bank, at Dowagiac, when it closed; and, as this amount was only \$495, and there are a large number of other preferred claims against the same fund, Nelson will receive, from this lien, nothing of consequence. He appeals from the disallowance of his claim as a lien against the fund in the National City Bank of New York on February 8th, and since transferred to the trustee.

I think this latter lien should be allowed. My understanding of the situation is that on February 5th, and because of the mingling of this fund, by the City Bank, with its general funds, Nelson had a lien upon such general funds. This was a floating, indefinite lien, and it could be localized and made specific, either by Nelson's act in seizing sufficient of such funds to satisfy it, or by the act of the City Bank in appropriating sufficient of such funds for that purpose, in which appropriation Nelson, or those representing him, should join or acquiesce. Such specific appropriation was made by the City Bank, when it drew its draft for that purpose against its New York depositary, and had already furnished, or then did furnish, to such depositary, funds sufficient to meet this draft. I think this appropriation of a fund for this purpose, followed by Nelson's use of the draft and demand for the fund so appropriated, established and fixed the lien for \$499.50 against such fund, and the trustee should pay to Nelson this amount, unless there are other conflicting liens against the same fund.

The same considerations which led the Court of Appeals in Board

of Commissioners v. Strawn, 157 Fed. at page 52, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100, to the conclusion that the lien, in that case, did not attach to funds in the correspondent or depositary bank, lead me, in this case, to the contrary conclusion. Paraphrasing, I may say:

"That the moneys remitted [to New York] were the trust moneys [by substitution] is to be presumed; for the presumption, upon which equity acts with respect to the character of the funds placed by the bank in special deposit with its New York correspondent, is that it placed there the money which it was obligated to send there for this very purpose."

I think the general, floating lien, which otherwise would not have extended to this item, was, by the act of the parties, localized and specialized, and attached to this particular property.

The situation is analogous to that considered by Judge Ray in the Northrup Case (D. C.) 152 Fed. 763, if we consider the fact that in the present case the City Bank, having, on February 3d, converted Nelson's money to its own use, did, on February 5th, transfer to Nelson's credit the same amount of its own money in its New York depository, and thus create a special deposit in the New York bank, payable to Nelson. Judge Ray says:

"It would be extremely and ridiculously technical to assert that, where a wrongdoer, so far as he can, rights a wrong committed in converting the money of another, by substituting at a subsequent time other money of his own to make good that converted, the beneficial owner may not claim and hold the substituted money or property as impressed with precisely the same trust as the original fund. * * * It does not lie with the wrongdoer or his assignee or trustee in bankruptcy who has made the substitution, to say that the substituted thing is neither the trust property itself nor its proceeds."

The order of the referee should be modified, so as to allow the preferential lien against \$499.50 of the New York fund, and this special lien would seem to amount to a waiver of the general lien against funds on hand at Dowagiac.

In re MONROE LUMBER CO.

(District Court, S. D. Mississippi, Jackson Division. June, 1910.)

BANKRUPTCY (§ 200*)—LABORERS' LIENS—INVALIDATION—ADJUDICATION.

Where laborers of an insolvent sawmill corporation instituted proceedings in chancery in the state court to establish a lien on the corporation's assets in the hands of receivers, which lien is conferred by Acts Miss. 1908, c. 131, such liens, created February 19, 1910, were dissolved by a bankruptcy adjudication against the corporation on April 13th following, and were not available in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 289-316; Dec. Dig. § 200.*]

In the matter of bankruptcy proceedings against the Monroe Lumber Company. On certificate of a referee to determine alleged laborers' liens. Referee's decision holding liens invalid affirmed.

The following is the report of Referee West:

During the administration of the above matter the following question was presented for determination: On the 10th day of February, 1910, the Monroe

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Lumber Company, a sawmill corporation at Monroe, Franklin county, Miss., was placed in the hands of receivers in the chancery court of Franklin county by petition of certain creditors, and the receivers took possession of all the property of the said corporation. On February 19, 1910, certain laborers filed their motion in the said court, claiming laborers' liens upon all the property of the said corporation, which motion I attach to these papers. The chancellor considered the said motion, and sustained the same, and decreed that the said laborers should propound their claims in the said court, which they did, as shown by the papers herewith attached. I also attach a motion to declare lien in favor of said laborers. There was no adjudication upon these claims by the chancery court. While the said matter was pending in said court, a petition in involuntary bankruptcy was filed against the said corporation on March 25, 1910, and on April 13, 1910, it was properly adjudicated a bankrupt. Trustees were duly elected and qualified in the bankruptcy proceedings, and the said laborers, who propounded their claims in the chancery court of Franklin county, have properly filed their claims in this court. Many of the said claims, where not exceeding \$300 nor more than three months prior to bankruptcy, have been allowed as preferred claims and will be paid as such from the assets in the hands of the said trustees in bankruptcy, provided there are sufficient assets to so pay them.

The laborers claim, however, that by virtue of the proceedings instituted by them in the chancery court of Franklin county they have established such a lien as is not nullified by the adjudication in bankruptcy. Practically all of the assets of the said corporation were mortgaged, and on a foreclosure sale by the trustees in bankruptcy by consent of all parties a sale was had, but the proceeds thereof were not sufficient to discharge the mortgage debts. If these mortgages are valid, there will not be sufficient assets in the hands of the trustees to pay in full the claims of the said laborers; hence the reason for the position that their proceeding in the chancery court is a fixation of their liens such as the bankruptcy court must recognize.

I think this position on the part of said laborers is untenable, as section 67 of the bankruptcy act, and the decisions thereunder, to be found in any edition of Collier on Bankruptcy, nullify such liens, if, indeed, any such were established in the said chancery court. Chapter 131, p. 137, of the Acts of 1908 of the State of Mississippi, and chapters 81 and 83 of the Code of 1906, are relied upon by said laborers as their authority for making the claim that their liens have been sufficiently established so that the adjudication in bankruptcy will not invalidate the same.

I do not think that the liens have been so fixed as that the adjudication can have no effect upon them, and the matter is now sent up to you for determination upon review. The amount of the claims in question aggregates something like \$7,000. Counsel will file with you comprehensive briefs.

W. P. Cassedy, for claimants.

J. S. Sexton, opposed.

NILES, District Judge. After a careful reading of the record in this cause (In re Monroe Lumber Co., Bankrupt), and briefs of counsel, I am of the opinion that the conclusions of the referee should be affirmed. Questions of this kind have, before this, been presented to this court, in Re Mississippi Mills Receivership and in Re Tishomingo Savings Institution, where a number of applications to establish liens, such as are here sought to be established, were filed by materialmen and laborers, and I have without an exception declined to recognize such claims, and from which no appeals have been taken. I cannot conceive of a lien which could have been created, either by the act of the parties or by operation of law, on the 19th of February, 1910, which could not have been dissolved by the adjudication on April 13, 1910.

The conclusions of the referee in this matter are affirmed.

In re FOSTER.

(District Court, S. D. Mississippi, Jackson Division. July, 1910.)

BANKRUPTCY (§ 407*) — CREDITS — FALSE STATEMENTS — OBJECTIONS TO DISCHARGE.

It is not a valid objection to a bankrupt's discharge that he made false statements concerning his financial condition to commercial agencies on the faith of which creditors extended credit, where the bankrupt made no statement directly to such creditors, under the bankruptcy act declaring that a discharge may be denied where the bankrupt obtained property from any person on a materially false statement in writing made to such person, for the purpose of obtaining property on credit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 407.*]

In the matter of bankruptcy proceedings of R. L. Foster. On objections to the bankrupt's discharge. Overruled.

Discharge confirmed on special finding of Referee West, which is as follows:

By proper order of this court, the undersigned was appointed as a special master to hear the evidence and report a finding of facts with recommendation thereon upon objections to the above-named bankrupt's petition for discharge. The only important question necessary for determination of the issue here presented is: Is a materially false statement in writing of a bankrupt's financial condition made to a mercantile agency a valid objection to a bankrupt's discharge?

The proof shows that the bankrupt made statements to the Bradstreet Company and R. G. Dun & Co. as to his financial condition. These statements were materially false, in that he did not own real estate to the amount mentioned in his statements to the mercantile agencies. In one of these statements he valued his homestead at \$7,000, and in another at \$5,000, both of which were untrue and were admitted to be untrue by the bankrupt himself. The evidence of the objecting creditors, as shown by the letters filed with the papers in the case, is that they extended the credit to the bankrupt solely upon the faith and truthfulness of the statements as made by Foster to the mercantile agencies, and not upon any statement that was made directly to them (the creditors) by Foster. There was no evidence that Foster at any time ever referred any of the objecting creditors to the mercantile agency as a basis of credit sought at their hands, so that the only issue is, as above stated, whether the making of a false statement to the mercantile agencies is alone a bar to a discharge.

The act prevents a discharge where any bankrupt has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." The objecting creditors rely upon the following cases: *In re Dresser* (2d Circuit) 16 Am. Bankr. Rep. 561, 146 Fed. 383, 76 C. A. 655; *In re Pincus* (D. C.) 17 Am. Bankr. Rep. 331, 147 Fed. 621. A reading of those two cases will show that they are not applicable to the question here presented, and are not authority for the contention of the objecting creditors. In the Dresser Case the bankrupt made a false statement, which he gave to his agent, and the agent delivered the statement directly to the person extending the credit, and upon the truthfulness of this statement the credit was extended. The bankrupt was denied his discharge. No such state of facts is presented in the instant case. It cannot be said that the mercantile agencies were the agents of the bankrupt. In the Pincus Case the bankrupt made a false statement to the Credit Clearing House, a mercantile agency having for its object, inter alia, the collection of information regarding mercantile establishments for the guidance of its subscribers, who are known as "associate mem-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bers." On or about July 11, 1903, the bankrupt furnished to the Credit Clearing House a statement in writing of their assets and liabilities as of date July 1st. At the foot of the statement was appended the following: "The above is a full and correct statement of our financial condition and is made to form a basis of credit with the associate members of the Credit Clearing House." On November 12, 1903, the bankrupt furnished to one of the objecting creditors a statement identical with the one above referred to, and at the bottom of that statement was appended the following: "The above is a full and correct statement of our financial condition on the 1st day of July, 1903, and is made to form a basis of credit with Sherman, Reid & Company." This last statement was furnished to a Mr. Chaffee, of the firm. His firm was an associate member of the Credit Clearing House. In that case it will be seen that the statement was made directly to the creditor extending credit to the bankrupt.

It is indeed unfortunate that a bankrupt may make false statements of his financial condition to a mercantile agency and that a creditor, relying upon the faith of such a statement, may not successfully defeat a discharge because of such a statement, but such is the law. Collier on Bankruptcy (7th Ed.) pp. 286, 287, and notes.

Watkins & Watkins, for bankrupt.

J. H. Thompson, for objecting creditors.

NILES, District Judge. Special finding of referee confirmed, and bankrupt discharged.

THE ROSALIE McLOUGHLIN.

GUINAN v. CRESCENT SAND & GRAVEL CO.

(District Court, E. D. New York. January 19, 1911.)

SHIPPING (§ 58*)—SINKING OF SCOW IN LOADING—UNSEAWORTHINESS.

The sinking of a scow while being loaded with sand by the charterer held, under the evidence, not to have been due to any fault or negligence of the charterer in loading, which rendered it liable for the injury to the vessel, but to the fact that the scow was not seaworthy, as represented, but leaked, which caused her to list and dump her load, and rendered the owner liable for its value and the expense incurred by the charterer in raising and removing her.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 58.*]

In Admiralty. Suit by the Crescent Sand & Gravel Company against the scow Rosalie McLoughlin, Bridget Guinan claimant, with cross-libel by claimant. Decree for libelant.

Armstrong, Brown & Boland, for Crescent Sand & Gravel Co.

James J. Macklin, for Bridget Guinan.

CHATFIELD, District Judge. The libelant Guinan was the owner of a scow, the Rosalie McLoughlin, which had previously been used for carrying sand from the works of the Crescent Sand & Gravel Company, at Port Washington, Long Island. At that time the scow leaked so that she required trimming and pumping to prevent disaster. She was subsequently caulked and repaired, and used for the carrying of coal.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

There is some dispute as to whether she did or did not leak with the cargo of coal, but at any rate, upon the 21st of May, 1909, her owner having represented that she had been made seaworthy, she was again chartered to go to Port Washington, to bring a cargo of sand to New York, at the rate of \$5 a day, the towing, wharfage, loading, and discharging of the scow to be at the expense of the respondent, who also paid the captain for trimming.

Upon her arrival she was placed under what are called the "bridges," which in reality are three small slips, with a trestle structure over each slip. A track for the dump cars runs out in the middle of each trestle; the sand thus being dumped over the line of the keel of the vessel, which substantially fills the slip when in position for loading.

The Rosalie McLoughlin was loaded with the amount of sand which the respondent's servants thought should be placed on board, and there is some testimony that her captain thought he could take a load or two more. Some dispute was had as to the question of trimming, and one witness testifies that the vessel was receiving more sand on one side than on the other, and listed until her rail was under water, but that, when some of the claimant's men trimmed the vessel, she gradually listed in the other direction. Soon after she sank, and dumped part of her load of sand in the slip, necessitating the services of wreckers to remove the boat herself, and of a tug to "kick out" the deposited sand from the slip.

The Crescent Sand & Gravel Company have filed a libel for the loss of sand, the expenses of wreckage and towage, and the necessary work to remove the sand deposited in the slip. The libelant Guinan has filed a cross-libel for the damage to the scow.

The evidence upon the trial shows that the vessel, as has been said, did sink, and did dump her load of sand; but no permanent injury to the dock was shown, nor did the Crescent Sand & Gravel Company apparently suffer any damage, except the loss of the sand itself, the cost of removing the vessel, and of "kicking out" the sand. The necessity for dredging was not proven.

As to the claim of Guinan, it must be held that no negligence in the method of loading, nor in the care of the boat, on the part of the Crescent Sand & Gravel Company, was shown. Some testimony was introduced to indicate that the captain of the boat went to a neighboring village and was occupied with matters relating to him personally, and that he did not care for his boat. But, whether that be so or not, the testimony indicates sufficiently that the boat leaked and acquired a list, which caused her load to shift, and that no other explanation of the accident can be predicated upon the evidence.

The libel of Bridget Guinan should be dismissed, without costs, and the claim of the libelant the Crescent Sand & Gravel Company should be allowed, to the extent of the value of a boat load of sand, the cost of removing the vessel and the sand, with the costs of the cross-libel.

NATIONAL BANK OF COMMERCE IN ST. LOUIS v. SANCHO PACKING CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)
No. 2,107.

1. CORPORATIONS (§ 414*)—NOTES—EXECUTION—SIGNING.

Where a corporation's by-laws provided that notes signed by the treasurer, or, in his absence, by the president or vice president, should be binding on the company, and also provided that the office of secretary and treasurer should be held by the same person, notes signed in the name of the "secretary" by the person holding the office of treasurer and secretary were not objectionable because he signed the word "secretary" instead of the word "treasurer" following his name.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640–1646; Dec. Dig. § 414.*]

2. BILLS AND NOTES (§ 371*)—CORPORATIONS—ACCOMMODATION NOTES—DEFENSES—BONA FIDE PURCHASER.

That notes executed by a corporation were made for the accommodation of indorsers who were also financially interested in the company was no defense to a suit thereon against the corporation by a bona fide purchaser for value before maturity.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 964; Dec. Dig. § 371.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Action by the National Bank of Commerce in St. Louis against the Sancho Packing Company and others. From so much of the judgment as released the packing company and defendant T. L. Macon, Jr., from liability on the notes in question, plaintiff brings error. Reversed.

Edwin T. Merrick, Walter S. Lewis, Ph. Gensler, Jr., and Ralph J. Schwarz, for plaintiff in error.

Legier & Gleason, for defendant in error Sancho Packing Co.

Zengel, Thomas, Suthon & Loomis, for defendant in error T. L. Macon, Jr.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is an action by the National Bank of Commerce in St. Louis against the maker and indorsers of two promissory notes. One of the notes, with indorsements, is as follows:

\$6,000.00

New Orleans, La., Feb'y 5th, 1907.

"Twelve months after date we promise to pay to the order of ourselves six thousand 00/000 dollars, for value received, with interest at the rate of six per cent. per annum from date until paid. Sancho Packing Company,

"Jno. A. Wogan, Secty.

"[Indorsed on back:] Sancho Packing Co.,

"Jno. A. Wogan, Secty.

"Jules M. Wogan.

"Jno. A. Wogan.

"Z. W. Tinker.

"T. L. Macon, Jr.

"Pay Come'l N. Bk., N. O., or order for collection. The Nat'l Bank of Commerce, in St. Louis. J. A. Lewis, Cashier."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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The other note bears the same date, and is in the same form and indorsed in the same way. It only differs from the one copied by being payable "eighteen months after date," and being for a larger sum, \$7,300.

The defense interposed by the maker of the notes was, in effect, that the notes were accommodation paper; that the maker received no consideration; and that it had no authority to issue accommodation paper.

The defense pleaded by the indorser T. L. Macon, Jr., was that the plaintiff had failed to have the notes duly protested and to give him notice of their dishonor.

There is but little, if any, conflict in the evidence on the question to be decided.

The plaintiff became the owner of the notes, paying value for them, before maturity, in the regular course of business. When each note became due, it was presented for payment. The larger note was duly protested and notice given to all parties. The evidence tended to show that no notice was given to the indorser, Macon, of the maker's failure to pay the smaller note. Evidence was offered by the defendants, and received against the objections of the plaintiff, tending to show that the notes were made and issued by the maker, the Sancho Packing Company, for the accommodation of the indorsers, and that the notes were used by John A. Wogan and Jules M. Wogan, two of the indorsers, in the purchase of some of the capital stock of the corporation from the other two indorsers, Z. W. Tinker and T. L. Macon, Jr., and that the maker of the notes, the Sancho Packing Company, received no consideration for the notes. There was no evidence tending to show that the plaintiff, at the time it paid value for the notes, before their maturity, had any notice of these facts. On the contrary, it was shown affirmatively that the plaintiff paid value for the notes, before their maturity, without notice of any infirmity in the notes. The charter of the Sancho Packing Company, the maker of the notes, conferred on the corporation the right to engage in the business of packing and canning fruits and vegetables, and the right to manufacture boxes, etc., and the right to buy, sell, and deal in property, and "to do any and all things necessary to or connected with the conduct of said business." The by-laws of the company provided for the election of "a secretary and a treasurer," and that these two offices should be "combined in one and the same person." Section 6 of the by-laws is as follows:

"Checks, notes, drafts, acceptances, or other papers requisite for the ordinary and usual course of business shall be signed by the treasurer or in his absence by the president or vice president. The signature of either one on such paper shall be binding on this company."

The John A. Wogan who signed the notes in the name of the corporation, by himself as "secretary," was, in fact, the treasurer and secretary of the company.

The court directed a verdict in favor of the maker of the notes, the Sancho Packing Company, and in favor of the indorser T. L. Macon, Jr., on the note for \$6,000; otherwise, there was a direction

to find for the plaintiff. Verdict was rendered accordingly, and judgment entered. From this judgment releasing the maker, the Sancho Packing Company, from all liability on the notes, and releasing the indorser Macon as to one of the notes, the plaintiff brings error.

The material question to be considered is: Did the court rule correctly in directing the verdict in favor of the maker of the notes?

[1] As before stated, the plaintiff was the holder and owner of the notes, having received them in regular course of business, before maturity, and without notice of the circumstances under which they were issued. The notes were made by a corporation chartered to do business and which had authority to issue its notes in connection with its business. The notes were in due form, payable to the maker and by the maker indorsed. The by-laws of the corporation authorized the treasurer, or in his absence the president or vice president, to sign checks, notes, drafts, or acceptances for the company. These notes were, in fact, signed by the treasurer, who was also, pursuant to a by-law of the company, the secretary. After signing the name of the corporation to the notes, the treasurer added his own name, "John A. Wogan"; but, instead of describing himself as "treasurer," he added the word "secretary." It is the use of the word "secretary" instead of the word "treasurer" that is pointed out as an irregularity affecting the validity of the notes. This objection, we think, is without substance. The notes were, in fact, signed by the treasurer. The secretary and the treasurer were one and the same person. Conceding that it was incumbent on the plaintiff before purchasing the notes to make inquiry as to the offices in the company held by John A. Wogan, such an investigation, had it been made, would only have disclosed the fact that Wogan was the treasurer, and that the secretary and the treasurer, under the by-laws, were the same person. The failure to describe himself also as "treasurer" was immaterial.

[2] The substance of the real defense urged by the maker is that the notes were issued for the accommodation of the indorsers, two of whom were officers of the company, who used the notes to raise money to make a purchase of stock from the other indorsers. Of course, the company's name and credit ought not to have been used for this purpose. The officers who were so using the company's name doubtless expected to pay the notes and intended that the company would never be called on to pay them. If all these facts had been known to the plaintiff when it received the notes, they would be fatal to its right of recovery. But the plaintiff had no knowledge or notice of these facts—it was an innocent bona fide holder, without notice of such facts. Fixed principles govern the liability of parties to a promissory note or bill of exchange which are essential to the credit of such paper, and one of the most important is that, whatever may have occurred between other parties to such instrument, if not fraudulent in its inception, the holder and owner of the same, if he acquired it for value, before maturity, in the usual course of business, cannot be affected by such transactions unless it be first proved that

he had knowledge of such transactions at the time he received the note. Such defense as is here urged amounts to nothing unless it be shown that the plaintiff had notice. *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934; *Brown v. Spofford*, 95 U. S. 474, 481, 24 L. Ed. 508; 1 Daniel on Neg. Inst. (5th Ed.) § 386. A different rule would greatly weaken the credit given negotiable paper and permit the insolvent officers or agents of a solvent company or corporation to use its name for their own accommodation and to obtain money from those ignorant of the wrong, and the lenders would be without remedy against the solvent accommodation maker.

The fact that an officer or agent of a corporation has exceeded his authority in giving accommodation notes, in the name of the corporation, is no defense to a suit on the notes by the holder who took them in good faith, for value, before maturity. *Bird v. Daggett*, 97 Mass. 494; *Farmers' National Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595, 599. If a corporation, under any circumstances, has the power to issue notes and bills, the bona fide taker has the right to presume that they were issued under circumstances which gave the requisite authority. *County of Macon v. Shores*, 97 U. S. 272, 278, 24 L. Ed. 889.

We are of opinion that the Circuit Court erred in directing a verdict in favor of the maker of the notes, the Sancho Packing Company.

The court below directed a verdict in favor of the indorser T. L. Macon, Jr., on the \$6,000 note. The only reason, it is said in the briefs, for giving such direction, was that notice of the dishonor of the note was not given to Macon. It is contended that the instruction was erroneous because notice of the dishonor of the instrument is not required to be given to the indorser where the instrument was made or accepted for his accommodation. The testimony on the next trial may not be the same as on this on the question of notice to the indorser and on the question whether or not the notes were made for Macon's accommodation. We deem it, therefore, unnecessary to consider and decide assignments of error based on the instructions as to Macon's liability as indorser. When the facts are ascertained, the law applicable is well settled.

For the error in directing the verdict in favor of the Sancho Packing Company, the judgment is reversed, and the cause remanded for a new trial.

BAUMHAUER v. AUSTIN.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)

No. 2,103.

1. BANKRUPTCY (§ 340*)—CLAIMS—RELATIONSHIP BETWEEN BANKRUPT AND CREDITOR.

That a claimant of a bankrupt is closely related to him is a circumstance justifying a more rigid scrutiny than is the case where no such relationship exists, but the honest or dishonest character of the claim may not be determined by any mere question of relationship.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. BANKRUPTCY (§ 342½*)—FINDINGS OF REFEREE—CONCLUSIVENESS.

The court is not bound by the findings of the referee in bankruptcy on a question of fact based on inferences drawn from the evidence.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 342½.*]

3. BANKRUPTCY (§ 340*)—ESTABLISHMENT OF CLAIMS—ORDER FOR PRODUCTION OF INSTRUMENTS.

Proceedings in bankruptcy to require a claimant of the bankrupt to produce instruments on the hearing of his contested claim are summary, and the party must comply with such orders lest he meet a rule for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

4. BANKRUPTCY (§ 340*)—CLAIMS—EVIDENCE.

Evidence in bankruptcy held to support a claim for borrowed money, necessitating a reversal of the findings of the referee affirmed by the District Court, rejecting the claim in part.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

5. BANKRUPTCY (§ 340*)—CLAIMS—PROOF OF CLAIM.

A proof of claim in bankruptcy in the form prescribed by Bankruptcy Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), is testimony in support of the claim, and, in case of contest, the claimant who is present is subject to call by the court or contestant for explanation in the nature of a cross-examination, and the claimant's silence when he is not called on for an explanation does not justify an inference against him.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 340.*]

Error to the District Court of the United States for the Southern District of Alabama.

In the matter of William C. Baumhauer, bankrupt. From an order of the District Court (179 Fed. 966) affirming an order of the referee disallowing a part of the claim of J. H. Baumhauer, he appeals. Reversed and remanded.

William C. Fitts and Norville R. Leigh, Jr., for appellant.

Robt. H. Smith, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On March 16, A. D. 1909, on the application of creditors, William C. Baumhauer was adjudged a bankrupt by the District Court for the Southern District of Alabama. The appellee, W. G. Austin, was duly appointed trustee of the bankrupt estate. On April 6, 1909, J. H. Baumhauer made proof of claim in due form against the estate of the bankrupt for the sum of \$15,220, stating in his affidavit:

"That the consideration of said debt is as follows: Money loaned and advanced by the deponent at divers times to said W. C. Baumhauer, * * * evidenced by a certain promissory note executed and delivered to this deponent by the said W. C. Baumhauer on, to wit, the 16th day of April, 1908. * * * Said note is hereto attached and filed herewith."

The transcript of the record does not show the dates of the subsequent proceedings until February 10, 1910, which is the date of the referee's opinion and decree, but at some time between these dates this minute appears:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Comes William G. Austin, trustee in bankruptcy in the above-entitled cause, and contests the claim of J. H. Baumhauer, heretofore, on April 7, 1909, filed with the referee in said cause, which said claim amounts to \$15,220, and moves the referee to disallow said claim upon the ground that the amount claimed is not due to the said J. H. Baumhauer by the said bankrupt, and that the note attached to the claim and forming the basis thereof is without consideration."

Then follows in the transcript "a stenographic report of testimony introduced on hearing of contest of the claim filed by J. H. Baumhauer in the matter of W. C. Baumhauer, bankrupt, in bankruptcy." "Examination of the witnesses on the objections of the trustee to claim of J. H. Baumhauer." Claimant offered his claim and then rested. Then follow 85 printed pages of the reported testimony, when we reach the opinion and decree of the referee dated, as before said, February 10, 1910, and filed March 29, 1910. It is in these words:

"This matter comes on to be heard on the objections filed to the claim of J. H. Baumhauer.

"In this cause it is shown by the evidence that J. H. Baumhauer kept an account at the People's Bank in which were kept considerable sums of money; that he drew on this account regularly just before the pay checks of the M. & O. Railroad Company were issued each month a sufficient amount to cash such checks as might be issued to such employés of the railroad as dealt with him. These checks running up to as high as \$2,000 in some months.

"It is further shown that his practice in this connection was to cash the check of his customer, taking out such amount as might be due him, and pay the balance in cash to such customer.

"It is also shown that various parties had seen at sundry times large sums of money in the possession of J. H. Baumhauer, sometimes in his safe and sometimes in his cash drawer.

"It is further shown that J. H. Baumhauer was a man of considerable means, and possessed of a considerable amount of ready cash at all times.

"J. H. Baumhauer resided and did business in Whistler, Ala., while W. C. Baumhauer, the bankrupt, did business in the city of Mobile, Ala. It is further shown that they were brothers.

"It is also shown that W. C. Baumhauer kept his bank account with the First National Bank of Mobile, and an examination of the original deposit slips offered in evidence shows that no considerable amount was deposited by W. C. Baumhauer at any time during the period it is claimed that the money evidenced by the note was loaned by J. H. Baumhauer to W. C. Baumhauer. The claimant, J. H. Baumhauer, offered in evidence his claim and the original note, but did not testify as a witness himself, but examined W. C. Baumhauer, the bankrupt. The contestant upon the close of claimant's case without J. H. Baumhauer having been placed upon the stand offered in evidence certain checks which had been produced by J. H. Baumhauer in response to a demand of the contestant asking for his checks upon the People's Bank. An examination of these checks will show that the letters 'W. C. B.' were written in the lower left-hand corner of the check, and in each instance this lettering seems to be in a different ink from that in which the check was written.

"W. C. Baumhauer testified that the amounts loaned him by J. H. Baumhauer were always in cash and never by check, and that these letters were not placed on these checks by him. With the exception of two items, which the evidence shows were sent to W. C. Baumhauer for J. H. Baumhauer through one Bancroft amounting to \$1,000 and \$1,200 respectively, there is no evidence of any other loans than the testimony of W. C. Baumhauer, and under it all the other sums were handed him in cash by his brother in Whistler. He testifies that, when he wanted money, he would go out to see his brother, and sometimes would get the cash when he first went, but generally he would make it known to his brother what cash he wanted, and a day or so after that would come again and get the money.

"It is further shown that there is no bank in Whistler. According to the story of W. C. Baumhauer, this whole sum of \$15,220 was loaned him by J. H. Baumhauer from January, 1907, to April, 1908. He says that on one occasion he got as much as \$2,500, but is unable to give any dates as to when he got this or any other item from his brother, and, in fact, the only two items which are definitely traced to him are those shown by the testimony of Bancroft in January, 1907. It is inconceivable to me that this much money could have been turned over in cash during this period of time by J. H. Baumhauer to his brother without more definite information being furnished as to the amounts and times.

"Bearing in mind that W. C. Baumhauer resided in the city where the banking business of J. H. Baumhauer was done, and that J. H. Baumhauer kept a large account during this period of time in the bank, the most natural thing in the world would have been for him to draw a check and give it to his brother, who could then have cashed it, instead of having this brother come twice for the purpose of getting the money, once to notify him and the second time to get it in cash and return to the city with it. Both these parties were business men, familiar with the practice of using the banks in their dealings, both keeping bank accounts, and, when the relationship between them is considered, it seems to me that the explanation of the methods in which these loans were made is weak and unsatisfactory. The further fact that W. C. Baumhauer would call ordinarily and notify his brother of what he wanted, and would then have to come again to get the cash, indicates that the brother did not then have the cash, but must have drawn it from some other source in order to furnish it to W. C. Baumhauer.

"Keeping the bank account in which he had large balances as he did, the most natural way would have been to draw it from this account, and yet there is no pretense that this was done. On the contrary, under the evidence, it apparently was not done, and I am asked to find that one brother furnished another under these circumstances with this large sum of money without ever resorting to his bank account in order to do it. Considering the case with which a fraud could be committed in the manner testified to by W. C. Baumhauer, and which is wholly contrary to the method pursued by business men, I am forced to the conclusion that the loans were not made in this manner.

"It is a hard case to decide under either aspect, because on the one side appears to be all the natural and reasonable methods in which such matters would have been conducted, and which would have furnished simple, definite, and positive evidence of the facts, while, on the other, the circumstances of the story would be so easy of fabrication and utterly impossible for the contesting creditors to ever break down the story told. While I am loath to find against the positive and direct testimony of W. C. Baumhauer that this money was loaned, I feel constrained to do so.

"Before the hearing of this case, the contestant served on claimant a notice to produce all claimant's checks on the People's Bank during a certain period, and on the hearing of this motion claimant's attorney objected to the order being made, and I ruled that they would not be required to produce all the checks, but only such of them as it was claimed went to W. C. Baumhauer, or that the cash represented by them went to him, and, on the hearing of this cause, certain checks were produced by J. H. Baumhauer in response to this motion. I feel that the circumstances of the production at the beginning of this hearing of the checks by J. H. Baumhauer, many of them bearing the initials 'W. C. B.' in the lower left-hand corner, were undoubtedly intended to lead the contestant to believe that these checks furnished the money which went to W. C. Baumhauer, such checks aggregating \$6,900 bearing these initials, while the checks aggregating \$5,075 so produced have no such initials upon them.

"The fact that these checks were produced in response to the notice, taken in connection with the further fact that J. H. Baumhauer was not put upon the stand to testify to the facts, though he was present during the whole examination, and the circumstances of the story told as to how the loan was made, taken in connection with the other evidence in the case, made a case which in my opinion calls for corroborating testimony and explanations of

these circumstances which J. H. Baumhauer ought to have been able to give, and I admit frankly that these matters influence me in the conclusion I reach.

"It is therefore ordered that the claim of J. H. Baumhauer be and the same is hereby disallowed as to the note, but I allow the claim for the amounts shown by Bancroft to have been loaned, viz., \$2,200, with interest from January, 1907."

On application of the claimant, the proceedings had were on the 20th of March, 1910, certified to Judge Toulmin, of the District Court, who on June 3, 1910, entered his order affirming the action of the referee (179 Fed. 966), accompanied by the following opinion:

"It is the recognized rule of the courts of bankruptcy that, on review of the decision of a referee based upon his conclusions on questions of fact, the court will not reverse his findings, unless the same are so manifestly erroneous as to invoke the sense of justice of the court—[citing and quoting from authorities].

"The contention of the claimant is that he, having filed his claim properly verified, made out his case, and that he should have been allowed his entire claim. It is true that the claimant filed a formal proof of claim against the bankrupt estate, and it is also true that this proof of claim is *prima facie* evidence that the allegations made therein are correct, and this *prima facie* evidence must prevail until it shall be properly and successfully attacked—[citing and quoting from authorities]. In the case at bar the claimant, though present at the hearing, did not testify, but the bankrupt did testify in behalf of the claimant. The referee had the opportunity to see and hear him and observe his manner while testifying, which is an advantage of great value in cases of this character. This witness' testimony is in some material respects vague and uncertain, if not evasive. He stated that he borrowed \$15,000 from the claimant at divers times and in divers amounts from January, 1907, to April, 1908, but that he did not remember the specific dates or months in which he obtained the money, nor did he remember the specific amount he got each time or at any one time, except in one instance when he borrowed \$2,500, the date of which he did not remember. He testified that he was a merchant and kept a cash book, but did not enter the cash obtained on said various loans on said book or keep any memorandum of them; that he made a note for each loan when obtained, which was taken up and destroyed when the note for the next succeeding loan was made, the amount of the prior loan or loans being included in the last note made, and that the note for \$15,220 now claimed to be due included all said prior loans. He also stated that said alleged indebtedness is not shown anywhere on his books.

"On these facts and circumstances, and other facts and circumstances of probative force shown by the evidence and particularly pointed out and considered by the referee, as appears in his opinion filed in this case, his conclusion was that the claimant had not established his claim as made, and the same was disallowed by the referee as to the full amount claimed.

"It is contended that the claimant's formal proof of his claim and the bankrupt's positive testimony as to the particular fact that the former loaned to the latter the amount of money claimed being uncontradicted by any one, the claimant is entitled to the full amount of his claim, and that the same should have been allowed; and it may be said that, to justify the referee's finding, he must have disbelieved both the claimant and the bankrupt. While it is true that the positive testimony of an uncontradicted witness cannot be disregarded by the referee or the court arbitrarily or capriciously, yet there may be such a gross or such an inherent improbability in the statements of the witness in reference to the fact testified to as to discredit him, and to induce the court or referee to disregard his evidence in the absence of any direct conflicting testimony—[citing and quoting from authorities].

"I cannot assume that the referee acted arbitrarily in refusing to believe the testimony of any witness; and no evidence produced convinces me that he was wrong in his conclusions in this case. His findings and order are affirmed."

The claimant appealed and assigned errors to the effect that the District Court erred in rendering the decree appealed from.

[1] As applicable to the opinion of the referee and of the distinguished district judge, we quote the following language from the opinion of Circuit Judge Lurton in *Ohio Bank v. Mack*, 163 Fed. 155, 89 C. C. A. 605, 24 L. R. A. (N. S.) 184:

"The fact that the bankrupt is closely related to a creditor is a circumstance which justifies a more rigid scrutiny than would be the case if no such relation existed. Nevertheless the honest or dishonest character of a debt is not to be determined by any mere question of relationship—[citing cases]. * * * No arbitrary rule can be laid down for determining the weight which should be attached to a finding of fact by a bankrupt referee. His position and duties are analogous, however, to those of a special master directed to take evidence and report his conclusions, and the rule applicable to a review of a referee's finding of fact must be substantially that applicable to a master's report—[citing cases]. * * * Much in both cases must depend upon the character of the finding. If it be a deduction from established fact, the finding would not carry any great weight, for the judge, having the same facts, may as well draw inferences or deduce a conclusion as the referee. But, if the finding is based upon conflicting evidence involving questions of credibility and the referee has heard the witnesses much greater weight naturally attaches to his conclusion, and the weight of authority is that the district judge, while scrutinizing with care his conclusion upon a review, should not disturb his finding unless there is most cogent evidence of a mistake and miscarriage of justice—[citing cases]."

[2] On the same subject we quote the language of Judge Lowell in *Re Swift* (D. C.) 118 Fed. 349:

"No precise quantitative weight is in this district assigned to the findings of fact made by a referee. If those findings are based largely upon the good or bad faith of witnesses seen and heard by the referee, this court will always bear in mind that the referee's means of judgment are in an important respect better than its own. If, on the other hand, the findings depend upon inferences to be drawn from admitted facts, this court's means of judgment are nearly as good as the referee's. The weight to be assigned to the referee's findings in the two cases supposed is by no means the same. No labor-saving formula will determine the weight of the finding, or show just how strongly the court must incline against it in order to reverse it. To say that the finding should not be set aside unless it is 'clearly erroneous,' 'manifestly erroneous,' 'so manifestly erroneous as to invoke the sense of justice of the court,' or 'unless it discloses prejudicial errors by the referee, some of which may, without exaggeration, be denominated gross' is to darken counsel, if more is meant than that the court will not set aside the finding unless it is deemed erroneous after due allowance for the circumstances under which it was made. Artificial and quantitative presumptions of fact are foreign to the spirit of the common law, and the introduction of these presumptions has been rare and unfortunate."

On the same subject, in *Re People's Department Store Company* (D. C.) 159 Fed. 287, Judge Hazel said:

"Nor is the court bound by the conclusions of the referee because the witnesses appeared before him and gave testimony. The evidence is not in serious conflict, and the conclusions are principally based upon inferences to be drawn from a peculiar state of facts. The inferences drawn by the referee are not thought to be sufficiently supported by the evidence, and therefore there can be no valid objection to a decision based upon the facts and circumstances according to the judgment of this court—[citing *In re Swift*.]"

In the printed brief which the counsel for the appellee submitted to us it is stated that the appellee's contention is that the bankrupt

did not borrow the \$15,220 from his brother, the appellant, but that the bankrupt and appellant entered into a scheme to defraud the creditors of the bankrupt estate by having a large claim allowed to the appellant, and that in furtherance of this scheme the bankrupt signed the note and antedated it, and that the appellant then filed with the referee a claim duly sworn to and based upon this note.

If appears from the proof that the claimant and the bankrupt are brothers; that their parents resided at Whistler when claimant was born; that he has resided there all his life. The witness W. H. Smith has resided there even since 1870, and worked there for the father of these brothers before the appellant was born. Whistler is a suburb of Mobile. The shops of the Mobile & Ohio Railroad are located there. It is a considerable village. The mother of these brothers is still living in Whistler, and is a woman of comparative wealth. The appellant is its leading merchant doing a general merchandise business. The witness Bancroft testified that whatever any one there wants he can get at appellant's store, and whatever any one has to sell for cash he can sell to appellant. He keeps an active bank account with the People's Bank in Mobile. During the last six months of 1906 his monthly balances in that bank averaged near \$6,000 each month. Before the 1st of January, 1907, the bankrupt was established in the city of Mobile as a merchant and manufacturer of candy. He was doing and had been doing a large business. He kept an active bank account with the First National Bank of Mobile, and was able on the 1st of January, 1907, to owe that bank between \$12,000 and \$14,000. About this time, he began to get assistance from his brother, the appellant. The bankrupt continued his business and continued keeping his bank account with the First National Bank until the close of the year 1908, when his stock of merchandise and his candy manufacturing plant were totally destroyed by fire. He had insurance on his property, but the companies made some trouble about the condition in which his books were found. He employed the appellee, W. G. Austin, who appears to be an expert accountant, to go through and arrange his books to see if the difficulty of the companies could not be met. The result was that on the advice of this expert accountant and of the bankrupt's counsel he made a composition with the insurance companies receiving 60 per cent. of the amount they had written. Thereupon, under date of the 27th of February, 1909, he notified his creditors in writing that, in view of the fact that he had suffered a great loss very recently by fire, he was unable to pay his creditors in full and offering to pay 40 per cent. on the amount which he owed, for which he would want a receipt in full. His proposition was not accepted, and on March 9, 1909, certain creditors filed their application in the District Court of the Southern District of Alabama to have him declared a bankrupt. On this application the adjudication was made. On April 6, 1909, the appellant made his proof of claim and the next day he filed the same with the referee. Thereafter (date not given) the appellee presented to the referee in writing his objections to the allowance of the claim. The issue came to hearing before the referee (date not shown) and claimant offered his claim and rested. The appellee proceeded to offer proof. He first offered

the bookkeeper of the First National Bank (in which the bankrupt kept his account), who stated he had access to the books of the bank, had been through the deposit slips from January 7, 1907, to April 30, 1908, and that the deposit slips offered him for identification were all the deposit slips of the bankrupt for that period. Appellee then called the local manager for R. G. Dun & Co., who stated that on the 1st of March, 1908, he called on Mr. Baumhauer, the bankrupt, for a statement of his affairs, and he (Mr. B.) was on his books at the time, and he called off a copy of what he claimed was an inventory just completed, and, as he called off, the witness put down the figures, and subtracted the liabilities from the total assets, and went back to his office and dictated the figures to the typewriter from this memorandum book, and, eliminating totals, these are the figures:

States city accounts receivable.....	\$ 5,698 20
States county accounts receivable.....	12,649 55
Bills receivable.....	675 00
Horse and wagon.....	1,000 00
Stock and merchandise.....	22,000 00
Fixtures	1,000 00
Fixtures in retail store.....	1,000 00
Stock in retail store.....	1,000 00
Machinery, etc.....	750 00
 Liabilities.	
Accounts	\$10,849 00
Owe bank.....	8,000 00
Note	2,873 00

Appellee showed by very numerous witnesses (12 or more) the manner of dealing with the employés of the railroad shops in Whistler, the result of which was to show that the railroad employés in Whistler were paid by checks, and that the appellant kept always on hand at the time these checks were being handled funds ample to cash such as were presented to him for discount, and did cash the same without charging any premium thereon, but deducting therefrom any store account which the payee of the checks owed him.

Appellee then brought six witnesses to attack the character of the appellant for truth and veracity. The result of their examination, coupled with that of the rebutting witnesses called by the appellant, did not furnish ground, in the opinion of the referee, to support his findings on the claim, as he makes no reference to this feature of the case in his opinion which we have copied above.

After the appellee was through offering testimony in chief the appellant called Prof. Bancroft, and omitting immaterial questions, the professor testified as follows:

"Q. Were you at any time in the year 1907 the bearer of any sum of money in actual cash from J. H. Baumhauer to his brother W. C. Baumhauer? A. On two occasions when Mr. Baumhauer was sick with rheumatism. It was just before he left for Hot Springs, Ark. I believe that was in the early part of 1907, but it was between the 1st of January and the latter part of March. I brought two sums of money to Mobile from J. H. Baumhauer to his brother and delivered it to W. C. Baumhauer, and took his receipt for it. Q. What was the first sum of money? A. One thousand dollars in greenbacks. It had a rubber band around it. Q. You brought it from one to the other. Was anything said about tearing up an old note, and making a

new note? A. Now the message was: 'This is the money I promised to get to you to-day.' Told me to explain to his brother that he could not come. Q. You just simply said: 'This is the money I promised to you to-day'? A. Yes, sir. Q. How many weeks after that was it that you became the bearer of the second amount? A. I don't remember. Q. About how many? A. About two or three weeks. The first time was on a Sunday, the second time it was on a week day, because Mr. Baumhauer sent the order boy at the school for me to come around to his store, and he asked me if I was going to town that day, and said he wanted me to do the same thing for him I did a short while back, and this time I took down \$1,200. Q. Was that in bills? A. Yes, sir. Q. And you delivered it to W. C. Baumhauer? A. Yes, sir. Q. Did you deliver it to his store? A. Yes, sir; the place on Dauphin street next to Damrich's."

Appellant also called the bankrupt, who testified, touching the note in question, that he signed that note in Mobile on the 16th day of April, 1908; that at the date of the execution of that note he owed J. H. Baumhauer the amount of money evidenced by the note; that he owed him for money borrowed at different times; that he made the first borrow in the early part of January, 1907, and continued borrowing from then on, and that each time when he made a borrow he gave his brother a new note; that his brother would bring the old note down, and the witness would just add the amount of the old note and accrued interest to the amount of the new loan and put this sum in the new note; that, when he made a new note including the old one and the new loan, he destroyed the old note; that he borrowed from \$500 up to \$1,000 and \$1,500 and \$2,500; that sometimes he went out to Whistler to get the money, and sometimes his brother came to Mobile and brought it, and on two occasions Mr. Bancroft brought it; that it was never given in a check, but always in money; that he spoke to his brother about it two or three days before each borrowing; that he used the money in his business, kept some of it at home, and some of it in the bank; that he used part of it in making payments on a note he owed the First National Bank; that in 1907 he owed that bank between \$12,000 and \$14,000, and wanted to reduce that indebtedness; that when he got the money from his brother, Jake, he just used it as he needed it to pay on his city bills and the like; that he kept a checking account in his bank; that frequently drafts came in on him, and he cashed them out of the money that he had got from J. H. Baumhauer; that he kept a cash book, but did not keep a correct book; that he did not put any of the money he got from his brother in that cash book, but put it in his safe and used it as he wanted to; that he did not keep any account with his brother about these transactions, but just let the note keep the account; that he did not include the note held by his brother in the statement made to Dun's agency because he did not think it was necessary, he knew his brother was not going to press him; that, when Prof. Bancroft brought his money from his brother, he gave the professor a receipt for it, and, that when the next note was made, the amount received from Prof. Bancroft was carried into the new note; that his brother brought the old note and the receipt the witness had given to Bancroft when the next loan was made; that the note given in April, 1908, included all the money loaned by his brother to him during this period of borrowing; that in April, 1908, witness was told by appellant that

he had let witness have all that he could let him have; that, while the witness was getting this money from the appellant, "I would notify him I would like to have some money, and in a day or two I would tell him how much, and he usually brought it in to me—that is, if I didn't go out there"—that there is nothing in this note except borrowed money and accrued interest at the legal rate of 8 per cent.

"By Mr. Ervin (the referee): Q. What did you do with your previous notes? A. I would tear them up. Q. When did you begin borrowing money from your brother? A. In January, 1907. I had borrowed some before. Q. But you didn't owe him anything before January, 1907? A. No, sir. Q. Have you any recollection of the amounts and the dates? A. I got from \$500 up to \$2,500. Q. Do you remember what you got in January? A. No, sir. Q. Do you remember any particular amount and the month? A. No, sir. Q. Whose handwriting is the 'W. C. B.' on these checks? A. That is not mine I know.

"By Mr. Smith: I offer all checks in evidence.

"(Objection by Mr. Fitts on the ground the same is irrelevant and immaterial, and there is no contention that they were given to Mr. W. C. Baumhauer; that they represent the amounts of money which were loaned by J. H. Baumhauer to W. C. Baumhauer, and are simply isolated checks out of the general transactions of Mr. J. H. Baumhauer.)

"By Mr. Smith: In reply we will state that the order of the court required Mr. Baumhauer to produce the checks and in response to that demand of the court these checks were produced.

"By Mr. Ervin (the referee): My recollection of that matter was this: There was a request for the production of checks when that matter was heard, and I stated I would not require all of the checks during this period to be produced, but I thought the objecting creditors would have a right to have the checks which were thought to have been used for the benefit of W. C. Baumhauer to be produced, and Mr. Leigh (counsel for the appellant) said that he expected to produce and use certain checks on the hearing and would produce those checks.

"The checks now offered signed by J. H. Baumhauer dated March 30, 1907, June 15, 1907, July 15, 1907, August 15, 1907, August 16, 1907, August 17, 1907, September 13, 1907, November 14, 1907, December 18, 1907, February 14, 1908. (Objection by Mr. Fitts because it is irrelevant and immaterial and shows no light on this question. Objection overruled.)"

In his opinion the referee says:

"Before the hearing of this case the contestant served on claimant a notice to produce all claimant's checks on the People's Bank during a certain period, and on the hearing of this motion claimant's attorney objected to the order being made, and I ruled that they would not be required to produce all the checks, but only such of them as it was claimed went to W. C. Baumhauer, or that the cash represented by them went to him, and on the hearing of this cause certain checks were produced by J. H. Baumhauer in response to this motion. I feel that the circumstances of the production at the beginning of this hearing of the checks by J. H. Baumhauer, many of them bearing the initials 'W. C. B.' in the lower left-hand corner, was undoubtedly intended to lead the contestant to believe that these checks furnished the money which went to W. C. Baumhauer, such checks aggregating \$6,900 bearing these initials, while the checks aggregating \$5,075 so produced have no such initials upon them."

If the notice served on the claimant was in writing, no copy of it appears in the transcript. It seems evident that no minute of the exact terms of the referee's order to produce checks was made at the time the order was made, and the record we have of this matter "is in some material respects vague and uncertain, if not evasive."

[3] Such proceedings in bankruptcy are summary, and it behooves parties to be wary in complying with such orders lest they meet a rule for contempt. The 10 drafts in question were written in 1907. (The originals are before us.) The order to produce them could not have been made before March 16, 1909, and probably was made just before entering on the hearing of this case in which they were offered. If the letters "W. C. B." were put upon these checks for the purpose that the referee imputes to the act of producing them, the writing of these letters would necessarily be fresh and bear other features of fabrication besides seeming to be in different ink from that in which the check was written. No expert in handwriting was called to testify as to the difference in the color of the ink or the age of the writing or any other features of these papers that he could translate into evidence that might be used against the claimant. Our skill is not equal to the task of settling the exact terms of the referee's order on the claimant to produce checks. Our eyes, which are somewhat aged, see through glasses darkly, and are untrained to detective work on chirography, do not discover on the lower left-hand corner or anywhere on these drafts any evidence of their manufacture which coupled with their production under the circumstances in which they were produced is injurious to the claimant or excites in us any suspicion against him.

An overwhelming array of figures and deposit slips taken from the respective banks in which the brothers did business is presented and is pressed on our attention, and doubtless was on that of the referee, to show how easy and natural it was for the claimant to have gotten the money which he let his brother have from his bank in Mobile, and counsel insist they show conclusively that the money he did get on these 10 checks from his bank in Mobile he did not use in whole or in part in furnishing money to his brother during the 16 months that his help to his brother was being extended. Our knowledge of the hidden mysteries of scientific commercial bookkeeping is not large, but it is sufficient to satisfy us from an examination of this flood of figures that they do not show that no part of the money which the claimant got from his bank was used to aid his brother; nor do they tend to show, as we read them, that the testimony of the bankrupt as to the manner and the extent in and to which the claimant gave the bankrupt aid from the 1st of January, 1907, to the 16th of April, 1908, and in consideration of which the note attached to the proof of claim was executed and delivered in Mobile on the 16th of April, 1908, is not true, much less that it is unthinkable that such transactions could occur between such parties.

[4] We cannot concur in the inferences which the able referee drew from the established facts in this case. In our opinion the proof is ample that the claimant had abundant means in ready money to let his brother have approximately \$1,000 a month for 15 months without drawing on his bank at all if he so chose not to draw. It is clear to us that the referee and the learned judge failed to allow adequate probative force to the claimant's proof of claim. *Whitney v. Dresser*, 200 U. S. 532, 26 Sup. Ct. 316, 50 L. Ed. 584. It is also clear that the referee and the judge did not give sufficient corroborative weight

to the testimony of Prof. Bancroft. 3 Wigmore on Evidence, § 2042, p. 2723 et seq.

[5] The claimant's case did not lack his testimony in his own behalf. At every stage of the trial it had that testimony to the full extent and in the exact form prescribed by the statute. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443). The verification of the proof of debt is in no true sense an *ex parte* affidavit. In case of contest, as here, the claimant is subject to call by the court or the contestant for explanations in the nature of a cross-examination, and would not be permitted to decline to answer any proper question propounded by the court or referee or by the contestant. The claimant was present to answer such a call. He was not called. And this failure to call him more than answers the inference sought to be drawn from the claimant's so-called, but miscalled, silence.

We conclude that the District Court erred in rejecting any part of the appellant's claim, for which error the decree of that court must be reversed and this case remanded to the court below, with instructions to allow the full claim, and award the costs in that court and in this court in favor of the claimant and against the contestants.

And it is so ordered and decreed.

UNITED COMMERCIAL TRAVELERS OF AMERICA v. SAIN.

(Circuit Court of Appeals, Sixth Circuit. April 4, 1911.)

No. 2,077.

1. INSURANCE (§ 789*)—DEATH BENEFITS—NOTICE—CONSTITUTION AND BY-LAWS—INSTRUCTIONS.

The constitution of defendant mutual benefit society provided that within 90 days from the receipt of satisfactory proof of the death of a member in good standing the society would pay to the person entitled thereto a sum not exceeding \$5,000, and would also pay to the person entitled thereto the sum of \$1,300 in weekly installments of \$20 each; the first to be paid within 90 days from the receipt of proof of death. The by-laws declared that in case of an accidental injury notice must be given within 10 days thereafter, containing specified information, and a notice of like character given in like manner and time in case of death or loss resulting from accidental injury, and a failure to give any notice required, or to furnish, within 30 days after the period of immediate, total, continuous disability resulting from accidental injury, or from the date of death or loss resulting therefrom, direct and affirmative proof of such accident and of such disability, death, or loss, shall be deemed a waiver of all claims against the order. Held, that such provisions with reference to notice contemplate a distinction between injuries to the member from disability or loss of life or other bodily injury and claims made by the beneficiary in case of the death of the member, and that such beneficiary was therefore not required to give notice of her claim for death or loss until 30 days after the insured's death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1963–1965; Dec. Dig. § 789.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INSURANCE (§ 789*)—MUTUAL BENEFIT SOCIETIES—NOTICE OF DEATH—WAIVER.

By-laws of a mutual benefit society, providing for notice of a death claim within a specified time after the member's death, are for the benefit of the society and may be waived.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1965; Dec. Dig. § 789.*]

3. INSURANCE (§ 819*)—MUTUAL BENEFIT SOCIETY—DEATH OF MEMBER—NOTICE—WAIVER.

In an action on a mutual benefit certificate, evidence held to justify a verdict finding that defendant company had waived a provision of its by-laws, requiring notice of death within a specified time.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 819.*]

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

Action by Mary Lou Sain against the United Commercial Travelers of America. Judgment for plaintiff, and defendant brings error. Affirmed.

Cooke & Swaney and Vorys, Sater, Seymour & Pease, for plaintiff in error.

Spears & Lynch and Williams & Smith, for defendant in error.

Before SEVERENS and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. This was an action brought by the defendant in error, Mary Lou Sain, to recover an amount which she claimed to be due her from the plaintiff in error, on account of the death of her husband, who was a member of the order, and who had made her his beneficiary in case of his death by the terms of his subscription when he became a member. The plaintiff in error is a fraternal beneficiary association incorporated under the laws of Ohio and has its principal office and place of business in the city of Columbus in that state. Under its constitution the supreme authority of the order is vested in a supreme council, subordinate to which are the grand and subordinate councils whose authority is limited to the districts in which they are organized. One of these subordinates, known as "Lookout Council No. 162," is maintained at Chattanooga, Tenn. One of the objects for which the order was organized and of its constitution was the provision and establishment of an indemnity fund which is maintained by assessments upon its members. From this fund its members are indemnified against bodily injuries to the member resulting in disability or loss of limbs or death.

In August, 1903, Charles G. Sain was admitted to membership in the order at Chattanooga, and remained in good standing until his death. He met with an accident at that place on the 3d day of December, 1906, whereby he was thrown with violence upon a roadway from the buggy in which he was riding, by collision with a dray which was passing on the street. He suffered some contusions upon the back of his head and body, but which seemed at the time not to be severe. He continued to work in his customary vocation for nearly 10 days, complaining somewhat of pains in his head and back, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

then became suddenly worse, and soon thereafter he became unconscious, and he died on the 20th day of the same month, in consequence, as is claimed, of the injuries so received. Some of the doctors testified that the immediate cause of his death was cerebro-spinal meningitis.

[1] The provision of the constitution of the order upon which the plaintiff founded her right to recover reads as follows:

"If any member of the order (other than a social member) who has paid, when due, all fees, fines, costs, dues and assessments charged or levied against him shall sustain, during the continuance of his membership, and while in good standing, bodily injury effected through external, violent and accidental means, which alone shall occasion death immediately, or within six months from the happening thereof, the Order of United Commercial Travelers of America, within ninety days from the receipt of satisfactory proof of his death, shall pay to the person or persons entitled thereto, a sum not exceeding five thousand (\$5,000) dollars, and shall also pay to the person or persons entitled thereto, as aforesaid, the sum of thirteen hundred (\$1,300) dollars, in weekly installments of twenty-five (\$25) dollars each, the first of such weekly installments to be paid within ninety days from the receipt of such proof of death."

The main controversy in the case is found in the following provisions of the constitution of the order concerning the giving notice to its secretary of the injury or death. This provision is found in section 7 of the constitution and reads as follows:

"In event of any accidental injury on account of which a liability may arise against the order, notice in writing must be sent to the Supreme Secretary within ten days thereafter, stating the full name and address of the injured member, the nature, date, extent and full particulars of his accident, and injury, and the name and address of his medical attendant; and notice of like character shall also be given in like manner and time in case of death or loss resulting from accidental injury.

"Failure to give any notice hereinbefore required, or to furnish, within thirty days from the termination of the period of immediate, total, continuous disability resulting from such accidental injury, or from the date of death or loss resulting therefrom, direct and affirmative proof of such accident and of such disability, death or loss, shall be deemed a waiver of all claims against the order and shall invalidate the same."

The plaintiff in error alleged by plea that the notices required by this provision had not been given, and that in consequence the right of recovery by the defendant in error had been forfeited. Other defenses were made by plea; but, in so far as they concern issues of fact, they are concluded by the verdict of the jury, unless the plea that there was no evidence at all upon the essential grounds of the recovery or some of them can be sustained.

The vital questions in the case therefore arise upon the consideration of the requirements of the constitution in regard to the notices required to be given. It is contended that in a case such as this these several notices must have been given, that is to say, notice in writing to be sent within 10 days after the accident, and then, in case of death, if claim is made on that account, notice of the death and the circumstances must be given within 10 days after the death, and that direct and affirmative proofs of the accident and of the death must also be given within 30 days after the death; and it is insisted that, if any of these notices are omitted, there is a waiver of all claims against the

order. On the other hand, it is contended by counsel for defendant in error, and as we think correctly, that the notices required have reference to the injury complained of and contemplate a distinction between injuries to the member from disability or loss of life or other bodily injury and claims made by the beneficiary in case of death of the member. This distinction is indicated by the peculiarities of the subject-matter to which the language is to be applied. It is a case for the application of the maxim, "Reddendo singula singulis." Black on Interpretation of Laws, § 66. The first notice was one which was intended to be required in case the insured himself was claiming indemnity for his loss of time by reason of disability and probably also in case of loss of a member of the body, legs, arms or eyes. The other was intended to apply to the case of beneficiaries made such either by express stipulation or from being the representatives of the deceased. In this instance no claim was made for disability on account of the accident or any loss which the deceased might have suffered from the loss of the members of his body; therefore no notice adapted to such a case was necessary.

[3] The question remains whether the beneficiary, the plaintiff in this action, gave the notices required in the case of a claim for death, or, if she did not, whether it was waived by the association. The death occurred, as above stated, on the 20th day of December. On the day of the death or the day after, pursuant to an agreement made between the father of the beneficiary and a Mr. Henry, who was an officer of the local organization and a member of its executive committee, an autopsy was held on the body of the deceased, and Mr. Henry hired Dr. Wise, the local surgeon of the order, to assist in the autopsy. While this was being held, Dr. Wise requested that the body be held until Dr. Taylor, the chief surgeon of the order, could be summoned and arrive to examine the body. This delay was assented to, and Dr. Taylor was notified and came from Columbus to Chattanooga. Dr. Taylor was not only the chief surgeon of the order, but he had charge of the claim department, and it was his duty to receive all notices and to file all claims until they were disposed of. He arrived on Saturday, the 24th day of December. He made a full investigation of the case, was informed by persons who had knowledge of the circumstances, including the medical attendant of the deceased, of all the facts of its history from the time of the occurrence of the accident down to the death and the then conditions. The autopsy was continued in his presence and under his direction. He also employed in behalf of the company several other surgeons to assist at the autopsy. The minutes of the investigation were taken down by a stenographer employed by Dr. Taylor. These minutes were transcribed by the stenographer and were taken by Dr. Taylor to Columbus on his return. All this had been done before the expiration of 10 days after the death. No request was made for any formal notices of the death and its causes, nor were any final proofs requested. It is true that the father of the beneficiary, who was an old and apparently not a very well-informed person, sent a request to the company for a blank form for a report and final proof, and that such blanks were

sent by the association, but in consequence of the absence of the minister who conducted the funeral service, who was supposed to be an important witness, these forms were not filled out and sent within 30 days from the time of the death of the deceased. We think, however, that it is not important to consider this request for blanks or what was done in pursuance of it, if the notice and proofs had been already waived. We think the evidence was sufficient to justify, if indeed it did not require, the jury to find that there had been a waiver of the notice of the death and the final proofs. Upon this subject the court instructed the jury that the giving of the notice and the furnishing of the proof was a requirement that the association might waive, and that if the jury found from the evidence, and particularly the sending of the general surgeon and superintendent of claims to make personal investigation, that the company had intended to waive notice of the death and the furnishing of proofs of the circumstances, they might find that a waiver had been made out. Thus the court did not determine as matter of law that what the company had done amounted to a waiver, but left it for the jury to say whether, from all the facts proven, they believed that the company did not intend to insist upon the formal notice, which would be required by the constitution of the order, and the final proofs; that is, whether it had not taken upon itself the ascertainment of the facts which the notice and formal proofs would disclose. The verdict of the jury was for the plaintiff, and it is necessary to presume that the jury found that the defendant order did not intend to require the information which a formal notice and proof of facts would give, and it seems to us that the verdict of the jury was quite permissible in the circumstances.

Nothing likely or possible, so far as we can see, would probably be disclosed by the notice and formal proof which defendant's counsel insist should have been given, was left to be supplied after the chief surgeon and manager of the claim department had ascertained by his own examination and of which he had a full and ample account made by the stenographer employed by him and put on file in his own office. After all that, the insistence upon these formalities seems altogether devoid of merit.

[2] A number of cases involving this subject have been cited by counsel. We think it is well settled, and that the court was quite right in saying to the jury, that notices such as these may be waived by the insurer, and that evidence of such waiver may be found in the conduct of the association as in the case before us. And it has been held that where the association or company insuring has, upon information of the death, or other ground for a claim of indemnity, within the time allowed for giving notice, sent its own expert official for the very purpose of investigating and ascertaining the facts which might be material to its own exoneration, the insistence upon notice and proofs rests upon a barren technicality. See, for examples, the cases of American Accident Ins. Ass'n v. Norment, 91 Tenn. 1, 18 S. W. 395; Martin v. Equitable Accident Ass'n, 61 Hun, 467, 16 N. Y. Supp. 279; Sheanon v. Pac. Mutual Life Ins. Co., 83 Wis. 507, 53 N. W. 878.

Much reliance is placed by counsel for the plaintiff in error upon the case of *Travelers' Ins. Co. v. Nax*, 142 Fed. 653, 73 C. C. A. 649, in which Judge Gray delivered the opinion, wherein the subject was carefully discussed and the varying conditions in previous cases pointed out and the rules of law governing such conditions explained and affirmed. We find nothing in that case to criticise; on the contrary, we think that the conclusion of the court in that case was no doubt correct. But it furnishes no support to the defense made in the present instance. The contract for indemnity in that case required immediate notice to be served of any accident or injury. The deceased lived 72 days after the accident, and no notice was served for 67 days after his death, and there was no evidence of any waiver by the insured. We do not perceive how any other result could have been reached, and that, the contract having been disregarded by the failure to give notice, the plaintiff forfeited all right to recovery. The decisive fact or facts of the present case did not arise and were not considered.

We think it is not necessary to refer to other cases which relate to the consideration of the language of such contracts other than a few which seem most nearly relevant because of the similarity of the contract for indemnity to that in the present case. These are the cases of *Odd Fellows Fraternal Accident Ass'n v. Earl*, 70 Fed. 16, 16 C. C. A. 596, decided by the Court of Appeals for the Second Circuit; *Rorick v. Railway Officials' & Employés' Accident Ass'n*, 119 Fed. 63, 55 C. C. A. 369, decided by the Circuit Court of Appeals for the Ninth Circuit; *Western Commercial Travelers' Ass'n v. Smith*, 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653; and *Cooper v. United States Mutual Accident Association*, 132 N. Y. 334, 30 N. E. 833, 16 L. R. A. 138, 28 Am. St. Rep. 581.

Perceiving no error in the rulings of the Circuit Court, we must affirm the judgment.

In re DORR.

ALLEN v. FORBIS.

(Circuit Court of Appeals, Ninth Circuit. April 3, 1911.)

No. 1,873.

1. GAMING (§ 11*)—FUTURES—VALID TRANSACTIONS.

Rev. Codes Mont. § 8416, prohibiting places where stocks, etc., are sold on margins, relates only to such transactions on margins as are recognized as gambling transactions, and does not invalidate an agreement for a purchase from a member of a stock exchange of particular stock, one-fourth of the price being paid, and the stock being held as security for the balance where actual delivery is expressly contemplated.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 23; Dec. Dig. § 11.*]

2. GAMING (§ 3*)—PENAL STATUTES—CONSTRUCTION.

Rev. Codes Mont. § 8416, prohibiting places where stocks, etc., are sold on margins, being penal, must be strictly construed.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 3; Dec. Dig. § 3.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. BANKRUPTCY (§ 314*) — CLAIMS — ILLEGAL TRANSACTIONS — FUTURES—EXECUTED CONTRACTS.

Even if a contract to purchase stock was originally invalid as a gambling transaction on margins in violation of Rev. Codes Mont. § 8416, the illegality cannot be asserted by the broker's trustee in bankruptcy against a claim by the purchaser where the contract was executed by the broker purchasing the stock, and where he disposed of it without the claimant's knowledge and consent, and misappropriated the proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 314.*]

Petition to Revise an Order of the District Court of the United States for the Southern District of California.

In the matter of Fred Dorr, bankrupt. On petition by Carroll Allen, trustee, to review an order of the referee denying the trustee's petition to reconsider a claim of John J. Forbis. Petition denied.

A petition is presented for the revision of an order of the District Court affirming the order of the referee in bankruptcy denying the petition of the trustee to reconsider the claim of the respondent which had theretofore been allowed. The respondent had filed his claim for \$7,312.89 against the bankrupt's estate, and the claim had been allowed. The trustee filed a petition for the reconsideration and rejection thereof on the ground, and the sole ground, that the claim was based on a gambling transaction in stock prohibited by the law of Montana. The facts as stipulated are as follows: The respondent was a resident of Butte, Mont., in June and July, 1908, and at the same time the bankrupt was a stockbroker at the same place conducting a brokerage business where grain stocks and other securities were sold on margin and otherwise. On June 30th the respondent purchased from the bankrupt certain shares of stock of the United Steel Corporation, the total purchase price of which, with the commission, was \$15,162.50. The respondent paid on account thereof \$3,864.35, leaving a balance due the bankrupt of \$11,258.15, for which the latter held the stock as security. The bankrupt was a member of the New York Stock Exchange, where the orders of the respondent were executed. On August 12, 1908, the value of the stock so purchased was \$18,750, and before said date the bankrupt had without the knowledge or consent of the respondent disposed of the stock, and at the time when the petition for bankruptcy was filed he had in his possession none of the stock, nor any stock of the same kind, nor any money with which to purchase such stock. Said purchase and sale was made subject to the following agreement: "All orders for the purchase and sale of any article received and executed with the distinct understanding that actual delivery is contemplated, and the party giving the orders so understands and agrees. It is further understood that, on all credit business, the right is reserved to close transactions when credits are running out—or so nearly in our judgment, as to endanger the account—with further notice, and settle contracts in accordance with rules and customs of Exchange when order is executed." For violation of the rules the bankrupt was suspended from membership in the New York Stock Exchange on July 29, 1908. The petition in bankruptcy against the bankrupt was filed on August 12, 1908, and at that time the value of the said stock was \$18,750.

Section 8416 of the Revised Codes of Montana provides: "Gambling Games Prohibited.—Any person who carries on, opens up or causes to be opened, or who conducts or causes to be conducted, or operates, or runs, as principal, agent or employé, any game of monte, dondo, fan-tan, tan, stud-horse poker, craps, seven and a half, twenty-one, faro, roulette, draw-poker, or the game commonly called round-the-table poker, or solo, or any banking or percentage game, or any game commonly known as a sure-thing game, or any game of chance played with cards, dice or any device whatever, or who runs or conducts or keeps any slot machine, or other similar machine, or permits the same to be run or conducted, for money, checks, credits, or any representative of value, or for any property or thing whatever, or any

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

person or persons who conduct any brokerage business, bucket shop or office where grain stocks or securities of any kind are sold on margins and any person owning or in charge of any saloon, beer hall, barroom, cigar store or other place of business, or any place where drinks are sold or served, who permits any of the games mentioned in this section to be played in or about such saloon, beer hall, barroom, cigar store, or other place of business, or permits any slot machine, or other similar machine to be kept therein, is punishable by a fine of not less than one hundred nor more than one thousand dollars, and may be imprisoned for not less than three months, nor more than one year, or by both such fine and imprisonment."

Hickcox & Crenshaw, for petitioner.

W. T. Craig, for respondent.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1] The referee allowed the claim of the respondent and thereafter denied the petition of the trustee to reconsider the same, holding that the provision of the statute of Montana (section 8416) subjecting to a penalty "any person conducting any brokerage business, bucket shop or office where grain stocks or securities of any kind are sold on margins" did not render the respondent's claim illegal as based upon a contract prohibited by law, and so held upon the consideration that the purpose and aim of the statute in which that provision is found was to inhibit gambling games, and that the transaction in question was not a gambling transaction, but was a legitimate contract for the future delivery of merchandise, and that there was no evidence to show that, instead of the delivery of the article purchased, there was to be a mere payment of the difference between the contract and the market price. We are inclined to the opinion that the referee was right in so construing the statute.

[2] The statute was directed against gambling and gambling games, and, being a penal statute, it is to be strictly construed. A transaction such as is disclosed in this record was not a gambling transaction, but was a contract such as receives the recognition and protection of the courts. In Clews v. Jamieson, 182 U. S. 461, 489, 21 Sup. Ct. 845, 45 L. Ed. 1183, Mr. Justice Peckham said that a sale for future delivery is not on its face void, but is a perfectly legal and valid contract, and that the fact that at the time of making the contract for future delivery the party binding himself to sell has not the goods in his possession, and has no means of obtaining them for delivery otherwise than by purchasing, does not invalidate the contract. Such a transaction is to be distinguished from that which met the condemnation of this court in Joslyn v. Downing, Hopkins & Co., 150 Fed. 317, 80 C. C. A. 205, in which there was no actual buying or selling of stocks or commodities, but the transactions were gambling deals or bets on the market price thereof. We think it should be held, therefore, that the clause in the statute, the title of which is "Gambling Games Prohibited," and which denounces a penalty against any person who conducts a bucket shop or office where grain stocks or securities of any kind are sold on margins, refers only to such transactions on margins as are recognized as gambling transactions.

[3] But there is other ground on which the petition for revision should be denied. If it were conceded that the original transaction between the respondent and the bankrupt was forbidden by the statute of Montana, and was therefore unlawful on the ground that every contract which contravenes any legal principle or enactment is declared void, still the illegality of the contract cannot be set up to defeat the claim of the respondent, for the reason that the contract had been executed. It is not denied that the bankrupt had in his possession at or before the adjudication of bankruptcy money which belonged to the respondent, money realized from an unauthorized sale of respondent's property. To defeat the claim, the trustee relies on the illegality of the contract whereby the property was acquired. But the allowance of the claim does not involve the enforcement of the contract which was made in the broker's office in Butte. The contract, so far as it could be affected by the statute of Montana, had been completed, and, when the bankrupt disposed of the respondent's property, a new obligation was created, an obligation to turn over to the respondent property which belonged to him, and in which the bankrupt had no interest. If money has been actually paid to an agent or a partner, the illegality of the transaction by which it was acquired does not affect the right of the principal or the other partner to recover. In *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132, it was held that, where an illegal contract has been completed and money has been received by a joint owner as the fruit of the illegal contract, he will not be permitted to retain it, and he cannot protect himself by setting up the illegality of the contract. Of similar import is *Brooks v. Martin*, 2 Wall. 70, 17 L. Ed. 732, and in *Planters' Bank v. Union Bank*, 16 Wall. 483, 498, 21 L. Ed. 473, it was held that, although an illegal contract will not be enforced by the courts, yet when the contract has been executed, and the illegal result accomplished, money acquired thereby will as between the parties be a legal consideration for an implied promise to pay. Said the court:

"But when the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them."

In *Willson v. Owen*, 30 Mich. 474, Judge Cooley said:

"It is true that the trials of speed for money at the horse fair and the selling of pools under the auspices of the association were illegal; but there is no illegality in the promise, express or implied, of the defendant to pay over to the plaintiffs the money received for them, from whatever source derived, or from whatever transaction springing."

This doctrine has been applied to illegal transactions in stocks on margins similar to that which according to the petitioner's contention is here presented, and it has been held that, where the illegal transaction has been closed and money belonging to the customer is shown to be in the hands of the broker, the latter may be required to pay the

same. Peters v. Grim, 149 Pa. 163, 24 Atl. 192, 34 Am. St. Rep. 599; Overholt v. Burbridge, 28 Utah, 408, 79 Pac. 561; Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98; McDonald v. Lund, 13 Wash. 412, 43 Pac. 348.

The petition is denied, with costs.

LOUISVILLE & N. R. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1911.)

No. 1,999.

1. RAILROADS (§ 254*)—SAFETY APPLIANCE ACT—ACTION FOR VIOLATION—PLEADING.

The declaration in an action by the United States against a railroad company to recover penalties for violation of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), considered, and held sufficient.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 254.*]

2. COMMERCE (§ 27*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

The provision of Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), amendatory of the safety appliance acts of March 2, 1893 (chapter 196, § 6, 27 Stat. 532), and April 1, 1896 (29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]), extending the provisions of such acts relating to train brakes, automatic couplers, grabirons, and the height of drawbars to "all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce," is intended as a regulation of such railroads only when engaged in interstate commerce, and does not apply to a road when engaged in the domestic commerce of a state.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

3. COMMERCE (§ 27*)—SAFETY APPLIANCE ACT—CONSTRUCTION.

The provision of Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), amendatory of the safety appliance acts of March 2, 1893 (chapter 196, § 6, 27 Stat. 532), and April 1, 1896 (chapter 87, 29 Stat. 85 [U. S. Comp. St. 1901, p. 3175]), that the requirements of such acts relating to train brakes, automatic couplers, etc., shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used in interstate commerce, "and all other locomotives, tenders, cars and similar vehicles used in connection therewith," does not require that the connection between a car not equipped as therein required and one used in interstate commerce shall be immediate to bring it within the statute, but it is sufficient if they are in the same train.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 27.*]

4. EVIDENCE (§ 215*)—COMPETENCY—RECORD AS ADMISSION.

In an action by the United States against a railroad company to recover penalties for violation of Safety Appliance Act March 2, 1893, c. 196, § 6, 27 Stat. 532, as amended by Act April 1, 1896, c. 87, 29 Stat. 85 (U. S. Comp. St. 1901, p. 3175), and Act March 2, 1903, c. 976, § 1, 32 Stat. 943 (U. S. Comp. St. Supp. 1909, p. 1143), a record kept by a station agent of defendant in his office in the regular course of his duty showing the contents of a car loaded at his station and its origin and destination was admissible on behalf of the government to prove that the car was being used in interstate commerce, as an admission of fact by defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 754-759; Dec. Dig. § 215.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Error to the District Court of the United States for the Western District of Tennessee.

Action by the United States against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John B. Keeble, Ed. T. Seay, and C. G. Bond, for plaintiff in error. George Randolph, U. S. Atty., Wade H. Ellis, Asst. Atty. Gen., Philip J. Doherty and Walter N. Brown, Special Asst. U. S. Attys., and R. F. Walter, for the United States.

Before SEVERENS, WARRINGTON and KNAPPEN, Circuit Judges.

SEVERENS, Circuit Judge. This action was prosecuted by the United States in the District Court for the recovery of penalties alleged to have been incurred by the defendant by reason of its failure to comply with the provisions of the act of Congress approved March 2, 1893, commonly called the "Safety Appliance Act," and the amendments thereto passed April 1, 1896, and March 2, 1903, respectively, and more particularly the provisions of the last-mentioned amendment.

The declaration contains four counts, each of which alleged in equivalent phraseology the violation of the law in respect to the use in interstate commerce of a particularly numbered car on which the couplings or handholds did not comply with the requirements of the act. The first count will serve as a sample of them, and, omitting preliminaries, is here reproduced as follows:

"For a first cause of action, plaintiff alleges that said defendant is a common carrier engaged in interstate commerce by railroad among the several states and territories of the United States, particularly the state of Tennessee.

"Plaintiff further alleges that in violation of the act of Congress known as the safety appliance act, approved March 2, 1893 (contained in 27 Statutes at Large, p. 531 [U. S. Comp. St. 1901, p. 3174]), as amended by an act approved April 1, 1896 (contained in 29 Statutes at Large, p. 85), and as amended by an act approved March 2, 1903 (contained in 32 Statutes at Large, p. 943 [U. S. Comp. St. Supp. 1909, p. 1143]), said defendant on or about August 10, 1908, hauled on its line of railroad one car, to wit, its own No. 40146, said car being one regularly used in the movement of interstate traffic, and at the time of said violation hauled in train containing interstate traffic one other car in said train, to wit, its own No. 92920, containing interstate traffic, to wit, merchandise, consigned to a point within the state of Alabama.

"Plaintiff further alleges that on or about said date defendant hauled said car, its own No. 40146, as aforesaid, over its line of railroad from Paris, in the state of Tennessee in a northerly direction, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the chain connecting the lock block or lock pin to the uncoupling lever being disconnected on said end of said car, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by section 1 of the act of March 2, 1903.

"Plaintiff further alleges that by reason of the violation of said act of Congress, as amended, defendant is liable to plaintiff in the sum of \$100."

The defendant interposed a demurrer to the declaration, the grounds of which were, in substance, that in neither of the counts was it charged that at the time when the car was hauled with defective equipments, whether in respect of its couplings or handholds, it was being employed in interstate commerce, and, further, that the act of March 2, 1903, on which the action was based, is unconstitutional and void, in that "it does not confine the violation to car or cars actually engaged in or used in interstate commerce, but creates a liability though the car, or cars, complained of were not used in interstate commerce." The demurrer was overruled and the defendant pleaded not guilty.

[1] The first of these grounds taken by the demurrer raises a question of pleading. It is whether the paragraph commencing, "Plaintiff further alleges that on or about said date defendant hauled said car," etc., is sufficiently connected with the preceding paragraph in time, place, and circumstances to show that it refers to the same occurrence so as to be a more specific allegation of what had in part already been stated. It must be admitted to be loose and rather inconsequential pleading. But a majority of the court is inclined to hold that the pleader intended to signify that the later averments were of the identical matter stated in the former and that this was made sufficiently apparent. In this respect the counts were all alike.

Having reference to the proofs for a more specific exhibition of the charge, the case was this: The defendant railroad company operates a railway as a common carrier in several contiguous states, in interstate as well as intrastate commerce. At the time when the alleged offenses were committed, it was moving a freight train on its road from Paris, in the state of Tennessee, to another place in the same state. The organization of the train was, so far as it is necessary to describe it, this: Near to the forward end of it was a car loaded with freight, some of which was consigned to a point or points in Alabama. It is not charged that this car was not equipped with the proper couplings and handholds. Toward the rear end of the train were the four freight cars in question, not alleged to be carrying interstate freight, which were not equipped with the required couplings as to two of the cars, nor with proper handholds as to the other two. Between these and the car carrying interstate freight were other cars not alleged to be carrying interstate freight, and not alleged to be without the required couplings or handholds.

The case was tried before a jury. Evidence was produced tending to prove the foregoing facts. Some of this evidence was received under objection, a matter which we pass by for the present. The court instructed the jury, among other things, as follows:

"As to whether or not these cars were being used in interstate commerce at the time it is alleged these defective cars were being so hauled, I charge you that if there was in that train one car containing freight that was being hauled from a point in Tennessee to a point in another state that one car contained interstate commerce, and, under this statute, that one car inoculated the whole train, and the train was being operated in interstate commerce, although the other cars in the train were cars that were being used for camp purposes, and being hauled only between points in Tennessee."

The railway company complains of this instruction, and contends among other things that if the car carrying interstate freight was

equipped with the proper appliances, and the cars, or engine and car, in immediate connection therewith, were also properly equipped, the law was not violated. This point we also pass by for the moment.

[2] The second ground is of much more serious import. By the first section of the act of March 2, 1903, it is declared that:

"The provisions and requirements hereof and of said acts [meaning the acts of March 2, 1893, and April 1, 1896] relating to train brakes, automatic couplers, grabirons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce."

And the question is whether this language is intended to be directed to all railroads, which are sometimes engaged in interstate commerce, and to be applicable to them at all times whether they may be then engaged in interstate business or in the domestic commerce of the state, or is it directed to the regulation of such railroads when they are engaged in interstate commerce? The language is broad enough to amount to a regulation of such railroads while engaged in the domestic commerce of a state, and, if it were not restricted by any limitation, might be held to extend to every kind of commerce whether interstate or domestic. These were the conditions which were presented to the Supreme Court in the so-called Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. And, if these were all the conditions of the case now before us, we should be required by the authority of that case to sustain the demurrer. But in that case there had been no previous legislation upon the subject, and therefore nothing which could be referred to as explanatory of the meaning of the act. There was nothing which the court could lay hold of to restrict the generality of its terms. This being so, there was no alternative but to construe the act upon the plain meaning of the language employed. But the act of 1903 was an amendment of previous legislation upon the same subject—that is to say, of the acts of 1893 and 1896—and that legislation sufficiently indicated that it was directed to railroad companies for their regulation while they were employed in interstate commerce. At page 503 of the Employer's Liability Cases, 207 U. S. at page 147 of 28 Sup. Ct. (52 L. Ed. 297), the now Chief Justice White, after referring to another argument made by counsel for the plaintiffs in error, observed:

"And the same observation is appropriate to the reference made to the text of the safety appliance act of March 2, 1893 (27 Stat. 531), which, it is insisted, furnishes a guide which, if followed, would enable us to disregard the text of the act. We say this because the face of that act clearly refutes the argument based upon it. It is true that the act like the one we are considering is addressed to every common carrier engaged in interstate commerce, but this direction is followed by provisions expressly limiting the scope and effect of the act to interstate commerce."

And the amendment would be read as if it were consolidated with the earlier acts; for it is a rule of construction that "an amendment of a statute by a subsequent act operates precisely as if the subject-matter of the amendment had been incorporated in the prior act at the time of its adoption, so far as regards any action had after the amendment is made." Black on the Interpretation of Laws, 357.

These considerations lead us to the conclusion that the amendment of 1903 was intended to be a regulation of railroads while they are engaged in interstate commerce, and that the language means the same thing as if the word "when" were interposed before the word "engaged." And, indeed, this is not a forced construction, but is one of the natural constructions which the words actually used would bear; for "engaged" might with equal propriety refer to a continuous period, or to a definite time. And this fact would found the duty of adopting the latter definition. And, so construed, the statute is relieved of the objection that Congress has no power to regulate the domestic commerce of a state.

[3] Then, further, it is argued that the "connection" of the car carrying interstate freight which the act intends is an immediate connection with cars not properly equipped, and that there was neither allegation nor proof that these conditions existed. Because the act visits a penal consequence upon its violation, and of other considerations which we need not dwell upon, there was some ground for argument that the law should have such restricted operation. But the trend of decision in the Circuit Courts and the Circuit Courts of Appeals has been the other way, and is to the effect that the connection of the cars in a train is not required to be immediate, and we are not so far convinced that those decisions are wrong as to justify us in holding to the contrary.

[4] It remains to consider certain objections to the admission of evidence. Notice was given to the attorney for the railroad company to produce upon the trial the original waybills which accompanied these cars. The attorney denied all knowledge of them, and they were not produced. A witness named Johnson was called by the government, and testified that he was an agent of the railroad company at Paris, and that it was his duty in August, 1908, to oversee the loading and unloading of freight, locking up cars and billing them out; that he kept a record of the movement of cars at that station and of the origin and destination of freight passing through it; that he kept a record, made under his supervision, of the contents of car 92920 on August 10, 1908; and that that record was preserved in his office. He produced an impression copy of an entry of the waybill book, a part of such records. It was offered in evidence, and admitted against the defendant's objection that it was "not the best evidence of what the car contained." The objection was overruled, and the defendant excepted. The impression copies contained entries of freight in car 92920 consigned to various points in Alabama, Illinois, and Tennessee. Proof of what the car contained might have been made by the original waybills. But they were not the only competent evidence of the facts. They were not contractual instruments between these parties, and were not the necessary proof of the facts which they might have a tendency to prove. An admission of the facts made by the defendant would be competent evidence to prove them, independently of the waybills. The record kept and preserved by the agent at Paris employed for the purpose by his company were competent, though doubtless not incontestable, evidence to prove an admission of the fact by the railroad company. For this purpose, it would not be necessary to establish

all the necessary conditions of proof which would be required if the railroad company were offering these records for some self-serving purpose of its own. These records were kept for the very purpose of giving necessary information on which the company itself would rely. It is proper to add that the objection was not aimed to the circumstance that the papers offered were not the records of the company's office, and were only impressions of them, but was directed to the point that they were secondary evidence of the waybills. This is confirmed by the argument here. They state their point thus:

"The question comes up, then, as to whether these records were admissible in evidence or whether they are secondary and hearsay and inadmissible."

And the argument made is to demonstrate that the original entries made were not made in such conditions as would justify their admissibility in evidence.

Another witness named Cash who was a car inspector employed by the Interstate Commerce Commission for the purpose of detecting violations by railroads of the safety appliance acts testified that he saw the original waybills in the caboose of the train containing the cars in question, and that he made a memorandum of them showing the origin of the shipments, destinations, and the names of the consignors and of the consignees. This was offered in evidence. The record shows that this memorandum was read to the court and jury without objection. Subsequently, and at the close of his evidence, counsel for the railway company moved to exclude the testimony of the witness, "because," as they said, "it is not shown as a matter of fact whether this was properly done, or whether it is the original." Assuming, without deciding, that the objection was seasonably made, we understand that the last objection must refer to the question whether the memorandum produced was his original memorandum. But the evidence was such as might satisfy the court and jury that it was the original memorandum which he made at the time. And, as to the question whether "it was properly done," it might fairly be inferred that, when he said he made a memorandum of the bills, he meant that he made it correctly.

The judgment must be affirmed, with costs.

UNITED STATES FIDELITY & GUARANTY CO. v. COMMONWEALTH
OF PENNSYLVANIA, to Use of CLARION COUNTY POOR DIST.

(Circuit Court of Appeals, Third Circuit. February 8, 1911.)

No. 62.

1. COUNTIES (\$ 98*)—OFFICIAL BONDS OF COUNTY COMMISSIONERS—CONSTRUCTION—PENNSYLVANIA STATUTE.

The liability of an official bond given by a county commissioner in Pennsylvania under Act Pa. May 24, 1878 (P. L. 118), conditioned for "the faithful discharge of all duties imposed upon him by law," extends to the duties imposed on him as a poor district officer by Act Pa. June 4, 1879 (P. L. 78), which created each county in the state into a poor district under the control and management of the county commissioners

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

who are authorized to purchase property and erect buildings, etc.; their accounts to be audited by the county auditors.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 98.*]

2. COUNTIES (§ 98*)—COUNTY COMMISSIONERS—OFFICIAL BONDS.

The provision of Act Pa. May 24, 1878 (P. L. 118) that the official bonds of county commissioners shall be taken in the name of the commonwealth "for the use of the county," does not preclude a recovery on such a bond for the use of the county as a poor district, into which each county is created by Act Pa. June 4, 1879 (P. L. 78).

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 98.*]

3. BONDS (§ 124*)—PLEADING—EFFECT OF DECLARATION OF USE.

A declaration of use in a statement of claim in an action on a bond is not a part of the pleading and has no force to make an issue different from what it would have been if the phrase had been left out.

[Ed. Note.—For other cases, see Bonds, Dec. Dig. § 124.*]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Action at law by the Commonwealth of Pennsylvania, for the use of the County of Clarion at the suggestion and now for the use of the Clarion County Poor District, against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Don C. Corbett, Harry E. Rugh, and Stonecipher & Ralston, for plaintiff in error.

J. T. Reinsel, F. J. Maffett, H. M. Rimer, and Lewis Collner, for defendant in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

BUFFINGTON, Circuit Judge. This case of the Commonwealth of Pennsylvania, for the use of the county of Clarion, at the suggestion and now for the use of the Clarion county poor district, against the United States Fidelity & Guaranty Company, was begun in the court of common pleas of the county of Clarion. Thereupon the defendant, a citizen of Maryland, had the case removed to the United States Circuit Court, where it was tried and a verdict found for the plaintiff. On entry of judgment on such verdict the defendant sued out this writ. The action was to recover for the breach of the official bond of Saxton, a commissioner of Clarion county, on which bond the defendant was surety.

[1] Substantially the question involved is: Does the liability of an official bond given by a county commissioner in Pennsylvania, under the act of May 24, 1878 (P. L. 118), "for the faithful discharge of all duties imposed upon him by law," extend to the performance of duties imposed upon such commissioner as a poor district officer, by the act of June 4, 1879 (P. L. 78)?

The bond in question is an official bond as county commissioner given in pursuance of an act of 1878, which provides as follows:

"That the county commissioners of the several counties of this commonwealth hereafter elected, shall before entering upon their official duties each give bond, with sureties to be approved by the court of quarter sessions of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the same county, or by one of the judges thereof, and in such penalty as the court shall deem sufficient, not less than two thousand dollars each, *for the faithful discharge of all duties enjoined upon them by law*, and for the faithful and legal appropriation of all county and other moneys which said commissioners have any authority to draw out of the county treasury, upon checks or orders given by them, or over which they have control; the said bonds shall be taken in the name of the commonwealth of Pennsylvania for the use of the county."

At the time this statute was passed, the several townships and boroughs of Clarion county were the only poor districts in Clarion county, and the commissioners of such county had nothing to do with the care of the poor. In 1879 a sweeping change in the poor system of the state was made by the act of June 4, 1879, whereby it was provided:

"Section 1. Be it enacted, etc. For the purpose of furnishing relief to the poor, destitute and paupers, giving them employment and carrying out the provisions of this act, each county of this commonwealth is hereby created a district, to be known as _____ County Poor District.

"Sec. 2. The commissioners of each county are authorized and empowered to select and purchase real estate within said district, erect thereon buildings, provide tools, machinery and stock, as they in their judgment may deem necessary, proper and sufficient to carry out the purpose and design of this act. The conveyance and title for such real estate shall be taken in the name and for the use of the district mentioned in the first section of this act."

"Sec. 6. The county commissioners and their successors in office shall have control, management and direction of the property purchased as aforesaid, and shall provide all things necessary for the maintenance and employment of the poor of their said district, make repairs and improvements of buildings, cultivate the real estate and use the proceeds of labor of the poor under their charge in their support and maintenance."

"Sec. 8. The treasurer of such county shall be ex officio treasurer of said poor district; he shall receive all moneys belonging to the district, and pay out the same on warrants drawn by the commissioners, who shall fix his compensation for such service. The accounts of the treasurer with the said district shall be audited by the auditors of said county, in accordance with the laws relating to accounts of county treasurer."

"Sec. 11. The said commissioners, shall from time to time receive, maintain, provide for and employ all paupers, poor and indigent persons within their district, entitled to relief and having a settlement therein. The duties heretofore performed by overseers of poor within such districts, shall be done and performed by said commissioners with the same rights and subject to the same penalties. * * *

"Sec. 17. The county commissioners shall keep accurate accounts of all moneys received by them in any way for the purposes of this act, as well as all paid out, including such reasonable expenses as they may incur in carrying out the business, and which they shall be allowed credit for. *All accounts under this act shall be audited by the county auditors.* Said commissioners shall be entitled to charge in their account as compensation the same rate per day for time necessarily employed about the business that they are entitled to receive as county commissioners."

"Sec. 19. The commissioners may require bond with security from any officer or employee appointed by them under this act; it shall be their duty to see that the county treasurer gives bond with surety to secure the safe-keeping and proper payment of all moneys that come into his hands on account of said district, and shall fix the amount of the treasurer's bond."

By proper steps the county of Clarion accepted the provisions of the act, and in pursuance thereof its commissioners, one of whom, Saxton, with the defendant as surety, had duly given the bond here in

suit, dated November 22, 1902, undertook the erection of a county poorhouse. By virtue of section 17 of the act, the county auditors audited the accounts of the poor district of Clarion county, growing out of the erection of the poorhouse, and on June 13, 1908, filed their report in the common pleas of Clarion county, and therein, *inter alia*, surcharged Saxton and his fellow commissioners some \$6,600 for sundry overpayments in and about the erection of the poorhouse, "which payments were by said commissioners illegally and fraudulently made." The auditors' surcharges, their report being unappealed from, became judgments of the court. The question before us is whether this breach of duty on the part of Saxton falls within the provisions of his official bond by which he and the defendant obligated themselves to be "held and firmly bound unto the commonwealth of Pennsylvania for the use of the county of Clarion," and which provided:

"Now the condition of this obligation is such that if the above-bounden John S. Saxton shall faithfully discharge all duties enjoined on him by law as such commissioner, and shall faithfully and legally appropriate all county and other moneys which he as such commissioner shall have authority to draw out of the county treasury upon checks or orders given by him on the county commissioners of Clarion county, or over which either he or they have control, then this obligation to be void, otherwise to be and remain in full force and virtue."

Recovery is resisted: First, on the ground that the Supreme Court of Pennsylvania has decided that the county of Clarion and the poor district of the county of Clarion are different entities; it being contended, therefore, that Saxton's bond did not cover his acts as commissioner with reference to the poor district of Clarion county. And, secondly, on the ground that liability on the bond is limited to the use of the county of Clarion solely as a county and cannot inure to the poor district of the county of Clarion.

We have carefully examined *Commonwealth v. Summerville*, 204 Pa. 300, 54 Atl. 27, *Melvin v. Summerville*, 210 Pa. 41, 59 Atl. 483, and *Commonwealth v. United States, etc., Co.*, 220 Pa. 148, 69 Atl. 550, where the general subject-matter of this litigation was involved, and in our judgment none of the questions now before us were there adjudged. Had they been, we should of course be concluded. In *Melvin v. Summerville* the question was whether in building the poorhouse the approval of the judge of the court must be had as in the case of distinctive county buildings, such as a jail or courthouse, under the act of April 19, 1895 (P. L. 38). The Supreme Court held such approval was not necessary, but that the procedure pointed out by the act of 1879 creating the county poor district was to be followed, and the language used in the opinion of that court that the district is "a separate quasi municipal corporation," that the officers "are not the less district officers and not county officers while acting," must be read in the light of the argument then being made that the poorhouse was not included in the "other county buildings" covered by the act of 1895, which referred to courthouses, jails, and "other county buildings." And in *Commonwealth v. United States, etc., Co.*, supra, where

this bond was before it, the Supreme Court expressly stated it did not decide whether the protection of the same extended to the district.

Such being the case, the question whether the malfeasance here complained of was a breach of any of the "duties enjoined on him by law as such commissioner" is open to us. Now it is certain that Saxton was elected to, bonded for and entered upon, but one office, to wit, that of county commissioner. It is equally certain that until he qualified as county commissioner he had no authority to do any act in reference to the poor district of the county of Clarion. It is also clear that as soon as he qualified as county commissioner he thereby and virtue officii was empowered and constrained to perform certain duties in reference to the poor district. How then can it be contended that when, as county commissioner, he was performing certain duties in reference to the poor district which the law and his office as commissioner compelled him to perform, that he was not, in the words of his bond, performing "duties enjoined on him by law as such commissioner"? If such duties were not enjoined on him by law, by whom or by what were they enjoined? Indeed, there can be no logical escape from the conclusion that, if they were not enjoined on him by law, he was an irresponsible volunteer, and not an official in so acting. The learned judge who tried this case in the circuit court was appointed and qualified as a district judge. He tried this case in the circuit court, sitting therein as a circuit judge ex officio, by virtue of his office as a district judge. Will it be contended for a moment that in trying this case he was not performing "duties enjoined on him by law as such district judge"?

[2] Seeing then that Saxton's malfeasance was a breach of a duty enjoined on him by law as a commissioner of Clarion county, is enforcement of his bond to be denied because the statute provides that the bond "shall be taken in the name of the commonwealth of Pennsylvania for the use of the county," and because the suit here and the liability shown are for the use of the Clarion county poor district?

In Jenks v. Sheffield, 135 Pa. 400, 19 Atl. 1004, and in Commonwealth v. Summerville, *supra*, the Supreme Court, in construing the act of 1879, said:

"The general plan or purpose of the act is that each county shall be and become a single poor district."

When, therefore, a statutory bond is taken in the name of the commonwealth of Pennsylvania for the use of the county, and, as provided in the act, "each county of the state is hereby created a district," is it reasonable to contend that the beneficial use of this bond shall be restricted to the county as a county and not to extend to the county as a poor district? For, unless the declared beneficial use of the bond to the county extends to the county in all its relations—that is, to the county both in its entity as a county and its entity as a poor district—how can the county of Clarion have and enjoy the whole beneficial use? Indeed, any narrower construction shears the use of its beneficial character. Furthermore, the statement of the use party to a bond is not part of the pleading and is often disregarded as mere surplusage.

[3] Thus in Boston, etc., Co. v. Grace, 112 Fed. 279, 50 C. C. A. 239—and to it we may add U. S. v. Abeel, 174 Fed. 18, 98 C. C. A. 50, and American Bonding Company v. Allison, 182 Fed. 810—it is said:

"According to respectable authority, the expression of a use may be disregarded as surplusage. Its purpose is to guard the interest of the uses against the adverse action of a nominal plaintiff. It is held that such a phrase has no force to make an issue different from what it would have been if the phrase had been left out. It is held, also, that the declaration of use is not part of the pleading."

But we are not limited to that ground. Our Pennsylvania Provincial Act of 1713 (1 Smith's Laws, p. 85, § 14) provides:

"All such bonds * * * as by * * * law are directed to be given to the Register General * * * or by any other officers or persons in office whatsoever in this province for the due execution of his or their representative offices or employments, are hereby declared to be to and for the use of and in trust for the person or persons concerned, and that the benefit thereof shall be extended from time to time for the relief and advantage of the party aggrieved by the misfeasance or nonfeasance of the officers that did or shall give the same."

Now this act was declared to be in force in Commonwealth v. Wolbert, 6 Bin. 296, 6 Am. Dec. 452, and we think the principle of that case meets the objection that this bond cannot be enforced for the benefit of the county as a poor district. The bond in that case was given to the commonwealth "for the use thereof," and the court said:

"These are the extractions, and taken literally they indicate a use of the commonwealth only. But perhaps the use may be extended to private persons who may be injured by the official misbehavior of the prothonotary because the condition extends to all the duties of his office. We have an old act of assembly made in 1713, by the fourteenth section of which (1 Smith's Laws, p. 85) it is enacted that all bonds given by direction of any law by persons in office for the due execution of their respective offices shall be for the use of and in trust for the persons concerned, and the mode of proceeding on such bonds is pointed out. * * * If private persons have any interest in it then, it must be because, from its nature, it appears to be in trust for them."

The Legislature in framing the act of 1879, which, as said in Melvin v. Summerville, supra, provides "an elaborate and complete system of poor law to carry out the objects set forth in the title," had before it the question of giving bonds. It provided for an additional bond for the county treasurer, as treasurer of the county poor district, but made no provision for a second bond for county commissioners. It therefore follows that the Legislature either meant that the vast expenditures made in the numerous counties of Pennsylvania were to be made by unbonded county commissioners, or else they thought that the bond required of them by the act of 1878 conditioned "for the faithful discharge of all duties enjoined on them by law" would cover the additional duties enjoined upon them by the statute they were then making, to wit:

"The county commissioners of each county are authorized and empowered to select and purchase real estate within said district, erect buildings thereon," etc.

And in view of the provincial statutes quoted and the construction placed thereon by the Supreme Court the Legislature had ground for

believing that the statutory bond of county commissioners provided for by the act of 1878 for the use of the county extended to the benefit of the county as a poor district. Such has been the view on which the affairs of Pennsylvania counties as poor districts have been administered for years, and, as our holding of the bonded liability of county commissioners acting with reference to the poor district is in accord with that firmly established practice, our decision is in line with that salutary principle of interpretation which makes fixed practice its own interpreter and which is referred to in *Stuart v. Laird*, 1 Cranch, 308, 2 L. Ed. 115. There it was sought to raise the question that the Justices of the Supreme Court had no right to sit as circuit judges; but the court said:

"To this objection, which is of recent date, it is sufficient to observe that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most formidable nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest and ought not to be disturbed."

Finding no error in the judgment of the court below, it is affirmed, with costs.

CENTRAL TRUST CO. OF NEW YORK v. THIRD AVE. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 172.

1. STATES (§ 110*)—CLAIMS—PREFERENCE.

The state does not succeed as sovereign to all the prerogatives of the British crown, among others the right to a preference for debts due it over other creditors.

[Ed. Note.—For other cases, see States, Cent. Dig. § 108; Dec. Dig. § 110.*]

2. TAXATION (§ 510*)—PRIORITY—PRIOR MORTGAGE.

Tax Law (Consol. Laws 1909, c. 60) §§ 185, 197, giving the state a lien on a street railroad company's property for a tax on certain dividends, does not give the state priority over a prior mortgage.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 946; Dec. Dig. § 510.*]

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Action by the Central Trust Company against the Third Avenue Railroad Company and others. From an order on a claim by the people of the State of New York, they appeal. Affirmed.

Thomas Carmody, Atty. Gen. (W. A. McQuaid, Deputy Atty. Gen., of counsel), for the People of New York.

Evarts, Choate & Sherman (H. J. Bickford and M. S. Borland, of counsel, for appellees.

Before COXE, WARD, and NOYES, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

WARD, Circuit Judge. In 1907 the Third Avenue Railroad was being operated by the New York City Railway Company as lessee and was subject under section 185, c. 908, Laws 1896, re-enacted in section 185 of the tax law (chapter 62, Laws 1909 [chapter 60, Consol. Laws 1909]), to a tax of 3 per cent. upon its dividends in excess of 4 per cent. for the privilege of exercising its corporate franchise or carrying on its business. It was also required under section 192 to make a return on or before August 1, 1907, of the amount of these dividends during the year ending June 30th, and section 197 made the tax due and payable August 1st, and further provided that it should be a lien upon the company's real and personal property "from the time when it is payable until the same is paid in full." This particular provision in the tax laws appeared for the first time in section 194 of the old tax law (chapter 908, Laws 1896). September 24, 1907, after this tax had become due and payable, receivers were appointed of the New York City Railway Company, who operated the property until January 12, 1908, when they turned it over to a receiver appointed for it January 6, 1908. The Third Avenue Railroad Company was subject to a mortgage executed by it to the Central Trust Company, as trustee, May 15, 1900, and in an action foreclosing the mortgage a decree was entered May 17, 1909, against the railroad company for \$40,381,173.33. March 1, 1910, the railroad was sold for \$26,000,000. The state of New York now claims a priority over the mortgage for the taxes for 1907 under section 185 of the tax law, amounting to \$2,543.33.

[1] We regard it as settled law in this state that the state does not succeed as sovereign to all the prerogatives of the British crown, among others the right to a preference for debts due it over all other creditors. It has been expressly held that taxes due the state have no priority of payment out of a fund in court for distribution, unless the priority was expressly given by statute, or unless the fund has come into court impressed with a priority for the tax. *Wise v. Wise Co.*, 153 N. Y. 507, 47 N. E. 788. O'Brien, J., said:

"The contention of the learned counsel for the receiver of taxes rests upon a somewhat novel proposition. It is that from the most ancient times the courts of England have recognized the right of the sovereign, representing the state, to priority of payment over all other claims, though they may have been secured by specific liens; that the people of this state have succeeded to all the prerogatives of the British crown as parts of the common law suitable and applicable to our condition. In support of his contention he has called our attention to various authorities in England and in this country. *Giles v. Grover*, 9 Bing. 130-285; 2 Bac. Abr. p. 363; *Toller on Ex. c. 2*, p. 259; *In re Columbian Ins. Co.*, 3 Abb. Dec. 239; *Central Trust Co. v. N. Y. C. & N. R. R. Co.*, 110 N. Y. 250, 18 N. E. 92, 1 L. R. A. 260; *Union Trust Co. v. I. M. R. Co.*, 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963; *U. S. v. State Bank of North Carolina*, 6 Pet. 29-34, 8 L. Ed. 308. The general doctrines contained in these cases would seem, upon a superficial view, to go far in support of the contention upon which this appeal is based, although it should be observed that a very important fact present in this case was absent in the cases cited, and that was the existence of a specific lien at law upon the personal property acquired by a levy under valid legal process in the hands of the sheriff.

"On a closer examination, however, it will be found that they do not sustain the broad principle contended for. They undoubtedly go far enough to sustain the principle that, when a fund is in the hands of the court or

the trustee of an insolvent person or corporation, a claim due to the government upon a debt or for taxes is entitled to a preference in certain cases or under certain circumstances. The prerogatives of the crown with respect to the imposition and collection of taxes was the subject of a long and obstinate dispute in England between the people and the executive. Without attempting to ascertain whether the limits of this prerogative have ever been judicially defined with anything like precision, it is entirely safe to say that many of the utterances of the English courts on the subject to be found in the books cannot be considered law here, or even in that country. The great contest with respect to the right of the sovereign to levy and collect what was called 'ship money' illustrates the extent to which the claim of prerogative was pushed, the nature of the dispute, and the conflicting views of the judges. 3 Howell's State Trials, 826-1254.

"In this country the right of the government to be preferred in the distribution of such a fund exists, under the authorities, in two cases: (1) Where the preference is expressly given by statute as was the case in U. S. v. State Bank of North Carolina, *supra*. (2) Where, before the fund has come to the hands of the receiver or trustee, a warrant or some other legal process has been issued for the collection of the tax or debt, and the fund has come to his hands impressed with a lien in favor of the government in consequence of the proceedings for collection, as was the case in the Columbian Ins. Co. Receivership, 3 Abb. Dec. 239. But where there is no statute giving the preference, and no warrant or process has been issued for the collection of a tax on personal property, there is no controlling authority for preferring such a claim over specific prior liens in favor of creditors obtained by levy under attachments or executions. Roraback v. Stebbins, 4 Abb. Dec. 100."

[2] In this case a lien upon the company's real and personal property, taking effect from August 1, 1907, was expressly given by section 197 of the tax law. The question is whether the section also gave that lien a priority over claims of all other creditors. Most of the New York cases cited as to taxes due the state are not applicable, because they were incurred before the provision making them a lien was enacted in 1896. Undoubtedly the state has power to confer the priority, but such a construction of the act should not be adopted unless the language used compels it. The fact that, though the tax is for the whole year, it is not given a lien until it is payable, viz., August 1st, is some indication that it is subject to liens arising before that date. This is consistent with the general principle applicable to liens: "Qui prior in tempore est potior in jure." In the absence of unmistakable intention to do otherwise, we think it fair to suppose that the Legislature intended to make the tax a lien on the property in its then condition. We discover no equity to induce a contrary construction in imposing the burden of making the state's loss good upon one person rather than upon the citizens at large.

It is contended, however, that this priority necessarily follows from the provision of the statute that the taxes are to remain a lien until they are paid in full. It was so held by the Supreme Court of Pennsylvania in Eaton's Appeal, 83 Pa. 152. But we think the provision as consistent with an intention that the taxes shall remain a lien as to the property in question and its proceeds against all subsequent lienors and general creditors until paid, and perhaps with an intention to rebut the common-law presumption of payment after the lapse of 20 years (Bean v. Tonnelé, 94 N. Y. 381, 46 Am. Rep. 153), as with the intention that the lien shall never be displaced until the taxes are paid.

The statute which makes taxes a prior lien upon real estate in the city of New York (section 1017 of the charter of Greater New York [Laws 1901, c. 466] taken literally from the consolidation act of 1882) does show this intent clearly by providing that they shall "continue to be until paid a lien thereon and shall be preferred in payment to all other charges."

The Circuit Court of Appeals for the Eighth Circuit, in *State v. Central Trust Co.*, 94 Fed. 244, 36 C. C. A. 214 (certiorari denied 174 U. S. 803, 19 Sup. Ct. 883, 43 L. Ed. 1188), held the state of Minnesota to be entitled to priority of payment, even out of personality, of all debts due it over every other debt. This conclusion was rested upon the rights of Minnesota as a sovereign, without reference to statute, which, as we have seen, is not the law of this state.

We are also referred by the Deputy Attorney General to section 203 of the tax law, which authorizes, in an action brought by the Attorney General, the forfeiture of the franchise of any corporation which intentionally fails to pay its taxes; but it contains nothing to change our conclusion as above stated. The forfeiture of the Third Avenue Railroad Company's franchise would not affect in any way the distribution of its assets among its creditors. *People v. O'Brien*, 111 N. Y. 1, 18 N. E. 692, 2 L. R. A. 255, 7 Am. St. Rep. 684.

The order is affirmed.

NOYES, Circuit Judge (dissenting). Concededly the state had the power to make the tax in question a lien on the corporation's property and to give it priority over other liens. The only question is whether it has done so. The law provides:

"Such tax shall be a lien upon and bind all of the real and personal property of the corporation, joint stock company or association liable to pay the same from the time when it is payable until the same is paid in full."

This provision expressly makes the tax a lien. It does not expressly give the lien priority; but that, in my opinion, necessarily results from the provision that it shall bind the property of the corporation "until the same is paid in full." A lien cannot bind property until a tax is paid in full, if, without being paid at all, it can be wiped off by the foreclosure of a prior mortgage. The construction placed upon this provision by the opinion of the majority deprives it of all practical efficacy. It is wholly unnecessary to say that, as against subsequent lienors and general creditors, the lien shall remain until paid. And, assuming that the 20-year presumption of payment applies to taxes, the possibility that the Legislature had it in mind in making this enactment is very remote.

It must be borne in mind that we are not dealing with conventional liens, in which the parties cannot by any stipulations affect the rights of prior lienors. We are dealing with a demand of the government, which the government has the right to make a charge upon the property, and to which charge it may give priority. And in my opinion the provision in question was intended to accomplish that result, is appropriate for the accomplishment of that result, and must be erroneously limited in scope not to accomplish that result.

I think that the order should be reversed.

ROBINSON v. HAYS et al.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1911.)

No. 1,861.

1. APPEAL AND ERROR (§ 154*)—RIGHT OF REVIEW—ESTOPPEL—ACQUIESCEANCE IN DECISION.

Where a court made an order of distribution to apply to the proceeds of a judgment for costs, a portion being awarded to the assignee of the judgment who was also directed to collect the same, which he did, paying the proceeds into the registry of the court, neither his acting pursuant to such direction nor his using, with leave of the court, a portion of the fund collected to pay the costs of an appeal from the order of distribution was such an acquiescence therein as precluded him from prosecuting the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 957-969; Dec. Dig. § 154.*]

2. ATTORNEY AND CLIENT (§ 182*)—LIEN OF ATTORNEY FOR COSTS ADVANCED—EFFECT OF CONTRACT.

An attorney who advanced money to his client to be used in payment of costs and expenses in litigation involving an estate, under an agreement that he was to be repaid from the estate if recovered, had no lien upon a judgment for costs recovered for such advances.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 315, 399-406; Dec. Dig. § 182.*]

3. APPEAL AND ERROR (§ 1178*)—REVERSAL—ORDER OF DISTRIBUTION.

An order distributing costs under a judgment for costs among persons claiming to have made advances during the progress of the litigation reviewed, and reversed for further evidence in support of such claims.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1178.*]

Appeal from the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Suit in equity by Hannah O'Callaghan and Edward Corcoran against Terrence O'Brien, administrator of the estate of John Sullivan, deceased, and Marie Carrau. Appeal by J. W. Robinson, assignee of the judgment recovered for costs, from an order distributing certain of the proceeds of the judgment to W. F. Hays and W. M. Russell. Reversed.

John Sullivan died September 26, 1900, at Seattle, King county, in the state of Washington, seized of property in that state which Marie Carrau claimed under a nuncupative will. This will was admitted to probate in the superior court of King county. Hannah O'Callaghan et al., subjects of Great Britain, claiming to be the only living heirs of the deceased, opposed the claim of Marie Carrau under the nuncupative will, and litigation ensued, including an action in equity commenced by Hannah O'Callaghan et al. in the Circuit Court of the United States for the Western District of Washington against Terrence O'Brien, as administrator of the Sullivan estate, and Marie Carrau, by which the complainants sought to annul and set aside the will and its probate in the superior court of Washington. The Circuit Court entered a decree in favor of the complainants. O'Callaghan v. O'Brien (C. C.) 116 Fed. 934. From this decree Marie Carrau appealed to this court, where the decree of the Circuit Court was reversed for want of jurisdiction in that court, and the cause remanded, with directions to dismiss the bill at complainants' cost. Carrau v. O'Callaghan, 125 Fed. 657, 672, 60 C. C. A. 347. The complainants appealed to the Supreme Court of the United States, and, following a motion in that court to dismiss the appeal,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an application was made on behalf of the complainants for the allowance of a writ of certiorari. The appeal was dismissed, and the writ of certiorari allowed. The record on appeal was treated as a return to the writ. On the merits the judgment of the Circuit Court of Appeals was affirmed. *Farrell v. O'Brien*, 199 U. S. 89, 119, 25 Sup. Ct. 727, 50 L. Ed. 101. Upon filing the mandate of the Supreme Court in the Circuit Court, a judgment was entered dismissing the action and for costs in favor of Marie Carrau, and against the complainants in the sum of \$2,619.90. Thereupon Marie Carrau assigned said judgment to J. W. Robinson, one of her attorneys and the appellant herein, authorizing him to take whatever action he might lawfully do under the law to collect the judgment with interest and costs. The assignment was subject to whatever payments had been made on the judgment by the United States Fidelity & Guaranty Company as surety upon the cost bond wherein there was a judgment against the company with interest and costs amounting to the sum of \$495.89. From the judgment of dismissal in the principal case the complainant appealed to the Supreme Court of the United States where the judgment was affirmed. *Corcoran v. O'Brien*, 208 U. S. 613, 28 Sup. Ct. 568, 52 L. Ed. 645.

It appears that W. F. Hays, another attorney for Marie Carrau, claimed a lien against the judgment assigned to Robinson. This claim was for money claimed to have been advanced by him in payment of necessary expenses in litigation amounting in the aggregate to \$1,500. It appears, also, that one W. M. Russell claimed to have loaned \$1,500 or \$1,600 to Marie Carrau for the purpose of defraying the expense of litigation, and that Hays guaranteed the payment of a part of the money so borrowed. It appears, further, that the appellant caused execution to issue upon the judgment, and the sum of \$2,891.50 was realized after deducting the \$495.89 paid by the surety company on the judgment. The court took testimony with respect to the rights of the parties claiming interest in the fund derived from the cost judgment, and thereupon entered an order distributing the fund to the claimants, under which order the following amounts were paid: To W. M. Russell \$1,790, and to W. F. Hays \$496.33.

From this order Robinson has appealed to this court, assigning as errors the order of the court in determining that the lien claimed by W. F. Hays was a valid claim against the judgment, and the funds arising from the enforcement of the execution, and in determining that there was anything due Hays for money advanced, for which he stood as the guarantor to Marie Carrau to make her defense in the action; also, in determining any question whatever with reference to the amount of money advanced by W. M. Russell, or that said Russell had a lien under the Hays lien upon the judgment, or otherwise; that the court erred in not making an order distributing the whole of said funds equitably between all the parties who had furnished money to the said Marie Carrau in order to make her defense in the main action.

From a supplemental record it appears that the appellant was permitted by order of the court to use funds in the registry of the court for the purpose of defraying the expenses of this appeal.

James J. Godfrey and J. W. Robinson, for appellant. W. F. Hays, Reynolds, Ballinger & Hutson, and Frank Shay, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The appellees have interposed a motion to dismiss this appeal on the ground that upon the face of the supplemental record the order appealed from has been adopted by the appellant, and he is bound thereby. It appears that in the order directing the distribution of the proceeds of the cost judgment to Russell, Hays, and Robinson in certain specified amounts it was ordered that Robinson should have the right to control the proceedings for collecting the judgment; that thereaft-

er execution was issued as directed by the court upon the request of Robinson and the amount of the judgment collected, and paid into the registry of the court; that, after the record on appeal had been forwarded to this court, Robinson applied to the lower court and obtained an order permitting him to apply such portion of such fund in the registry of the court as might be necessary to meet the expenses incident to this appeal, and charge the fund with such amounts. We find no merit in the motion to dismiss the appeal. The court found it necessary to take action for the purpose of collecting the judgment, and to make this action effective to place the duty of controlling the execution upon a party to the action. Robinson was such a party, and was an assignee of the judgment, and was therefore the party properly designated by the order to collect the judgment. But in acting under this order Robinson did not become bound to the terms of the order of distribution, which was entirely a different order and related to a different matter. He was at liberty in a proper proceeding to question the correctness of the order of distribution, and secure its reversal if incorrect or unauthorized by law. Nor do we find grounds for holding that Robinson was bound by the order of distribution because he obtained an order allowing him to use a portion of the fund in the registry of the court to defray the necessary expenses of this appeal. As an assignee of the judgment, he was admittedly a stakeholder or trustee whose interest it was to have it finally determined to whom the fund belonged, and the several amounts to which each was entitled under the law. It cannot be said that in these proceedings Robinson received such benefits under the order or decree of distribution as bound him to its terms. The motion to dismiss the appeal must therefore be denied.

The order of distribution is next to be considered on its merits. It appears that Hays claimed a lien against the judgment assigned to Robinson, but took no action to establish such a lien until Robinson applied to and obtained from the Circuit Court an order directed to Hays requiring him to establish his lien. Upon this order the court took the testimony contained in the record, and made the order now under consideration. It does not appear that Russell, to whom an award of \$1,790 was made by the order, ever presented to the court any petition or application for such an award, or for any award. He was not a party to the proceedings, but a witness upon the order to show cause and identified a written agreement with Marie Carrau, wherein he agreed to advance to the latter the sum of \$425 with interest, for which, in case Carrau was successful in obtaining the estate of John Sullivan, deceased, as devisee, she would pay to Russell the sum of \$1,000; but, in the event she failed to recover that estate, then she agreed to pay Russell the principal sum of \$425, with interest. Hays signed this agreement as guarantor. Russell also testified that he had advanced to Carrau the sum of \$1,600 for the expenses of the litigation, and that he had assigned the claim for this amount to Hays for collection.

It appears that this loan of \$425 was repaid to Russell from the proceeds of the judgment obtained against the United States Fidelity &

Guaranty Company. That amount is, therefore, not involved in this controversy. This leaves the claim of Russell for \$1,600 advanced by him to Carrau upon his testimony that he had advanced that amount "in this litigation." What litigation? It is not stated. There was litigation in the state courts. It may have been advanced to pay the expenses of that litigation. If so, the claim cannot be considered here. If the money was advanced to defray the expenses in the United States courts where the cost judgment was awarded, then that fact should be made to appear by competent evidence. Without such evidence the claim cannot be admitted.

[2] With respect to the claim of Hays for money advanced by him to Carrau, certain contracts were introduced in evidence in support of such claim. The contracts were entered into between Hays and Carrau, and related to the interest which Hays was to have in the estate if recovered by Carrau; and it was provided in the first contract that:

"Whatever costs, fees, or charges of the courts in such action or proceedings that may be required, or advanced shall be paid by the said Marie Carrau out of said estate."

And in the second contract it was provided that:

"Whatever costs, fees or charges of the court in such action or proceeding that may be required, to be advanced shall be deducted from the sum so recovered and the sum payable to said Hays shall be reckoned upon said basis."

[3] Manifestly Hays had no lien upon the cost judgment for advances which were to be paid to him out of the estate when recovered. The evidence respecting any other advances by Hays is too indefinite and uncertain to form the basis of an adjudication, and for that reason must be rejected. The testimony in the record is very unsatisfactory, and leaves the question as to the rights of the parties to the cost judgment in a very doubtful state. The judgment was assigned to Robinson for the purpose of having it collected and distributed among those entitled to be paid for their advances of funds to pay costs and expenses in the case of O'Callaghan v. O'Brien in the courts of the United States. We think the order should be reversed and remanded to the court below with instructions to permit Russell, Hays, and others claiming rights in this judgment to file their petitions with the court if so advised with such evidence as they may be able to produce in support thereof that their rights may be fully determined, and, when ascertained, the proceeds of the judgment to be distributed pro rata among all the claimants, claims having the status of liens, if there be any, to be accorded such preference as the law provides. Claims for advances for costs and expenses not incurred in the case of O'Callaghan v. O'Brien, or in the same case under other title, in the United States courts, should be excluded, as also claims for advances the repayment of which were contingent upon the success of Marie Carrau in this litigation.

Such will be the order of this court. It is further ordered that the appellant be allowed his costs.

SOUTHERN RY. CO. v. TERRELL.

(Circuit Court of Appeals, Fifth Circuit. March 28, 1911.)

No. 2,051.

1. TRIAL (§ 295*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.

In an action for injuries to a railroad lamplighter, the court gave an elaborate charge fully covering the issues, authorizing recovery only in the event the jury found defendant was negligent after defendant's servants discovered plaintiff's peril, but also charged that the jury should determine whether, when plaintiff got in peril on the track, had defendant's servants used reasonable care to keep a proper lookout, they would have seen him in time to have avoided injuring him, or whether, when he got in peril, defendant's servants or agents were so close that, even if they had kept a proper lookout, they could not have stopped in time to prevent running over him, and that in the first case plaintiff was entitled to recover, and in the second the verdict should be for defendant. *Held*, that defendant was not entitled to a reversal because such charge predicated liability on peril to plaintiff arising from the mere fact that he was on the track, or from some other peril than that which arose from the fact that his foot was caught in the track; the charge, when considered as a whole, being sufficient.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.*]

2. TRIAL (§ 260*)—REQUEST TO CHARGE—REFUSAL.

It is not error to refuse a request to charge substantially covered by instructions given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

In Error to the Circuit Court of the United States for the Northern District of Alabama.

Action by J. H. Terrell against the Southern Railway Company
Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action originally commenced in the city court of Birmingham, Ala., by the defendant in error, against the Southern Railway Company, the plaintiff in error, and removed by the latter, by proper proceedings, to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, at Birmingham. The plaintiff below sought to recover damages for personal injuries received by him August 19, 1905; it being alleged that, while being employed by the defendant as a lamplighter, and while acting in the line of his employment, he was in the act of crossing the defendant's track, near the city of Birmingham, his foot was caught between the rail and switchpoint of the track, so that he could not extricate himself, and that while he was in this position he was negligently run over, or wantonly run over, as variously charged in the several counts of the complaint, by an engine in charge of the defendant's employés, and so injured that his foot had to be amputated. On the trial of the case in the court below there were verdict and judgment for the plaintiff in the sum of \$5,000, from which judgment the defendant below sues out this writ.

The original complaint contained four counts, to each of which demurrers were interposed. After the removal of the case into the court below, eight other counts were added to the complaint, by amendment, numbered respectively, 5 to 12, inclusive, and to each of these additional counts the same demurrers were interposed. The court sustained the demurrers interposed to count No. 2, and overruled the demurrers to the other counts. Thereupon the defendant filed its pleas of the general issue and five special pleas, setting up contributory negligence of the plaintiff in various forms. Subsequently, after

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

all the evidence was introduced, the court gave the general affirmative charge as to each of counts numbered 8 and 12, and the court, in its oral charge to the jury, instructed them that they need not consider any of the counts of the complaint, except counts 5, 6, 7, 9, 10, and 11. These remaining counts were substantially alike in tenor and effect, except that counts 5, 6, 7, and 9 charged, respectively, simple negligence merely on the part of the employé mentioned therein, as having charge or control of the defendant's engine, in the operation of the engine, and counts 10 and 11, respectively, charged that the employé mentioned therein was guilty of wantonly or intentionally causing or inflicting the plaintiff's injuries. Count 5 attributes negligence to Charles Rollins (Rawlins), shown by the evidence to have been foreman of the engine; count 6 attributes negligence to J. F. Gallagher, shown by the evidence to have been the fireman; count 9 attributes negligence to a person in the service or employment of defendant, whose name was unknown, but who is alleged to have had charge or control of the engine; count 10 charges the said Charles Rollins (Rawlins) with having wantonly or intentionally inflicted the plaintiff's injuries; and count 11 charges the said Gallagher with having wantonly or intentionally inflicted the said injuries.

The case went to the jury only on the said six counts of the complaint and defendant's said pleas interposed thereto. The defendant requested in writing the general affirmative charge as to each of said six counts, but the court refused each of said requests, to which the defendant excepted. The plaintiffs in error do not insist on any of said last-named exceptions, except that reserved to the ruling of the court in refusing to give the general affirmative charge as to count numbered 7.

James Weatherly and J. T. Stokely, for plaintiff in error.

G. R. Harsh, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PARDEE, Circuit Judge (after stating the facts as above). At a former day of this term, this court entered the following opinion and judgment:

"The first six assignments of error complain of errors of the trial court in ruling on the pleadings. As to these assignments, counsel for plaintiff in error state in their brief that they do not insist upon them. All the other assignments complain of errors of the trial court in charges to the jury actually given, and to refusal to give specific charges requested.

We find in the record that on December 10, 1909, the trial judge granted 60 days from that date within which to file bill of exceptions; that on January 13, 1910, application was made for a writ of error to this court, which was allowed, and bond and assignment of error filed; but we do not find in the record any bill of exceptions, nor any explanation of a document found in the printed transcript entitled 'Bill of Exceptions,' but without date or filing marks, and not purporting to be signed by the trial judge. Without a duly signed bill of exceptions, we cannot pass upon alleged errors of the trial court in charging the jury.

"The judgment of the Circuit Court is affirmed."

Since entering this decree, it has been made to appear that the purported bill of exceptions found in the printed record, without date or filing marks, and not purporting to be signed by the trial judge, was actually signed by the trial judge, filed in due season, and left out of the transcript by omission of the maker thereof; and these facts are further made to appear by a written consent of counsel on both sides on file with the clerk. Under these circumstances, we have taken up the case for further consideration as though a formal application for rehearing had been filed and granted.

Of the assignments of error not passed upon in our former decree, counsel for plaintiff in error in their brief insist only upon the seventh, twelfth, and sixteenth, through the twenty-second, inclusive.

[1] The seventh assignment of error is as follows:

"The Circuit Court erred in orally charging the jury as follows: 'It seems to me, to simplify the matter, under the facts in the case, the important point for you to determine in regard to the liability of the parties is whether under the evidence you are reasonably satisfied that when the plaintiff got on the track, or when he got in peril on the track, whether you are reasonably satisfied from the evidence that, if the defendant's servants had used reasonable care to keep a proper lookout, they could have seen him in time to avoid his injury, or whether, on the other hand, when he got in peril, the defendant's servants or agents were so close that, even if they had kept a proper lookout, still they could not have stopped in time to have prevented running over him. In other words, in the first case you find for the plaintiff, and in the second case you find for the defendant. That is the way it looks to me."

It is claimed that in this charge the court predicates liability of the defendant on a situation of peril to the plaintiff arising from the mere fact that he was on the track, or from some other peril than that which directly arose from the fact that his foot was caught in the track. The above instruction is a part of an elaborate charge fully covering the issues presented by the pleadings and evidence, and from the charge as a whole it is clear that the judge does not predicate liability of the defendant from the time when the plaintiff got on the track, or even from the time when he got in peril on the track, but only from the time the defendant's agents should have discovered that the plaintiff was in peril.

The twelfth assignment of error complains of the refusal of the court to charge that under the evidence the jury could not find a verdict in favor of the plaintiff on the seventh count of the complaint. The evidence fully warranted submitting this count to the jury.

[2] The sixteenth to the twenty-second assignments of error complain of refusals of the court to give specific charges as follows, to wit:

"(16) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'Knowledge of the peril of the plaintiff, as applied to the facts of this case, dates only from the moment plaintiff was caught between the rails, and this fact must have been apparent to those in charge of the engine, and no duty to stop the train arose until it became apparent.'

"(17) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'If the jury believe from the evidence that none of those in charge of the engine had reasonable opportunity to avoid striking plaintiff with the engine after they became aware that he was "stuck" on the track, your verdict must be for the defendant.'

"(18) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'If the jury believe from the evidence that those in charge of the engine waited so long before beginning to stop the engine that they could not stop it in time, but that they began to stop as soon as they saw Terrell was in a position of peril, your verdict must be for the defendant.'

"(19) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'No duty to Terrell existed until he was actually in peril, and under the facts of this case he was not in peril until his foot was caught in the track, as shown by the evidence.'

"(20) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'If you believe from the evidence that the

plaintiff's foot was caught in the track, and that when caught the engine was so close to him it was too late to avoid striking him, you must bring in a verdict in favor of the railroad company.'

"(21) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'If you believe from the evidence that those in charge of the engine saw the plaintiff's peril as soon as it could have been seen by the use of due care (his peril consisting of the fact of his foot being caught in the track), and that thereafter they used due care to avoid striking him, you should find for the defendant.'

"(22) The Circuit Court erred in refusing to give the following written charge requested by defendant: 'I charge you that the fireman's duty to keep a lookout ahead is not an absolute duty, but is relative to other duties which he may have to perform, and he is not necessarily guilty of negligence if he did not look ahead, and he is not guilty of any wrong or negligence at all, if you believe from the evidence that in approaching the place of the accident, when he might have seen the plaintiff, he did not see him, because he was performing other duties which he was reasonably required to perform.'

The charge of the judge is given in full in the record. It substantially and correctly covers all the matters of law arising under the evidence and involved in these several special requests, and therefore we find no reversible error in refusing to stress by emphatic repetition any one of the propositions. It was his province to instruct the jury in the law of the case in his own language, and he could well refuse to adopt the specific language of counsel.

For the reasons herein given, and considering our former judgment as withdrawn, except in relation to the first six assignments of error, the judgment of the Circuit Court is now in all respects affirmed, with costs.

In re J. JUNGMANN, Inc.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 206.

1. BANKRUPTCY (§ 440*)—APPEAL AND REVISION PROCEEDINGS—APPEAL OR REVISION AS PROPER REMEDY—"CONTROVERSY ARISING IN BANKRUPTCY PROCEEDING."

A dispute between a receiver in bankruptcy and an outside person as to whether a contract was made between them for the sale and purchase of property of the estate, brought before the bankruptcy court for determination, is a "controversy arising in bankruptcy proceedings," within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (U. S. Comp. St. 1901, p. 8431), and an order made therein is reviewable by appeal.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. § 440.*]

2. BANKRUPTCY (§ 117*)—SALE OF PROPERTY—ORDER—PROceeding AGAINST PURCHASER TO ENFORCE CONTRACT.

An order made by a court of bankruptcy authorizing a receiver to sell property of the estate at private sale in accordance with an offer made therefor by an outside party, whose counsel was present and assented, rendered the transaction a judicial sale as binding on the purchaser as though his offer had been made and accepted and the sale approved by the court after authority to sell had been given, and, if he refuses without cause to carry out his contract, he may be compelled to do so by rule or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

attachment issuing out of the court under whose order the sale was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 167; Dec. Dig. § 117.*]

3. BANKRUPTCY (§ 117*)—SALE OF PROPERTY OF ESTATE—CONSTRUCTION OF CONTRACT.

Under a contract made with a receiver in bankruptcy for the purchase of property of the estate, including a stock of goods, by which the purchaser agreed to take "all salable merchandise in good condition at the lowest market purchase price," he cannot be required to accept the inventory and prices made by appraisers appointed by the court without having an opportunity to be heard as to the condition and market price of the goods.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 167; Dec. Dig. § 117.*]

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

In the matter of J. Jungmann, Incorporated, bankrupt. Appeal by Hegeman & Co. from an order of the District Court. Reversed.

This cause comes here upon appeal from and petition to revise an order of the District Court, Southern District of New York, which directed Hegeman & Co., a corporation, and certain of its officers, to carry out the terms of the judicial sale, ordered and confirmed "by said court, of certain property belonging to the estate of the alleged bankrupt." The order further provided that, in the event of failure to carry out the terms of said order, they "shall be liable as and for a contempt for their failure so to do."

The corporation J. Jungmann, Inc., had been in business for many years, selling drugs, medicinal articles, and druggists' sundries in a number of different stores in the borough of Manhattan. It became financially embarrassed, and on February 15, 1910, a petition in involuntary bankruptcy was filed in the Southern District of New York and a receiver of its property was appointed. The petition in bankruptcy was contested, and a committee of creditors was chosen at a meeting of creditors, which sought to reorganize the affairs of the alleged bankrupt. Apparently to facilitate their efforts in that direction, the receiver was discharged on March 3, 1910, but the bankruptcy proceedings were not dismissed. After negotiations between the chairman of this committee and the representatives of Hegeman & Co., an offer to purchase certain of the alleged bankrupt's property was made. It reads as follows:

"Hegeman & Co. of New York City, 200 Broadway.

"New York, April 18th, 1910.

"Mr. Jos. Plaut—Dear Sir: On behalf of Hegeman & Co. I offer to take over the Third Ave. store of Dr. Jungmann, same being 25 ft. by 105 ft. deep, and to pay for the store fixtures and prescription books \$7,500.00, and also to pay for all salable merchandise in good condition at the lowest market purchase price, excluding goods on hand made and manufactured and put up by Dr. Jungmann. The store is to have 21 (twenty-one) year lease from May 1, 1910; \$5,000.00 for the first ten years, and \$6,000.00 for the next eleven years, Hegeman & Co. to pay all the taxes and assessments during the life of the lease, and to be subordinated to a first mortgage of \$50,000.00.

"For the 42nd Street store we are willing to pay for all the store fixtures, fountain and everything connected with it, and prescription books, \$7,500.00 and purchase said store subject to a present lease and sub-letting. Purchase of merchandise of this store to be the same as the purchase of merchandise in 3rd Ave. store. Terms of payment in both cases to be made:

" $\frac{1}{3}$ —Cash.

" $\frac{1}{3}$ —Note, 6 months, @ 5%.

" $\frac{1}{3}$ —Note, 12 months, @ 5%.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

"For the purpose of defining merchandise, would say that we consider merchandise to be goods usually sold over the counter, and fixtures to consist of all articles not sold, including prescription books.

"This offer subject to acceptance within three days.

"Possession, the first Sunday following date all legal papers are signed satisfactory to our attorneys.

"Yours truly,
Geo. Ramsay, Vice President."

On April 21, 1910, upon the petition of certain creditors, a new receiver was appointed, who took possession of all the property of the alleged bankrupt, including that mentioned in the offer of April 18th. On May 6th the court made an order authorizing and empowering the temporary receiver "to sell at private sale the assets and effects of the alleged bankrupt in accordance with the offer of Hegeman & Co."

It is apparent from this offer and from undisputed testimony that, although by acceptance within the three days (or within whatever extended period might be agreed upon) a binding contract might be entered into, much more would have to be done before such contract could be completed. The leases of the two stores stood in the name of Dr. Jungmann. There was a blanket mortgage to one Wyeth of \$45,000 covering the Third avenue store and other property. The amount of salable merchandise had to be determined by taking inventories or otherwise, and its "lowest market purchase price" determined in some way. For some three months after May 6th the representatives of the parties were engaged in discussing how these matters should be arranged and in carrying out such arrangements. On August 11th Hegeman & Co. notified the chairman of the creditors' committee that "Hegeman & Co. had ceased to be interested in the Jungmann proposition," and on August 20th counsel for Hegeman & Co. wrote to counsel for the receiver to the same effect. Thereupon application was made to the court for an order compelling Hegeman & Co. to carry out the terms of the contract. Such application was heard upon voluminous petitions and affidavits submitted by both sides and resulted in the entry of the order now sought to be reviewed.

Philbin, Beekman, Menken & Griscom (Charles K. Beekman, S. Stanwood Menken, and Morton G. Bogue, of counsel), for appellant.

Thomas & Oppenheimer (Leo Oppenheimer, Charles E. Buchner, and Max Ash, of counsel), for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] It is contended that this order is not appealable; that it can be reviewed only by petition to revise. The authorities upon this branch of bankruptcy practice are so numerous and there is such conflict between them that it is sometimes difficult to determine within which class a particular order of the bankruptcy court may fall; whether it is a "proceeding of the court of bankruptcy," or "a controversy arising in bankruptcy proceedings." It may be taken as settled that each case is to be determined by its own facts, and that the important consideration is the object and character of the proceeding sought to be reviewed. To us the classification of the order in this case seems plain. If the question were whether or not the bankruptcy court should have directed the sale of the bankrupt's property at some particular time, or in some particular manner—at auction or at private sale—or to some particular individual, or for some particular price, we would have a proceeding in bankruptcy, pure and simple. But in this case substantially the only question raised is whether or not a contract of purchase was ever made. This would certainly seem to be a "controversy in a bankruptcy proceeding" arising between the receiver and

an outside person; the former insisting that the latter made a contract with him, and the latter strenuously denying that any such contract was made. Such a controversy would be justiciable in other courts. The receiver might, if he chose to do so, bring suit in a state court or in the Circuit Court provided there was the requisite diversity of citizenship, alleging the making of the contract and asking damages for an alleged breach of it. Since that is the kind of controversy which has arisen in this bankruptcy proceeding, its decision by the district judge is reviewable by appeal. *Mason v. Wolkowich*, 150 Fed. 699, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765; *Coder v. Arts*, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772.

The district judge found that the written offer concededly made to the committee of creditors was by it accepted within the three days and transferred to the new receiver with the full consent and approval of Hegeman & Co. There are conflicting statements in the affidavits and petitions; but, after a most careful perusal and analysis of them, we are entirely satisfied that this finding is correct. Indeed, there is sufficient in the papers submitted by appellant to show that during the period immediately succeeding the appointment of the new receiver it entered into negotiations with him which contemplated such action on his part as would enable him to carry out the terms of the contract and to give Hegeman & Co. a good title thereunder. We do not hold that these various statements show an estoppel, or anything of that sort, but find in them evidence entirely persuasive to the conclusion that its representatives knew that a contract had been made by offer and acceptance and were concerned merely in making sure that Hegeman & Co. should get a good title to what it had agreed to buy. When the order of May 6th was made, authorizing and empowering the receiver to sell the specified property at private sale in accordance with the offer of Hegeman & Co., its counsel was present. Respondent's papers would indicate that he united in the application, although the order does not recite the fact. An affidavit of the treasurer of Hegeman & Co. asserts that counsel "attended court at request of counsel for receiver to explain the situation to the court and the financial situation of Hegeman & Co.;" counsel himself makes no statement as to what took place before Judge Holt on May 5th, although three affidavits by him referring to other matters are found in the record. If there were any question about the acceptance of the offer by the committee within the three days, we should find no difficulty in reaching the conclusion that on May 5th Hegeman & Co. assented to the acceptance of its offer by the receiver, subject only to the qualification that such acceptance should amount to nothing, if the court failed to approve of a sale upon the terms indicated.

[2] We are also satisfied that, by the court's approval of the sale upon the terms offered, the transaction became a judicial sale as fully as if sale had been ordered before any offer were made, and the offer subsequently made had been considered and approved. There seems to be no sound distinction between a sale at auction and a private sale approved by the court, so far as the purchaser's obligation to comply with his bid or offer is concerned. In either case, by voluntarily becoming a purchaser of property sold under order of the court,

he submits himself to the jurisdiction of the court, and when such purchaser refuses without cause to carry out his contract he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale is had. *Camden v. Mayhew*, 129 U. S. 73, 9 Sup. Ct. 246, 32 L. Ed. 608; *Brasher v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 505; *Mason v. Wolkowich*, 150 Fed. 700, 80 C. C. A. 435, 10 L. R. A. (N. S.) 765.

It is further contended by the appellant that there is no evidence, except statements in the affidavits of receiver and his counsel, that receiver is in a position or has power to convey the property referred to in the order; and that appellant has never been tendered any documents conveying or purporting to convey a clear and valid title to the property. It should be remembered, however, that ever since August 11, 1910, when its vice president asserted that it had ceased to be interested in the Jungmann proposition, it has uniformly insisted that it never made any contract at all. Of course, if it had made no contract to purchase, all questions as to seller's title would be academic. The affirmance of this order will in no way impair appellant's right to insist upon its objections to the validity of the documents by which the seller may endeavor to carry out the terms of the contract. When application shall be made to punish for disobedience of the order, proof that the receiver has failed to tender what the contract called for will be a complete defense.

[3] In one important particular, however, the order appealed from seems not to be warranted by the proofs. The contract obligates Hegeman & Co. to pay for all salable merchandise in good condition "at the lowest market purchase price"; the order adopts "the inventory and prices made by the official appraisers," and directs Hegeman & Co. to pay "the amount so ascertained by said appraisers." Unless it is settled as a fact, which Hegeman & Co. can no further dispute, that the decision of the appraisers as to inventory and prices is correct, this part of the order is broader than the contract. Of course, under such a contract as this, the unspecified details of items and market prices must be settled in some way; but in whatever way that is done the purchaser must be accorded a hearing and opportunity to review. So far as this record discloses, Hegeman & Co. had no notice of application for the appointment of appraisers, no opportunity to be heard on their selection, no notice of any hearing before the appraisers, no opportunity to introduce evidence showing the condition of any goods (whether "salable" or not) or their market value, no notice of any determination by the appraisers, no notice of any application to the court to approve such determination or any hearing on such application. Apparently upon this important branch of the case it has as yet had no day in court. It may be that as a matter of fact it participated in the appraisement and concurred in the conclusions of the appraisers; but we can determine the validity of this order only upon the record submitted here; and, since the point is raised in the assignments of error and insisted upon on the argument, we must reverse the order.

If in fact they did so participate or had opportunity to participate, of which they did not avail themselves, this reversal will not prevent

the District Court from making a new order requiring Hegeman & Co. to carry out its contract. Or such new order may be made after the quantity of goods and their "lowest market price" shall have been determined at a hearing where Hegeman & Co. have been given full opportunity to be heard.

In one other respect the order is open to criticism. The contract provided for payment one-third cash, one-third 6 months' note, and one-third 12 months' note. The order recites that since the making of the inventories goods have been sold and bought by the receiver—both stores are going concerns—and a referee is appointed to ascertain what amount has been so sold and bought and whether the total value of the merchandise is less at the time of the transfer of possession than that found by the appraisers, such reduction, if any, to be credited to Hegeman & Co. This is a proper provision, but the order further directs that such amount be credited on the notes only; it should be credited in proportions like those named in the contract, one-third on the cash payment and one-third on each of the two notes.

The order is reversed, without prejudice to its re-entry when objections referred to in this opinion are removed.

RIMMERMAN et al. v. UNITED STATES. †

(Circuit Court of Appeals, Eighth Circuit. March 29, 1911.)

No. 3,396.

1. POST OFFICE (§ 35*)—SCHEME TO DEFRAUD—ELEMENTS OF OFFENSE.

The elements of the offense defined by Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), prohibiting the use of the post office in the furtherance of a scheme to defraud, are the devise or intended devise of the artifice to defraud by accused, the intention to effect the scheme or artifice by opening correspondence or communication with some person through the mail or by inciting some person to open communication with him through the mail, and the execution of the scheme or artifice or an attempt to do so by the deposit of a letter or other communication in the post office for transmission or delivery, or taking or receiving a letter or communication for that purpose therefrom.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

2. POST OFFICE (§ 35*)—WRONGFUL USE—SCHEME TO DEFRAUD—INDICTMENT.

In a prosecution for using the post office establishment in furtherance of a scheme to defraud, in violation of Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), it is not necessary that the scheme charged in the indictment, if carried out, would necessarily defraud, but it is sufficient if the scheme as charged is reasonably adapted to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. § 35.*]

3. POST OFFICE (§ 48*)—WRONGFUL USE—SCHEME TO DEFRAUD—INDICTMENT.

An indictment for using the post office establishment in the furtherance of a scheme to defraud alleged that, for the purpose of defrauding K. out of certain hotel property owned by him in Illinois, defendants represented and stated to him that they were the owners of a certain 360 acres of land in H. county, Okl., of the value of \$32 per acre, which they would exchange with K. for his hotel property, when, in fact, defendants had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 29, 1911.

no title or interest in the Oklahoma land which they undertook to convey to K. by a pretended deed, purporting to be made by others; that defendants intended to defraud, and did in fact defraud, K. out of the hotel property, and, in the furtherance of such scheme and as a means of executing it, they unlawfully, etc., devised and caused to be deposited in the post office certain letters, etc., containing an abstract of title and opinions of attorneys. *Held*, that the indictment was not demurrable for a failure to sufficiently state the facts constituting the scheme to defraud.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

4. INDICTMENT AND INFORMATION (§ 121*)—CERTAINTY—BILL OF PARTICULARS.

Where the language used in an indictment, though sufficient to state the offense intended to be charged, was such that defendants might be surprised by the production of evidence for which they were unprepared, their remedy was by an application for a bill of particulars before trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 316-320; Dec. Dig. § 121.*]

5. POST OFFICE (§ 48*)—MISUSE OF MAIls—INDICTMENT.

Where an indictment for misuse of the mails in the furtherance of a scheme to defraud alleged that, as a means of executing the scheme, defendants unlawfully, etc., deposited and caused to be deposited in a United States post office at H., in Oklahoma, a registered envelope addressed and directed to K. (the person intended to be defrauded), such envelope being duly stamped with postage thereon, and then and there contained a certain letter directed to K. purporting to be signed by one of the defendants, a copy of which was set out, and also containing opinions with reference to the title to land in Oklahoma, which defendants were attempting to exchange for K.'s property, and the letter so deposited in the United States post office was transferred by means of the post office establishment to K. in furtherance of and in execution of the scheme and artifice to defraud, it charged with sufficient certainty that defendants intended to effect the scheme or artifice by opening correspondence with K. through the United States mails.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

6. POST OFFICE (§ 48*)—MISUSE OF MAIls—INDICTMENT—DEPOSIT OF LETTER.

Where an indictment for the misuse of the mails in furtherance of a scheme to defraud did not expressly state that the letter in question deposited in the post office was to be sent or delivered by the Post Office Department, but charged that it was mailed and addressed to the person to be defrauded, that the envelope was duly stamped with postage, and that defendants then and there unlawfully, etc., and knowingly deposited it in the United States post office, it sufficiently charged that the letter was to be sent or delivered by the United States mails.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

7. POST OFFICE (§ 48*)—MISUSE OF MAIls—SCHEME TO DEFRAUD—SCIENTER.

Where, in a prosecution for misuse of the mails in the furtherance of a scheme to defraud, the indictment alleged the devise of a scheme to defraud K. out of certain hotel property by inducing him to make an exchange of the property for certain real estate in Oklahoma, which defendants did not own, that they contemplated the use of the mail service of the United States in executing the scheme, and actually employed such service in the sending of a letter to K., containing matter calculated to further the trade, it was not defective for failure to charge by way of scienter that defendants knew that neither they nor the person they expected to have convey the land did not have title thereto.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

8. CRIMINAL LAW (§ 1044*)—WRIT OF ERROR—REVIEW—OBJECTIONS IN TRIAL COURT—MOTION FOR DIRECTED VERDICT.

The sufficiency of evidence to sustain a conviction cannot be reviewed on a writ of error, where defendants made no request at the close of all the evidence for a directed verdict.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1044.*]

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Oklahoma.

Edward Rimmerman and another were convicted of using the United States mails in furtherance of a scheme to defraud, and they bring error. Affirmed.

N. A. Gibson (W. W. Hyams, on the brief), for plaintiffs in error.

Wm. J. Gregg, U. S. Atty. (Frank Lee, Asst. U. S. Atty., on the brief), for the United States.

Before SANBORN and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. Plaintiffs in error were indicted, tried, convicted, and sentenced in the United States Court for the Eastern District of Oklahoma for a violation of section 5480 of the Revised Statutes, as amended March 2, 1889 (25 Stat. 873). The indictment, though not skillfully drawn, in substance, charges defendants with having devised a certain scheme and artifice to defraud one John R. King, which scheme and artifice to defraud was to be effected by opening correspondence and communication with said King by means of the post office establishment of the United States. The indictment is very lengthy, occupying over three pages of the printed record. The scheme to defraud is stated with much detail, and, when analyzed, shows it was for the purpose of defrauding King out of certain hotel property owned by him in the state of Illinois of the value of \$12,000, to be accomplished by representing and stating to King that they were the owners of a certain 360 acres of land in Hughes county, state of Oklahoma, of the value of \$32 per acre, which they would exchange with said King for his said property; that, in fact, they had no title or interest in said land in Oklahoma; that they undertook to convey said land to King by a pretended deed purporting to have been made by one Thomas H. Wright and Dora Wright; that they intended to defraud and did in fact defraud said King out of his said hotel property, with a view to, and did, immediately convert the same to cash; that in furtherance of said scheme, and as a means of executing the same, they unlawfully, feloniously, willfully, and knowingly deposited and caused to be deposited in a certain United States post office at Holdenville, in the state of Oklahoma, one certain registered envelope addressed to the postmaster at Bridgeport, Ill., which contained a certain envelope addressed and directed to said King at Bridgeport, Ill., said envelope being duly stamped with postage thereon, and which envelope then and there contained a certain letter, dated at Holdenville, Okl., and directed to said King at Bridgeport, Ill.,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

which purported to be signed by one of the defendants, a copy of which letter was set out in the indictment, and that said letter also contained three certain written opinions of a party named to the effect that the title to said land in Oklahoma was vested in said Thomas H. Wright, which letter, being so deposited in the United States post office, was "transferred by means of the post office establishment to said John R. King, in furtherance of, and in execution of, the aforesaid scheme and artifice to defraud."

A general demurrer was filed to the indictment, which was overruled.

[1] It is settled law that the statute under which the indictment in this case was based contains three essential elements, which must be charged in the indictment in a substantial manner:

"(1) The person charged must have devised or intended to devise a scheme or artifice to defraud. (2) He must have intended to effect the scheme or artifice by opening correspondence or communication with some person through the mail or by inciting some person to open communication with him through the mail. (3) In and for executing the scheme or artifice, or attempting to do so, he must have either deposited a letter or other communication in the post office for transmission and delivery, or taken or received one therefrom." Brown v. U. S., 143 Fed. 60, 74 C. C. A. 214, and cases cited.

[2] It is not necessary that the scheme charged in the indictment, if carried out, would necessarily defraud. It is sufficient if the scheme as charged is reasonably adapted to defraud. Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Miller v. U. S., 133 Fed. 341, 66 C. C. A. 399; Brooks v. U. S., 146 Fed. 223, 76 C. C. A. 581. Such was the character of the scheme as charged in this case.

[3] The facts constituting this scheme were stated in a manner to acquaint accused of the charge against them and sufficiently to render the indictment unobjectionable as against a demurrer in that respect.

[4] If the language used was such that the defendants might be surprised by the production of evidence for which they were unprepared, they should, before the trial, have applied for a bill of particulars. It was said by Justice Van Devanter, then circuit judge, speaking for this court, in Rinker v. U. S., 151 Fed. 755-759, 81 C. C. A. 379, 383:

"When an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should, in advance of the trial, apply for a bill of the particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise case which he must meet upon the trial [citing numerous authorities]."

[5] The indictment charges with certainty the second element of the offense, that defendants intended to effect the scheme or artifice by opening correspondence with King through the United States mails.

[6] In charging the third element of the offense, the indictment does not in express terms say that the letter deposited in the United States post office was to be sent or delivered by the Post Office Department, as the amended statute requires, and as it would have been easy to do. It, however, charges that the letter was mailed at Holdenville, Okl., was addressed to said King at Bridgeport, Ill., the envelope was

duly stamped with postage, and that plaintiffs in error then and there unlawfully, feloniously, willfully and knowingly deposited it in the United States post office. This is a sufficient charge that it was to be sent or delivered within the rule announced by this court in Rinker v. United States, *supra*, wherein it was said:

"The indictment, in addition to stating that the defendant 'unlawfully and knowingly' deposited the letter in the United States post office, states that the letter was 'inclosed in an envelope which * * * was then and there stamped with a two-cent United States postage stamp so as to entitle it to transmission through the mails of the United States,' and 'was then and there addressed and directed to (the name will be omitted) city,' and that 'the mailing by him as aforesaid' was contrary to the statute, etc. Thus it is said that the defendant unlawfully and knowingly, which excludes any idea that the act was lawful or unintentional, deposited in the United States post office, the place for mailing letters to be transmitted through the mail, a letter inclosed in an envelope which was so addressed and stamped as to cause it to be transmitted through the mail when so deposited, and this is characterized as 'the mailing' of the letter. The plain and reasonable meaning of the charge is that the letter was deposited in the post office for mailing and delivery, and there can be no doubt that the defendant so understood it."

[7] Again it is said that the indictment is insufficient in that it does not charge that defendants knew that they or Wright did not have title to the land in Oklahoma, and hence a scienter is lacking. The same question was urged before this court in Lemon v. U. S., 164 Fed. 953, 90 C. C. A. 617, wherein it is said:

"There was no need of a definite averment that defendants knew that their bank was insolvent at the time they made the alleged false pretenses concerning it. This is not an action for deceit or a criminal action for making false reports touching the condition of the bank where the scienter is indispensable; but it is a criminal charge, the essential elements of which are (1) the devising of a scheme or artifice to defraud, (2) contemplating the employment of the mail service of the United States in its execution, and (3) the actual employment of the mail service in the execution or attempted execution of the scheme."

We think the indictment was good as against the demurrer, and that the motion in arrest of judgment was properly overruled.

[8] Complaint is made to the ruling of the court admitting upon the trial certain testimony. We have carefully considered such evidence, and think it was properly admitted. We cannot review the sufficiency of the evidence to sustain the verdict, as no request was made after the close of all of the evidence for a directed verdict. Drexel v. True, 74 Fed. 12, 20 C. C. A. 265; Pac. Mut. Life Ins. Co. v. Snowden, 58 Fed. 342, 7 C. C. A. 264; Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571, 40 L. Ed. 746; Simpson v. U. S. (C. C. A.) 184 Fed. 817, decided at this term.

The judgment is affirmed.

SANBORN, Circuit Judge (dissenting). The indictment contains averments that the defendants intended to send to King, and did send to him through the mails, an abstract of title which disclosed title in them and written opinions of lawyers that their title was good. It also contains allegations that King was deceived by these representations, but it contains no averment that the defendants were not equally deceived thereby, none that they did not believe that they had good ti-

tle to the property as represented by the abstract of title and the opinions of the lawyers, none that they ever intended to deceive King or any other person by the use or mailing of these papers, and for that reason the indictment seems to me to be bad. In my opinion it is indispensable to a good indictment for devising a scheme to defraud that it shall either allege that the defendants knew the representations they made were false and that they intended to deceive thereby, or shall allege the existence of facts which show their knowledge of the falsity of the representations and their intention to deceive. *Durland v. United States*, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709; *Rudd v. United States*, 97 C. C. A. 462, 463, 173 Fed. 912, 913.

In re MERRILL & BAKER.

(Circuit Court of Appeals, Second Circuit. February 14, 1911.)

No. 142.

1. BANKRUPTCY (§ 316*)—CLAIMS—CONTRACT—CONSTRUCTION.

Claimant being friendly to M., who desired to borrow money for the benefit of a bankrupt corporation, loaned a specified sum to another corporation controlled by the bankrupt, taking the latter's obligation therefore secured by its collateral, and by an agreement of the bankrupt reciting that it guaranteed repayment of the loan to the claimant by the borrowing company in accordance with its written agreement evidencing the loan and pledge. The money actually borrowed was to be immediately handed over to the bankrupt for its uses. While this loan was unpaid and the collateral unimpaired, claimant loaned a further sum to the borrowing corporation under the same circumstances. Before the loans were repaid or any demand had been made on the borrower, an adjudication was rendered against the bankrupt; claimant still holding the collateral for both loans. *Held*, that the bankrupt's contract was not a contract of suretyship, but of guaranty only, and, being in writing, and unambiguous; claimant was not entitled to treat the transaction as a loan to the bankrupt because of its control of the borrowing corporation, and the use of the funds for its benefit.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 316.*]

2. COURTS (§ 359*)—FEDERAL COURTS—CONSTRUCTION OF GUARANTY—WHAT LAW GOVERNS.

Where a guaranty was made in New York, it must be construed in bankruptcy proceedings against the guarantor, according to the New York law, most favorably to the guaranteee, though subject to the rule that, when the meaning of the words used has been ascertained, the guarantor's liability is strictissimi juris, and not to be extended beyond its precise import.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. § 359.*]

3. BANKRUPTCY (§ 316*)—CLAIMS—LIABILITY OF GUARANTOR.

Claimant made certain loans to B. & Co., accepting certain collateral as security with power to sell the collateral if the loan was not repaid within 60 days after demand; B. & Co., also agreeing that, in case the collateral should not sell for enough to pay the principal and interest and expenses, it would pay claimant the amount of the deficiency forthwith after such sale, with interest. As further security, the bankrupt guaranteed repayment to claimant by B. & Co. in accordance with its written agreement. An adjudication was rendered against the bankrupt before

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

either of the loans had been repaid by B. & Co. either in whole or in part, and while the collateral held as security for both loans was still intact in claimant's hands, and before any demand had been made on B. & Co. for payment. *Held*, that the liability of the bankrupt on the guaranty was neither presently due nor capable of liquidation at the time of bankruptcy; there being no certainty that anything would ever be due or that any liability would ever arise thereon, and hence the claimant was not entitled to the allowance of a claim for the amount of the loans against the bankrupt's estate.

[Ed. Note.—For other cases, see *Bankruptcy, Cent. Dig.* § 476; *Dec. Dig.* § 316.*]

Appeal from the District Court of the United States for the Southern District of New York.

In the matter of bankruptcy proceedings of Merrill & Baker. From an order modifying a referee's decision with reference to the allowance of claims of Walter M. Jackson, so as to expunge the same, claimant appeals. Affirmed on opinion of Hough, District Judge, which is as follows:

The legal questions before the referee and this court are covered by a stipulation as to the facts embracing many matters quite immaterial to a clear statement of the problem presented.

What is material seems to me this: Mr. Jackson was prepared to lend money to the business of his friend, Mr. Merrill. Merrill's business was that of the bankrupt corporation. That corporation conducted its affairs in part through certain subsidiary corporations whose stock was substantially owned by Merrill & Baker. So far as Jackson was concerned, the corporations of Merrill & Baker, of C. T. Brainard & Co., and others were all alike—they were merely the different parts of his friend Merrill's business. In this state of feeling Jackson, at the request of Merrill, loaned to C. T. Brainard & Co. (a corporation controlled by Merrill & Baker) \$24,387.50, thereupon Brainard & Co. deposited with Jackson certain collateral for this loan, giving Jackson quite ample powers to sell the collateral if the loan was not repaid "within 60 days after demand." The agreement of pledge then continued, "In case the proceeds of sale (of the pledged property) shall be insufficient to pay the principal, interest and expenses as aforesaid," the Brainard Company promises to pay Jackson "the amount of the deficiency forthwith after such sale with interest." Contemporaneously with the making of this loan and the execution of the agreement of pledge the bankrupt (Merrill & Baker) executed a document stating that it "hereby guarantees the repayment of said (\$24,387.50) to said W. M. Jackson by the said C. T. Brainard & Company in accordance with the written agreement" hereinbefore referred to. The actual and expressed consideration for this guaranty was that most of the money loaned by Jackson to Brainard & Co. was to be immediately handed over to the controlling corporation of Merrill & Baker for its own uses and purposes. The amount of collateral deposited with Jackson by Brainard & Co. under the agreement above referred to was in face value double the amount of the loan, and it was honestly thought to be worth the larger sum, or approximately that.

While this loan was unpaid and while the collateral was unimpaired, Jackson again at the request of Merrill loaned Brainard & Co. the further sum of \$9,740, and the Brainard Company executed an agreement whereby it covenanted that the collateral previously deposited with Jackson to secure the \$24,000 loan "shall be held by him as security for the further sum of \$9,740 this day loaned * * * giving to said Jackson * * * the same authority over said collateral for the payment of this additional loan that it gave to him" in the pledge agreement first above referred to. Merrill & Baker were to receive the benefit of this loan also, and accordingly that corporation in writing contemporaneously guaranteed to Jackson "the repayment of said sum."

*For other cases see same topic & § NUMBER in *Dec. & Am. Digs.* 1907 to date, & *Rep'r Indexes*

Merrill & Baker became bankrupt before either of these loans had been repaid by Brainard & Co. in whole or in part and while the collateral held as security for both was still intact in the hands of Jackson or his agents, and before any demand had been made on Brainard & Co. for the payment of either advance. Within a year after adjudication, Jackson filed claims in this proceeding. In each claim he asserted himself to be a creditor of Merrill & Baker for the full amount of his loan to Brainard & Co., although he still held the collateral and had made no demand on Brainard & Co. for payment until after the declared bankruptcy of Merrill & Baker.

[1] The contract made by the corporation of Merrill & Baker on the occasion of Mr. Jackson making each of his loans was admittedly one of guaranty. Let it also be assumed that a guaranty is a mercantile instrument to be construed according to what is to be fairly presumed to have been the understanding of the parties as ascertained from the circumstances accompanying the whole transaction. *Lee v. Dick*, 10 Pet. 482, 9 L. Ed. 503; *Mauran v. Bullus*, 16 Pet. 528, 10 L. Ed. 1056. [2] It will, however, still remain true that this particular contract of guaranty was made within the state of New York and is to be construed in the light of New York decisions, and it has in this state been held that, while the words being those of the guarantor must be construed most favorably to the guaranteee, the contract is subject to the same rules of interpretation as other contracts, and, when the meaning of the words used has been ascertained, the guarantor's liability is strictissimi juris, and is not to be extended beyond its precise import. *Powers v. Clarke*, 127 N. Y. 424, 28 N. E. 402; *McShane Co. v. Padier*, 142 N. Y. 211, 36 N. E. 880 (below 1 Misc. Rep. 332, 20 N. Y. Supp. 679); *Bank v. Coster*, 3 N. Y. 203, 53 Am. Dec. 280; *Bank v. Kaufman*, 93 N. Y. 273, 45 Am. Rep. 204; *Schwartz v. Hyman*, 107 N. Y. 562, 14 N. E. 447.

Applying these general rules to the interpretation of the agreements before the court, can it be said that there is any ambiguity in the meaning of the words employed by the parties? I think not. There may be said to be lack of clearness in expressing what was the real intent of Messrs. Jackson & Merrill. If Mr. Jackson be a layman, I have no doubt that he would have described the transactions above recited as loans to his friend Merrill. He doubtless recognized that Merrill had undertaken no personal responsibility to him, but he probably drew no distinction between the liability of Merrill & Baker, Incorporated, and that of Brainard & Co.; and this is really the position advanced by Mr. Jackson's able counsel. It is asserted in argument and brief that because it was the intention of the parties by this apparatus of papers that Jackson should loan money to Merrill's business, then, since Brainard & Co. and Merrill & Baker were but different parts or departments of Merrill's business, these paper writings should be construed as producing primary liability on the part of all the various corporations making up that business and signing any of these documents.

In no legal sense is this ascertaining the meaning or intent of the parties. If men entering into a contract use plain words, those words must be taken to mean exactly what they say. The fact that the parties did not think clearly nor use apt words to express what they intended does not open the way for construction when there is no ambiguity in the language employed.

Therefore, while entirely agreeing with much that has been said by counsel for Jackson regarding the intent of the parties, I think the court is constrained to follow the plain meaning of the instruments exchanged.

[3] With reference, then, to the larger loan, there is, in my opinion, nothing to add to the views of the referee. The engagement of Merrill & Baker was a guaranty. It was not a contract to pay at all events, but a contract that Brainard & Co. could pay, and pay what? Not necessarily the full amount of the debt, but any deficiency arising from the sale of the collateral. Brainard & Co. were not called upon to pay until demand had been made, and I perceive but one answer to the inquiry—could any action have been maintained on this contract against Merrill & Baker on the day of bankruptcy? Such action would clearly have been premature. If that action was premature, then no provable claim existed. On this subject there is nothing to add to the review of the cases contained in *Re Inman* (D. C.) 171 Fed. 185.

If I am right in believing that the documents evidencing the first loan are

plain and unambiguous, there then can be no doubt that the papers proving the second loan conclusively show that it was but an additional advance on the same collateral as the first loan and subject to all the conditions thereof. The distinction based upon the presence in the first guaranty of the words "in accordance with the written agreement" of pledge, and the absence of the same words in the second guaranty seems to me entirely fallacious. The crucial question is the same as to both transactions—had there been any breach on the part of Brainard at the date of bankruptcy which could at that time have justified any suit against Merrill & Baker? Plainly there was not.

To me it is clear that no plainer instance of liabilities neither presently due nor capable of liquidation at the time of bankruptcy can be imagined than these demands of Jackson. There was no certainty that anything ever would be due nor certainty as to what would be due if liability ever arose. The best proof of this is the language of the proofs of claim when compared with the facts shown on this hearing. The proofs of claim demand the full amount of the loan. Mr. Jackson's counsel has taken the only way out of this, and still demands dividends upon the face of debts which have largely been paid. To do this those contracts of guaranty must be construed as contracts of suretyship. They are not susceptible of such construction, and the referee's decision must be modified so as to expunge both claims.

Dean Emery, for appellant.

George Zabriskie, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The order is affirmed on the decision of the district judge. The difficulty with appellant's careful and extended argument as to the relations of the parties is that the contracts of loan and the contracts of indemnity are all in writing, precisely expressed and free from any ambiguity.

KAW VALLEY DRAINAGE DIST. OF WYANDOTTE COUNTY, KAN., et al.
v. METROPOLITAN WATER CO.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1911.)

No. 3,566.

1. EMINENT DOMAIN (§ 68*)—NECESSITY FOR APPROPRIATION—POWER TO DETERMINE.

If the purpose for which property is to be taken under the power of eminent domain is a public one, the necessity for the taking is not a judicial question, but is exclusively within the province of the Legislature, and one which it may determine by direct enactment or by delegating the power to some officer or board.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 168-170; Dec. Dig. § 68.*]

2. REMOVAL OF CAUSES (§ 4*)—CAUSES REMOVABLE—CONDEMNATION PROCEEDINGS—KANSAS DRAINAGE STATUTE—"SUIT."

The drainage statute of Kansas (Laws 1905, c. 215; Gen. St. 1909, § 3000 et seq.) authorizes the directors of a drainage district to determine when it is necessary to condemn private property for the use of the district and to present a written application to the judge of the district or common pleas court of the county for the appointment of three commissioners to make appraisement and assessment of damages. It then makes it the duty of the judge to make such appointment and requires the commissioners after notice to the owners to make awards and file their re-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

port with the county clerk. Either party may appeal from such award to the district court, where the question of compensation alone may be tried. *Held* that, until an appeal has been taken, the proceeding is in the nature of an inquest to determine damages, and is not a "suit," within the meaning of the removal statute of March 3, 1875, c. 137, § 2, 18 Stat. 470, as amended by Act March 3, 1887, c. 373, § 1, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 (U. S. Comp. St. 1901, p. 509), and is not removable into a federal court thereunder.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 18; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6769-6778; vol. 8, p. 7809.]

3. REMOVAL OF CAUSES (§ 4*)—CAUSES REMOVABLE—CONDEMNATION PROCEEDINGS.

The power of eminent domain may be exercised by the state in such mode as it may see fit. It may be by administrative inquest if provision is made permitting a determination of the amount of damages by a civil action at some period before the proceedings become final or the proceeding may be by a civil action at the outset. If the former, the federal courts are without jurisdiction until the proceedings assume the character of a civil action; but, if the latter, they may have jurisdiction from the inception of the proceeding.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 18; Dec. Dig. § 4.*]

4. CONSTITUTIONAL LAW (§ 280*)—"DUE PROCESS OF LAW"—CONDEMNATION PROCEEDINGS.

A statute authorizing the condemnation of property by a drainage district is not unconstitutional, as taking the owner's property without "due process of law," because it permits the district to take possession of the land pending appeal from the award of compensation on paying the amount of the award and securing payment of any additional amount which may be recovered.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 877-890; Dec. Dig. § 280.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

Appeal from the Circuit Court of the United States for the District of Kansas.

Suit in equity by the Metropolitan Water Company against the Kaw Valley Drainage District of Wyandotte County, Kan., George Stumpf, L. J. Mason, and Al Mebus. Defendants appeal from an order granting a preliminary injunction. Reversed.

L. W. Keplinger and C. W. Trickett, for appellants.

Willard P. Hall, Charles F. Hutchings, and O. L. Miller (Miller, Buchan & Miller, Samuel Maher, and McCabe Moore, on the brief), for appellee.

Before HOOK and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. The Legislature of the state of Kansas in 1905 authorized the formation of drainage districts in the several counties of the state by the board of county commissioners, upon the presentation to them of a proper petition, showing that the lands and property therein embraced are subject to injury and dam-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

age from the overflow of some natural water course, naming or describing it, and that the improvement of the channel or water course, the construction and maintenance of levees, drains, or other works, are necessary to prevent such overflow, and that such improvement or work will be conducive to the public health, convenience, or welfare. Upon the organization of such district it was provided that the tax-payers residing within the district should elect a board of five directors, and said drainage district should be declared to be a body corporate with power to sue and be sued in its corporate name.

The statute provided, in substance, that the board of directors shall have power, whenever it shall be deemed necessary to appropriate any private property for use by the district in widening, deepening, or otherwise improving, any natural water course to prevent the overflow thereof, or for the construction of any levee, to cause a survey and description of the lands so required to be made by some competent engineer and filed with its secretary. The board was thereafter authorized to make an order declaring that the appropriation of such land was necessary, setting forth for what purpose the same was to be used. The board of directors, as soon as practicable thereafter, was required to present a written application to the judge of the district court or the court of common pleas of the county in which the land was situated, describing the land sought to be taken, setting forth the necessity for the appropriation thereof for the use of the district, and praying for the appointment of three commissioners to make appraisement and assessment of damages therefor. Upon the presentation of such petition by such board of directors, or its attorney, the judge to whom the same was presented was required forthwith in writing to appoint such commissioners, and deliver a certificate thereof to the said board of directors, or its attorney, who were required without delay to cause the application and certificate of appointment to be recorded in the office of the register of deeds of the county. The commissioners so appointed were required to take an oath to honestly and faithfully discharge their duties, and to give all owners of property sought to be taken at least 10 days' notice of the time and place when and where the damages would be assessed, such notice to be given by one publication in some newspaper published in the county, and at the time fixed in such notice the commissioners were required, upon actual view, to appraise the value of the lands taken and to assess the other damages done to the owners of the property, respectively, by such appropriation. The commissioners were authorized to adjourn from time to time as they deemed convenient, correct all errors or omissions in the giving of notice by serving new notices or making new publications, and were authorized to make from time to time partial reports, and upon completing their duties to make a final report. Such reports were to be in writing and filed in the office of the clerk of the county. In such reports the commissioners were required to accurately describe the land by them set forth and appropriated, the purpose for which the same was taken, the name of each owner, if known, and appraise each owner's interest and assess his damages separately. The county clerk was required, upon any such report being filed, forth-

with to prepare and deposit a copy thereof in the office of the treasurer of the county, and, if the drainage district should pay to such treasurer the amount in full of such appraisement within 90 days of the time of filing such report, it was the duty of the treasurer to thereupon pay the same to the person or persons severally entitled thereto.

Any person being or claiming to be the owner of any lands so condemned or appropriated, deeming himself aggrieved by the award of said commissioners, could appeal from the award of said commissioners to the district court of the county; but such appeal should only affect the amount of compensation to be allowed and should not delay the prosecution of the work of the district, upon the district paying or depositing the amount assessed by such commissioners with the county treasurer, as aforesaid, and said district, upon executing a bond with sufficient surety to be approved by the county clerk to pay all damages or costs which said district might be adjudged to pay by said district court, was authorized, notwithstanding such appeal, to take possession of, appropriate, and use said land for the purposes for which it was condemned. Provision was also made in the statute allowing the drainage district, under certain circumstances, to appeal if desired from the award of such commissioners.

The Kaw Valley Drainage District, organized pursuant to the statute, on the 4th day of January, 1911, by its board of directors, presented its application to the judge of the district court of Wyandotte county, reciting the facts required by the statute to be recited in such application, praying for the appointment of commissioners to assess the damages to the owners of the property sought to be taken and damaged. On the following day, January 5th, respondent presented to the judge of the district court of Wyandotte county a petition and bond for the removal of such proceedings, instituted and taken by said drainage district for the appointment of commissioners, as aforesaid, to the Circuit Court of the United States for the District of Kansas; said petition and bond being in proper form and the security adequate. Such petition and bond were filed with the clerk of the district court of said Wyandotte county. The petition for removal was by the judge of said court denied, and the appellants Stumpf, Mason, and Mebus were by said judge appointed commissioners. The commissioners accepted the office, took the oath required by statute, and on the 6th day of January, 1911, caused a notice to be published, being such notice as was required by the statute, stating that they (the commissioners) would meet at 10 o'clock a. m., on the 19th day of January, 1911, at the east end of the James Street Bridge over the Kansas river, in Kansas City, Kan., and thereupon proceed, upon actual view, to condemn for the use of the drainage district the tracts of land described in the notice, and appraise the value of the land and assess the true damages done to the owners thereof.

Thereafter, and on the 13th day of January, 1911, plaintiff, having filed a transcript of the proceedings relating to the removal in the Circuit Court of the United States, filed its bill in the Circuit Court of the United States for the District of Kansas, setting forth the proceedings of said drainage district for the appointment of the commis-

sioners, its application to remove said proceedings into the United States Court, that such proceedings were of a civil nature and properly removable to the Circuit Court of the United States, and praying for an injunction to restrain said drainage district and the commissioners so appointed from farther proceeding in said matter, for the reason that the entire proceeding was then pending in the Circuit Court of the United States, and such commissioners had no authority to thereafter proceed excepting by the order and direction of said Circuit Court. It was farther alleged that the said legislative enactment was unconstitutional and void, in that it deprived complainant of its lands without due process of law, in violation of the fourteenth amendment to the Constitution of the United States, in that it authorized, after the award of damages by the commissioners, the taking possession of the lands so appropriated by the drainage district to its own use, pending an appeal to the District Court. A temporary order of injunction was granted as prayed. From such order the drainage district has prosecuted this appeal.

[1] The power of eminent domain is one which the state may exercise for any public purpose. Whether the purpose for which property is sought to be taken and used be a public one is undoubtedly the subject of judicial determination in a proper case. If the use be a public one, and it is here, whether the necessity for the taking exists is exclusively within the province of the Legislature of the state to say; such necessity may be determined by a direct legislative enactment, or its determination may be by the Legislature delegated to some officer or board. The question of the necessity is not necessarily one of a judicial character. *Buckwalter v. School District*, 65 Kan. 603, 70 Pac. 605; *Boom Co. v. Patterson*, 98 U. S. 403-406, 25 L. Ed. 206; *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557-568, 18 Sup. Ct. 445, 42 L. Ed. 853. It was said in the last-cited case:

"Neither can it be said that there is any fundamental right secured by the Constitution of the United States to have the questions of compensation and necessity both passed upon by one and the same jury. In many states the question of necessity is never submitted to the jury which passes upon the question of compensation. It is either settled affirmatively by the Legislature, or left to the judgment of the corporation invested with the right to take property by condemnation. The question of necessity is not one of a judicial character, but rather one for determination by the lawmaking branch of the government. * * *

"It is within the power of the state to provide that the amount shall be determined in the first instance by commissioners, subject to an appeal to the courts for trial in the ordinary way; or it may provide that the question shall be settled by a sheriff's jury, as it was constituted at common law, without the presence of a trial judge. These are questions of procedure which do not enter into or form the basis of fundamental right. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the federal Constitution."

While it is true that the state may not deprive the federal court of its jurisdiction to determine matters of a judicial nature which are within the federal judiciary act, it by no means follows that, in all instances, the proceedings to take private property for public use, which

are prescribed by the sovereign power of the state, must be from the inception judicial.

Boom Co. v. Patterson, *supra*, was a case in which condemnation proceedings had been instituted in the state of Minnesota. The statute of that state provided that the party seeking to condemn private property for a public use should apply to the district court of the county in which the property was situated for the appointment of commissioners to appraise its value and take proceedings for its condemnation. The law provided that they should give notice to the owners of the land before the appraisal was made. If the award of the commissioners should not be satisfactory, any one claiming an interest in the land was authorized to take an appeal to the district court, where it was to be entered by the clerk "as a case upon the docket." The court was then required to "proceed and determine such case in the same manner as other cases are heard and determined in said court." In that case an appeal was taken to the district court of the state from the award of damages by the commissioners, and the cause thereafter removed from the district court of the state to the United States court. The question was presented as to whether or not the United States court acquired jurisdiction in removal; the court saying:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest, to ascertain its value, and not a suit at law in the ordinary sense of those words. But, when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land; in other words, the value of the property taken. No other question was open to contestation in the district court."

In Pacific Railroad Removal Cases, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, among the questions presented was one as to when a condemnation proceeding instituted by the city of Kansas City, Mo., for the purpose of widening a street running through the depot grounds of the railroad, became an action so as to be removed into the federal court. By the statute law in that case, proceedings were instituted and tried before the mayor and a jury, from which an appeal could be taken to the circuit court of the county. The case was tried before the mayor and a jury and an appeal taken to the circuit court and removed from the circuit court of the county to the Circuit Court of the United States. It was contended in opposition to the removal that, as it was a case that had once been tried before the mayor and a jury, the application to remove after the appeal to the circuit court came too late. The court, on page 18 of 115 U. S., on page 1121 of 5 Sup. Ct. (29 L. Ed. 319), said:

"The second ground of objection, that the cause had been once tried before the mayor by a jury, and an appeal taken, before a petition for removal was filed, and therefore the application was too late, is answered by the reasoning of this court in the case of Boom Co. v. Patterson, 98 U. S. 403 [25 L. Ed. 206], which was a case very similar in this respect to the present. It was there held that the preliminary proceedings were in the nature of an inquest to ascertain the value of the property condemned, or sought to be condemned by the right of eminent domain, and was 'not a suit at law'

in the ordinary sense of those terms,' consequently not 'a suit' within the meaning of the removal acts; but that, 'when it was transferred to the district court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law and was thenceforth subject to its ordinary rules and incidents.'"

Searl v. School District, 124 U. S. 197, 8 Sup. Ct. 460, 31 L. Ed. 415, was a case in which condemnation proceedings had been instituted in Colorado by the school district, to condemn certain land for school purposes. The statute law of Colorado was summarized by Justice Matthews, who delivered the opinion of the court, as follows:

"The Code of Civil Procedure of that state provides for the appropriation of private property for public use, and authorizes a judicial proceeding in the district or county court for the purpose of ascertaining and awarding the amount of compensation to be paid therefor. It requires the filing of a petition setting forth the authority of the plaintiff to acquire the property in that mode, the purpose for which it is sought to be taken, a description of the property, and the names of all persons interested therein, who are to be made defendants and brought into court by the service of a summons or other process, as in other cases is provided by law. It provides, in the first instance, for the ascertainment of the amount of compensation or damages by a commission of three freeholders, but also that before the appointment of such commissioners any defendant may demand a jury of six freeholders residing in the county, to ascertain, determine, and appraise the damages or compensation to be allowed, and prescribes in such case the mode of trial, at which the court or judge shall preside in the same manner and with like power as in other cases; that evidence shall be admitted or rejected by the court or judge according to the rules of law; and at the conclusion of the evidence that the matters in controversy may be argued by counsel to the jury, and at the conclusion of the argument that the court or judge shall instruct the jury in writing in the same manner as in cases at law; that motions for a new trial, and to set aside the verdict, may be made and heard as in other cases; that an appeal may be taken to the Supreme Court in the same manner as provided by law for taking appeals from the district court to the Supreme Court; and that a writ of error from the Supreme Court shall lie in every such case to bring in review the final determination."

It was held that such a proceeding was a suit within the meaning of the Constitution and acts of Congress, conferring jurisdiction upon the courts of the United States. Comparing the case with the cases of *Boom Co. v. Patterson* and *Pacific Railroad Removal Cases*, it was said:

"The appointment of the commissioners is not, as in the case of *Boom Co. v. Patterson* and the *Pacific Railroad Removal Cases*, a step taken by the party seeking to make the appropriation *ex parte* and antecedent to the actual commencement of the adversary proceeding *inter partes*, which constitutes a suit in which the controversy takes on the form of a judicial proceeding, because under the Colorado law the appointment of the commissioners is a step in the suit after the filing of the petition and the service of summons upon the defendant. It is an adversary judicial proceeding from the beginning. The appointment of commissioners to ascertain the compensation is only one of the modes by which it is to be determined. The proceeding is therefore a suit at law from the time of the filing of the petition and the service of process upon the defendant."

It is, however, urged that the more recent case of *Traction Co. v. Mining Co.*, 196 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462, is a final determination that any step or proceeding by the state to take private property for public use is, from its inception, a civil action within the meaning of the federal judiciary act. We find nothing in that case

which warrants such conclusion. The language of the court in each opinion must be construed with reference to the case before the court. In that case the court was considering the question whether, under the statute law of Kentucky, a condemnation proceeding was, from the inception, a suit or action within the meaning of the judiciary act. Under the statute of Kentucky the proceeding to take private property for public use required the filing of a petition in the office of the county court, containing a description of the land, etc., and have commissioners appointed to assess the damages to which the owner was entitled. The commissioners were required to make their award of damages in writing, giving the names of the owners, etc. The clerk of the court was required to issue process against the owners of the property to show cause why the report should not be confirmed. At the first regular term after the owners should have been summoned, the court was required to examine the report and pass upon it. If exceptions were filed by either party, it was required that a jury be impaneled to try the issue of fact and judgment rendered in conformity to the verdict, if sufficient cause to the contrary should not be shown. Each and every step taken was a proceeding in the county court. Either party was entitled to appeal to the circuit court. In that case, after the report of the commissioners had been filed and process issued against the mining company, it filed its petition and bond for removal of the case before the court had taken action upon the report. The contention in the case was that, as the federal court could not, under the judiciary act of 1887 and 1888, acquire jurisdiction by removal, except in cases in which the court would have had original jurisdiction, removal could not be had because the proceeding being one in which the state was exercising a sovereign power, the federal court would not have original jurisdiction. It was, however, held that, under the statutes of Kentucky, the state had delegated the right to exercise this sovereign power to the traction company, that such exercise was to be had by instituting a civil action in the county court, which court was, under the Constitution of Kentucky, a part of the judicial system of that state; that commissioners were to be appointed to ascertain the damages, and process should issue against the mining company; that, if exceptions were filed to their report which presented any issue of fact, such issue of fact was to be tried in court as other cases. Under the Kentucky statute there was nothing to prevent the federal court from fully and completely exercising the jurisdiction conferred upon the county court. The petition could have been filed in the Circuit Court of the United States, commissioners appointed by that court, process to defendant could have been issued from that court, exceptions filed to their report, and issues of fact tried by a jury, and judgment rendered thereon in that court as in the county court. In that case the doctrine announced in *Boom Co. v. Patterson and Pacific Railroad Removal Cases*, supra, that condemnation proceedings may, in their inception, be merely an administrative inquest and not a civil action, was in no respect criticised or overthrown; but *Boom Co. v. Patterson* was cited with approval.

[2] In this case, involving a consideration of the Kansas statute, we are unable to perceive upon what theory it can be said that the

proceeding anterior to the appeal was a civil action, which could have been instituted in the federal court. The petition for the appointment of commissioners is not required to be presented to a court. It is to be presented to the judge of the district or common pleas court, and then, with his order appointing commissioners, filed not in court but with the register of deeds. The Legislature might have designated that the petition should be presented and commissioners named by any executive officer of the state or county. The designation of the judge was merely a description of the person or official who was to act upon the petition in the first instance. The report of the commissioners was not filed in any court, but was to be filed with the county clerk. No exceptions to the report of the commissioners could be made or heard. No proceedings in court were had until an appeal should be taken from the award of the commissioners. When such appeal was taken and lodged in the district court, a civil action was for the first time pending.

[3] The several decisions of the Supreme Court, relating to this subject, are in perfect harmony, to the effect that the power of eminent domain may be exercised by the state in such mode as it sees fit. It may be by administrative inquest, if provision is made permitting a determination of the amount of damages by a civil action at some period before the proceedings become final, or the proceeding may be by a civil action at the outset. If the former, the federal courts are without jurisdiction until the proceedings assume the character of a civil action, when, by the latter mode, federal courts may have jurisdiction from the inception of the proceeding, if the requisite diversity of citizenship and amount in controversy exist.

Complainant's contention that the statute violates the fourteenth amendment to the Constitution of the United States, in that it deprives complainant of its land without due process of law, by permitting the drainage district to take possession of the land pending the final hearing upon appeal, by paying the amount of the appraisement and giving an approved bond to pay any additional sum which should be awarded upon such appeal, has been too often decided against such contention to require extended consideration. The question was before the court in *Backus v. Fort Street Union Depot Co.*, *supra*, and it was said:

"Does this amount to a denial of the right to that protection to property which is guaranteed by the fourteenth amendment to the federal Constitution? In other words, is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and payment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation v. Southern Kansas Railway*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295, and *Sweet v. Rechel*, 159 U. S. 380, 16 Sup. Ct. 43, 40 L. Ed. 188. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof."

The bill in this case having been filed in aid of a jurisdiction wrongfully assumed, it follows that the injunction was improvidently awarded, and the judgment of the Circuit Court granting to complainant a temporary injunction is reversed, and the cause is remanded for proceedings in accordance herewith.

KAW VALLEY DRAINAGE DIST. OF WYANDOTTE COUNTY, KAN., et al.
v. UNITED STATES TRUST CO. OF KANSAS CITY, MO., et al.

(Circuit Court of Appeals, Eighth Circuit. February 24, 1911.)

Nos. 3,567-3,570.

Appeals from the Circuit Court of the United States for the District of Kansas.

Suits in equity by the United States Trust Company of Kansas City, Mo., trustee, and others, against the Kaw Valley Drainage District of Wyandotte County, Kan., and others; Gertrude L. Brown and others against the same; A. B. Adler against the same; and the Fowler Packing Company against the same. Appeals by defendants from orders granting preliminary injunctions. Reversed.

L. W. Keplinger and C. W. Trickett, for appellants.

Willard P. Hall, Charles F. Hutchings, and O. L. Miller (Miller, Buchan & Miller, Samuel Maher, and McCabe Moore, on the brief), for appellees.

Before HOOK and ADAMS, Circuit Judges, and WM. H. MUNGER, District Judge.

WM. H. MUNGER, District Judge. Each of the foregoing cases are in all material respects like the case of Kaw Valley Drainage District of Wyandotte County, Kansas, George Stumpf, L. J. Mason, and Al Mebus v. Metropolitan Water Company, 186 Fed. 315, just decided, and for the reasons there expressed the judgment in each case, granting to complainant a temporary injunction, is reversed, and the causes are remanded for proceedings in accordance with the opinion in the case of Kaw Valley Drainage District, etc., et al. v. Metropolitan Water Company.

THE KRONPRINZ WILHELM.

THE CROWN OF CASTILE.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 158.

COLLISION (§ 72*)—STEAMSHIPS NAVIGATING IN FOG—MUTUAL FAULT.

A collision in upper New York Bay, in a dense fog, between the steamships Kronprinz Wilhelm, which, after moving northward for a time from the quarantine station, had anchored, and the steamship Crown of Castile, which was following, *held* due to the fault of both vessels; the Crown of Castile in going at too high speed in the fog, and the Kronprinz Wilhelm in anchoring in the channel.

[Ed. Note.—For other cases, see Collision, Dec. Dig. § 72.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty for collision by the Crown Steamship Company, Limited, as owner of the steamship Crown of Castile, against the steamship Kronprinz Wilhelm, North German Lloyd, claimant, and cross-libel, by the North German Lloyd against the Crown of Castile. Decree dividing damages, and both parties appeal. Affirmed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Choate & Larocque (Joseph Larocque, of counsel), for the Kronprinz Wilhelm.

Convers & Kirlin (J. Parker Kirlin and William H. McGrann, of counsel), for the Crown of Castile.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. March 18, 1908, the North German Lloyd twin screw steamship Kronprinz Wilhelm, 663 feet long, lying off Quarantine Station in the Upper Bay, head to the flood tide, hove up her anchor at 6:52 a. m. and began to turn, on her way to New York, at 6:54. At 7:14 she got on her course, going half speed ahead on both engines. On account of fog coming on she slowed at 7:15, and stopped at 7:16, went slow ahead on her port engine at 7:19, stopped at 7:20, and on account of dense fog went half speed astern on both engines at 7:24, and stopped and dropped anchor at 7:25. Hearing cries of "Go ahead" on a vessel astern, she went slow ahead on both engines and stopped at 7:27, having come into collision with the steamer Crown of Castile, whose bow cut into the center of her overhang directly astern, causing and sustaining considerable damage.

The British single screw steamer Crown of Castile, 400 feet long, lying a little above the Kronprinz, also bound for New York, began to heave up her anchor at 7:05 a. m., and, following the Kronprinz, went ahead full speed at 7:15, half speed 7:20, and, hearing in the dense fog an anchor chain running out ahead a little on her starboard bow, dropped both anchors, went full speed astern, put her helm hard astarboard at 7:25, and came into collision at 7:29; stopped 7:32.

These entries are taken from the engine-room logs of each vessel. The first officer of the Crown of Castile testified that the port anchor was hove up after the collision, 45 fathoms were out on the starboard anchor, and it was dragged for two minutes, during which the engines continued to go full speed astern.

The engine-room log of the Kronprinz shows that the collision occurred at 7:27, because the engines were stopped in that minute, after the collision. We have no doubt that their log is more accurate on this point than that of the Crown of Castile. Everything that was done shows that the collision was imminent when the vessels discovered each other, and we cannot suppose, in confirmation of the entry in the log of the Crown of Castile, either that the Kronprinz continued to go astern, dragging her anchor, or that the Crown of Castile continued to go ahead dragging both anchors, for a period of four minutes before the collision.

The District Judge held that the Crown of Castile was at fault for going too fast in the fog, and the Kronprinz for anchoring in the channel. We concur in both conclusions.

The engine-room log of the Crown of Castile satisfies us that she was not going at a moderate speed. She went from her anchorage to the place of collision, a distance of two miles, with the flood tide running probably one knot in her favor in ten minutes. Her engines worked for the first five minutes full speed, and for the last five minutes half speed ahead. This would give her a speed of six knots at

the time she dropped her starboard anchor, which is obviously not moderate in a crowded thoroughfare in dense fog.

Coming to the place the Kronprinz anchored, her witnesses all supposed that the buoy above which they found themselves when the fog cleared away two hours after the collision was the northeast buoy of the Man of War Anchorage grounds, whereas, in point of fact, it had been removed by the government some days before, and the one they saw was the southeast buoy, 2,000 feet lower down the Bay. On this erroneous supposition they subsequently constructed their position on a chart with two bearings, viz., Robbins Reef N. 18° W., and the Anchorage buoy (which had actually been removed) S. 3° W. One of the second officers testified that he actually took these bearings, and they appear in the log. But it is quite clear that the bearings could not have been taken at the time, because it is now conceded by the proctor for the Kronprinz, and is amply proved, that she did not lie at the position stated at all. Similarly the pilot testified that he steered a N. N. W. course from the Bay Ridge bell buoy to his anchorage. This, too, was obviously a subsequent construction, and untrue. If the Kronprinz had been on that course, her anchor would have taken the ground at a point considerably to the west of the bow of the Crown of Castile, which was at her stern, and whose anchor took the ground at or about the place of collision. When the fog cleared, the vessels should have discovered each other lying to their anchors head to the tide; the Kronprinz considerably north and west of the Crown of Castile, instead of being, as the fact was, right astern of her. The quartermaster at the wheel of the Crown of Castile says he was steering a north course until immediately before the collision, when he got the order starboard and hard-astarboard; and we are convinced that the Kronprinz, when she let her anchor go, was on the same course, directly ahead of her. The bearings taken from the Crown of Castile when the fog cleared up show that both vessels were anchored in the channel.

There is no testimony that either vessel after the collision paid out chain, nor any that the Kronprinz dragged her anchor. On these premises, if the Crown of Castile did not drag hers, the stern of the Crown of Castile should have been very close to the bow of the Kronprinz when the vessels swung to the flood tide. Assuming that at the time of the collision the Kronprinz had gone astern about the length of her anchor chain, 45 fathoms to the windlass, and that the Crown of Castile was nearly over her anchor at the time of the collision, the bow of the Kronprinz when she swung to her anchor on the tide should have been her length and the length of her chain, say 800 feet, above the place of collision, and the stern of the Crown of Castile should have been her length and the length of her chain from her anchor, say 500 feet from the same place. This would make the distance between the stern of the Crown of Castile and the bow of the Kronprinz some 300 feet. But there is no testimony that the vessels were so near together; the clear preponderance being that they were from 1,000 to 1,500 feet apart. This could only have been as the result of the Crown of Castile's dragging her anchor while she was going astern, some time between 7:25 and 7:30.

We feel fully convinced that both vessels at the time of the collision were heading north, the Crown of Castile being directly astern of the Kronprinz; also that the Kronprinz deliberately anchored in the channel, though at a point different from the point she supposed. When she anchored, the Crown of Castile was still navigating and let go both her anchors, not for the purpose of coming to an anchorage, but to help stop her headway when she found herself so close to the Kronprinz. We also think that if the Kronprinz, knowing that the Crown of Castile was following, had paid proper attention to her fog whistle, she would not have anchored directly ahead. We also think that the vessels were very much nearer to each other at this moment than the witnesses now think, not more than 300 or 400 feet, and that there was very little motion on either. Very gentle contact between the bow of the Crown of Castile and the light overhang of the stern of the Kronprinz would cause the damage that was sustained.

Decree affirmed with interest and costs.

LUCKENBACH v. INSULAR LINE.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 214.

SHIPPING (§ 54*)—TIME CHARTER—LIABILITY FOR INJURY IN DOCKING.

A time charter, government form, by which the owner is to provide and pay the master and crew, although the master is to be under the orders of the charterer as regards employment, agency, and other arrangements, is not a demise of the ship, but leaves the owner responsible for her navigation, and he cannot hold the charterer responsible for an injury received by her in docking, due to the mismanagement or negligence of the master.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 219–221; Dec. Dig. § 54.*]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by Edgar F. Luckenbach, as owner of the steamer Julia Luckenbach, against the Insular Line. Decree for respondent, and libelant appeals. Affirmed.

This cause comes here upon appeal from a decree, dismissing the libel. The libel was filed to recover for damages which the steamer Julia Luckenbach sustained while being docked by steam tugs at Pier 31, Brooklyn, N. Y.

Peter S. Carter, for appellant.

Wheeler, Cortis & Haight (John W. Griffin, of counsel), for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Libelant is the owner of the steamer, which was chartered to the respondent, Insular Line, under a charter

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

party in the well-known form of "time charter, government form." It contains the usual clauses, yiz., that steamer is to be placed at the disposal of the charterers, being strong and in every way fitted for the service, and "with full complement of officers, seamen, engineers, and firemen."

"1. That the owner shall provide and pay for all provisions, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew; shall pay for all insurance of the vessel, also for all the cabin, deck, engine room, and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

"2. That the charterer shall provide and pay for all the coals, port charges, pilotages, agencies, commissions, consular charges (except those pertaining to the captain, officers or crew), and all other charges whatsoever, except those before stated."

"7. That the cargo or cargoes to be laden and/or discharged in any dock or at any wharf or place that the charterers or their agents may direct, provided the steamer can always safely lie afloat at any time of tide.

"8. That the captain shall prosecute his voyages with the utmost dispatch, and * * * the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements."

The vessel arrived from sea and anchored near Bedloe's Island to wait for tugs which were required to assist her in docking. Tugs were engaged by the charterer and sent to her, with directions that she should be docked at Pier 32. She raised her anchor and was towed over to the pier. She had her own steam up. When she reached there, her docking presented difficulties, owing to the state of the tide and the fact that she had a heavy list. No specific directions had been given her master to dock at any given time. In the process of docking she received injuries. The libel charges that there was negligence in attempting to dock the steamer at that stage of the tide, and avers that the damage was caused not through any fault on the part of libellant, but was caused "while in the possession, control, and while under charter to respondent."

It has been repeatedly held that this form of time charter is not a demise of the ship. It is sufficient to refer to our recent decision in *The Volund*, 181 Fed. 643, where we held that the navigation of the ship during the time of the charter is in the hands of the owner. We consider the docking of the vessel a part of her navigation. The master was in control of her, and if her condition was such that it was unsafe to undertake that operation in that state of the tide, he should have waited until the condition was more propitious. Many authorities are cited on appellant's brief in support of his contention that the charterer was in control of the navigation of the vessel for the purpose of docking her, and that the tugs were consignee's agents, for whose negligence it would be liable. We find in none of the cases cited anything to induce a modification of the conclusions expressed in *The Volund*. The case does not present one of the excepted situations reserved in that opinion for future disposition, where, for example, the consignee being required to furnish something he had agreed to supply, such as a pilot, a tug with master and crew, or what not, supplies a person whom he has reason to think incompe-

tent. So far as appears, the tugs were proper ones and their masters competent. *The Volund*, 181 Fed. 666.

The last page of the brief for appellant submits that the charterer is liable for the damages sustained while docking under article 4 of the charter party, which provides:

"4. Hire to continue until her delivery in like good order and condition to owners (unless lost) at New York."

No such claim is made in the libel, nor does it seem to have been raised in the District Court. There is no assignment of error which covers it. It seems sufficient to say that, where the charter party is not a demise of the vessel, there is neither reason nor authority for holding that the charterer must pay for damages caused by mismanagement in the navigation of the vessel.

The decree is affirmed, with costs.

THE MANHATTAN.

THE ALBANY.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

Nos. 207, 208.

COLLISION (§ 11*)—STEAMER AND MEETING TOW—UNLAWFUL TOW—LIABILITY OF Tows.

The regulations established by the Department of Commerce and Labor, under authority of Act May 28, 1908, c. 212, § 14, 35 Stat. 428 (U. S. Comp. St. Supp. 1909, p. 1100), limiting the length of tows and of hawsers between vessels in tows in inland waters, and prescribing penalties to be imposed on the master of a towing vessel willfully violating such regulations, while binding on tugs, are not binding on the vessels in a tow acting in obedience to the orders of the master of the tug, and they cannot be held in fault for a collision between one of their number and another vessel, on the ground alone that, following such orders, they had lengthened their hawsers beyond the prescribed limit, at a place not within the rule, and could not shorten them after reaching waters within the rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 10; Dec. Dig. § 11.*

Collisions with or between towing vessels and vessels in tow, see note to *The John Englis*, 100 C. C. A. 581.]

Appeal from the District Court of the United States for the Southern District of New York.

Suit in admiralty by the Hillside Coal & Iron Company, as owner of the barge Albany, against the steamship Manhattan, the Maine Steamship Company, claimant, and the steam tug North America, the Erie Railroad Company, claimant; and cross-libel by the Maine Steamship Company against the barge Albany and the tug North America. Decree (181 Fed. 229) against each vessel, and also against the barges Hawthorn and Troy, also owned by the Hillside Coal & Iron Company, for part damages, and such company appeals. Reversed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Wilcox & Green (Herbert Green, of counsel), for appellant.
Burlingham, Montgomery & Beecher (Charles C. Burlingham, of counsel), for the Manhattan.

Wallace, Butler & Brown (James K. Symmers, of counsel), for the North America.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. April 13, 1909, at about 11:15 p. m., in Long Island Sound, about off New Haven, the steamer Manhattan was proceeding from New York to Portland on a course E. $\frac{1}{2}$ N. Approaching her from the eastward was the tug North America on a course W. by S. $\frac{1}{2}$ S., bound from Boston to New York with three light barges in tow tandem, viz., the Hawthorn, Albany, and Troy. The night was dark, but clear. The Manhattan passed the North America and the Hawthorn safely green to green, but came into collision with the barge Albany; and, the barge Troy running up on the Albany, both sustained damage. The Manhattan did not see the lights of the barge, and only discovered the Albany by the reflection of her own masthead light on the Albany's sail, when the collision was inevitable.

The Hillside Coal & Iron Company, which owned all the barges, filed a libel to recover its damages against the Manhattan and the North America; and another libel was filed by the Maine Steamship Company, owner of the Manhattan, to recover its damages against the North America and the barge Albany. The District Judge held the Manhattan, the North America, and the barges Hawthorn and Albany at fault, and, the damages being agreed on, entered one final decree for one-quarter of the damages against the Manhattan and North America, each, and the remaining one-half against the three barges, following the case of The Eugene F. Moran, 212 U. S. 466, 29 Sup. Ct. 339, 53 L. Ed. 600.

We entirely agree with the District Judge in holding the Manhattan at fault for not discovering the lights of the Albany and Troy and not keeping out of the way, and also in holding the North America at fault for violating the regulations established by the Department of Commerce and Labor with reference to hawser towing in the inland waters of the United States. These regulations were enacted in accordance with the act of May 28, 1908, have the force of law, and are as follows:

"Regulations.

"(1) Tows of seagoing barges navigating the inland waters of the United States are limited in length to four vessels, including the towing vessel or vessels.

"(2) Hawkers are limited in length to 75 fathoms, measured from the stern of one vessel to the bow of the following vessel; and should in all cases be as much shorter as the weather or sea will permit.

"(3) In cases where the prescribed length of hawsers is, in the opinion of the master of the towing vessel, dangerous on account of the state of weather or sea, hawsers need not be shortened to that length until reaching the localities named below: (a) Tows bound for Hampton Roads or beyond, before passing Thimble Light. (b) Tows bound up the Chesapeake, to the northward of Baltimore Light. (c) Tows bound up the Delaware, between Fourteen

Foot Bank and Cross Ledge Lighthouses. Hawsers may also be lengthened in the same places, under the same circumstances, when tows are bound out.

"(4) In case of necessity, on account of wind or weather, hawsers of vessels navigating between Race Rock and Gay Head may be lengthened out in the discretion of the master of the towing vessel; but this paragraph shall not apply to Narragansett Bay north of Beavertail Light.

"(5) In all cases where tows can be bunched, it should be done. (a) Tows navigating in the North and East Rivers of New York must be bunched above a line drawn between the Statue of Liberty and the entrance to Erie Basin. When tows are entering Long Island Sound from the westward, the lines may be lengthened out to the prescribed length after passing Fort Schuyler; and when bound for New York from Long Island Sound tows must be bunched before passing Whitestone Point. (b) Tows must be bunched above the mouth of the Schuylkill river, Pennsylvania.

"(6) Section 15 of the act approved May 28, 1908 [U. S. Comp. St. Supp. 1909, p. 1100] provides: That the master of the towing vessel shall be liable to the suspension or revocation of his license for any willful violation of regulations issued pursuant to section fourteen in the manner now prescribed for incompetency, misconduct, or unskillfulness.

"(7) Any violation of these regulations shall be reported in writing as soon as practicable to the board of local inspectors of steam vessels most convenient to the officer or other person who may witness the violation."

Upon leaving Vineyard Haven the master of the tug ordered the barges to pay out plenty of hawser and the Hawthorn paid out 145 fathoms, the Albany 145 fathoms, and the Troy 75 fathoms. He was entitled to exercise his discretion as to the length of the hawser, under article 4 of the regulations, provided he thought the wind and weather made it necessary, while going between Gay Head, some 15 miles west of Vineyard Haven and Race Rock, at the entrance of Long Island Sound, a distance of about 60 miles. But after passing Race Rock, article 2 of the regulations required him to shorten the hawsers to at least 75 fathoms. The District Judge held him bound to shorten hawsers, whether he thought it safe or not, and the regulations do seem to give him no discretion, except as above stated, between Gay Head and Race Rock.

The regulations are, of course, plainly binding on the tug; but the District Judge went further and held them binding upon all the vessels in tow. We do not concur in this construction. The small discretion that is allowed by articles 3 and 4 is given to the master of the tug, and the only penalty provided is against him. It must be presumed that the regulations were drafted with knowledge of the established law that the master of the tug is in sole charge of the navigation. The City of New York, 49 Fed. 956, 1 C. C. A. 483; The Doris Eckhoff, 50 Fed. 134, 1 C. C. A. 494. Of course, the tow may also be liable for failure to perform duties lying upon it in matters under its control. Pederson v. Spreckles, 87 Fed. 938, 31 C. C. A. 308; The Lyndhurst (D. C.) 92 Fed. 681; The Nettie L. Tice (D. C.) 110 Fed. 461.

The towing hawser belonged to the barges, would have to be shortened on them, and could not be shortened unless the tug stopped. The barges were as helpless in respect to shortening hawsers in compliance with article 1, as they would have been in respect to bunching the tow under article 5 of the regulations.

Perhaps the barges would have been at fault if they had expressly agreed to tow with the hawsers in violation of the regulations, or

if they had submitted to doing so in a long course of business, or if they had submitted in a single case where they could have prevented it. This supposes a power to prevent the violation which does not exist in this case. It is said, however, that the failure to protest by signal to the tug establishes an agreement on the part of the barges to violate the law. The purpose of a protest is to put the party responsible for the act protested against at fault, which was not necessary as the tug was plainly at fault. If the barges were also at fault, a protest would not relieve them; and if they were not at fault, it would have been of no use whatever. Any one acquainted with watermen will appreciate how unlikely it would be for the captains of barges in tow to attempt to overrule the master of the tug as to the navigation or that any consideration whatever would be paid to their views.

Because we do not think the barges at fault, the decree is reversed, with directions to the court below to enter a decree awarding to the Hillside Coal & Iron Company, owner of the barges, its damages, with interest and costs, against the Manhattan and the North America and their stipulators, and to the Maine Steamship Company, owner of the Manhattan, one-half its damages, with interest and costs, against the North America and its stipulators.

JAROWSKI v. HAMBURG-AMERICAN PACKET CO.

(Circuit Court of Appeals, Second Circuit. March 8, 1911.)

No. 273.

APPEAL AND ERROR (§ 355*)—TIME OF TAKING PROCEEDINGS—EXTENSION OF TIME BY CONSENT OF PARTIES—ESTOPPEL.

Where the attorneys for a party, having by stipulation retained the papers in error proceedings presented to them for examination and acceptance until after the expiration of the six months allowed for taking such proceedings, stipulated that they might be filed *nunc pro tunc*, argued the case in the appellate court, and after reversal retried it in the court below without objection, they will not be heard to urge the invalidity of the entire error proceedings, because the writ was not sued out within the statutory time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1924, 1925; Dec. Dig. § 355.*]

In Error to the Circuit Court of the United States for the Southern District of New York.

Action at law by Beckie Jarowski against the Hamburg-American Packet Company. From the judgment, plaintiff brings error. On motion by defendant to vacate order found in 182 Fed. 320, 104 C. C. A. 548. Denied.

On motion by the defendant to vacate and set aside an order of this court, made December 15, 1910, denying the defendant's motion to vacate the judgment of this court reversing the judgment of the Circuit Court entered March 3, 1909, and to expunge from the records of this court the judgment of reversal entered June 24, 1910. The defendant also asks this court to declare

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

null and void its mandate to the Circuit Court, dated June 25, 1910, and to dismiss the writ of error sought to be prosecuted by the plaintiff from the judgment of the Circuit Court, entered March 3, 1909, dismissing the complaint.

F. M. Brown and A. L. Brougham, for the motion.

Jacob Manheim, opposed.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. In May, 1902, the plaintiff was seriously injured while a passenger on the steamship Columbia, owned by the defendant. In December, 1903, she began an action to recover damages for the injuries so received. The cause was tried in December, 1908, and the complaint was dismissed, and judgment entered March 3, 1909. The plaintiff sued out a writ of error dated November 1, 1909. On June 14, 1910, this court reversed the judgment, and on November 15, 1910, the action was again tried, and a verdict of \$7,000 for the plaintiff was found by the jury. On December 5, 1910, the defendant made a motion similar to the one in hand, asking that all proceedings subsequent to the entry of the first judgment dismissing the complaint be set aside as void, because the writ of error to review the said judgment was not sued out within six months after the entry of the judgment. The motion was denied by this court. The present motion, involving the same fundamental question, was made without permission of this court.

It is true that the writ of error was not sued out within six months; but the papers submitted by the plaintiff abundantly show that long prior to the expiration of that period the plaintiff's attorney presented the papers on appeal, including the writ of error, to the defendant's attorney for the purpose of having him examine and accept them. The time to consider these papers was extended for the accommodation of the defendant's attorney by written stipulation until after the expiration of the six months from March 3, 1909. When the papers were presented for filing, the attention of the plaintiff's attorney was called to the fact that the time had expired by the clerk of the Circuit Court. He immediately notified the attorney for the defendant, who expressed regret that such a situation had been brought about by an effort to accommodate him, and suggested and signed a stipulation that the writ of error might be filed *nunc pro tunc*. Without characterizing the action of the defendant's attorneys in making these motions, we deem it sufficient to say that, if they intended to rely upon the objection now made, they should have taken it before the argument on the appeal in this court and before the new trial. Their action, in legal effect, was a consent to the acceptance of the situation which was brought about by their failure to present the question when the plaintiff's rights might have been otherwise protected. Having appeared and argued the appeal, permitted the judgment of reversal to be entered, and taken part in the new trial without objection, they cannot avoid the adverse verdict by contending that the former judgment, that by their conduct they recognized as having been properly reversed, is still binding on the parties.

The motion is denied.

HILLARD v. REMINGTON TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 131.

1. PATENTS (§ 112*)—SUITS FOR INFRINGEMENT—EFFECT OF INTERFERENCE PROCEEDINGS.

The question in interference proceedings in the Patent Office is as to which of the contestants was the prior inventor, invention being conceded; and in subsequent litigation the unsuccessful party is not estopped to deny invention, or even priority of invention, although there is a strong presumption that the successful contestant was the prior inventor, which can only be overcome by clear and convincing proof.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162-165; Dec. Dig. § 112.*]

2. PATENTS (§ 328*)—INFRINGEMENT—LINE-LOCK MECHANISM FOR TYPEWRITERS.

The Hillard patent, No. 791,420, for improvements in typewriting machines, claims 8, 11, 12, and 15, which relate to means for releasing the line-lock, if conceded to involve invention, cover specific improvements only on the existing art, and must be limited to the improvements described. As so limited, they are not infringed by the devices of the Webb patents, Nos. 599,428 and 618,154.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Frederic W. Hillard against the Remington Typewriter Company. From a decree holding valid and infringed claims numbered 8, 11, 12, and 15 of letters patent No. 791,420, granted to Frederic W. Hillard for improvements in typewriting machines, defendant appeals. Reversed.

Frederick P. Fish, H. D. Donnelly, and W. W. Dodge, for appellant.

Kerr, Page, Cooper & Hayward (Thomas B. Kerr and John C. Kerr, of counsel), for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The patent in controversy was granted May 30, 1905, for an improvement in typewriters. It relates to line-locks, or, in other words, to the mechanism whereby the keys are automatically locked, at a predetermined point in the line of print, to notify the operator of the approach of the end of the line and thus prevent him from printing the letters one over the other at that point.

The claims in question relate to the second of the improvements described in the patent, viz., the means for releasing the line-lock. The line-lock lever is mounted at the extreme left of the rack bar, as shown in Fig. 1, and can be vibrated up and down upon the stud on which it is pivoted. The longer and heavier arm of this lever constitutes the line-lock stop which is prevented from dropping down and is held in normal position by a pin. When the carriage has been advanced sufficiently to bring the stop into the obstructive position which prevents further writing, by pressing down the key, which is the shorter and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

lighter end of the lever, the longer end is raised above the arm on the rocker frame and writing can be resumed. To accomplish this result would seem to be an exceedingly simple mechanical problem. A lever is pivoted so that one end is longer than the other. Naturally the heavy end falls and the light end rises. If it be desired to raise the heavy end two ways of accomplishing this result would suggest themselves to the mechanic: First, to elevate the long end; and, second, to depress the short end. The second would be the simpler method and, if the operation were to be frequently repeated, it would be advantageous to form the short end into a key. Once given the lever and the necessity for raising the heavy end, the means for accomplishing the desired result would occur to the veriest tyro in mechanics.

As this lever is at the rear of the machine and not easily reached or seen by the operator, the patentee has provided what he calls "a more convenient means for tilting the line-lock stop out of its obstructive position to unlock the type keys." For this purpose he has provided at the left hand end of the top bank of keys an independent release key which, by a train of connecting mechanism, pushes up the heavy end of the line-lock lever when the release key is depressed by the finger of the operator. In the one case the line-lock lever is raised by pressing down its short end and in the other it is raised by pressing up its long end. In the first instance the finger of the operator falls directly on the key mounted on the short end of the lever itself and in the second it falls on a key in the keyboard which by a simple arrangement of connecting levers lifts up the long end of the line-lock lever.

The specification describes and shows the independent key, which is a key having an operative connection with the line-lock when the latter is in its obstructive position and means operated by the key for independently moving the line-lock out of its obstructive position. The patentee states that prior to his application means for unlocking the line-lock were in use, but such mechanism did not include an independent key. The specification concedes that in one of the prior structures the key which shifts the carriage from lower to upper case may be utilized to unlock the line-lock, but it is contended that the carriage shifting key is not an independent key. The principal advantage of the patented key is alleged to be that it performs its office without the performance of any other essential function and is thus more correct and accurate. The patented key is one which, when performing its function of a line-lock releaser, is incapable of performing any other function in the operation of writing and consists in certain novel features of construction of the key which are not limited to any particular form of line-lock. The drawings show two examples of release keys, one mounted on the carriage and the other on the keyboard. It is unnecessary to analyze all the claims in issue. Claim 8 is as follows:

"In a typewriter line-dock the combination of two stops, one of which is mounted in the escapement and movable therewith and the other of which is moved with the carriage into position to obstruct the escapement-stop, a key, a line-lock releaser, and a connection between the key and the line-lock releaser whereby the releaser is controlled by the key substantially as described."

The claim consists in a typewriter line-lock of a combination having the following elements: First: A stop, mounted in the escapement and movable therewith. Second: A stop moved with the carriage into a position to obstruct the escapement stop. Third: A key. Fourth: A line-lock releaser. Fifth: Connection between the key and the releaser for controlling the releaser by the key.

Claim 15 is substantially similar to claim 8.

Claim 11 is as follows:

"In a typewriter, the combination with a power-driven carriage, of a power-driven stop and a key-driven stop, brought into obstructive position with each other on the movement of the carriage, an independent key normally free from the carriage and means controlled thereby for positively removing the power-driven stop from its obstructive position, substantially as described."

The claim contains the following elements in a typewriter combination: First: A power-driven stop and a key-driven stop brought into obstructive position with each other, on the movement of the carriage. Second: An independent key normally free from the carriage. Third: Means controlled by the key for positively removing the power-driven stop from its obstructive position.

Claim 12 is substantially similar to claim 11.

The defenses are lack of novelty and invention and noninfringement. Much was said in the Circuit Court and in this court, both in the briefs and orally, regarding the Brooks-Hillard interference, which was finally decided in favor of the latter. We do not understand, however, that it has any important bearing upon the present issues.

It was decided by the Circuit Court that no privity was legally established between Brooks and this defendant and the complainant expressly states in his brief as follows:

"But we have not and do not now claim estoppel by reason of the facts proven; only that they are persuasive of invention, and, as against the defendant, greatly increase the presumption of the same created by the grant of the patent."

And again:

"We make no claim to estoppel. It is well settled that the defeated party to an interference has the right to contest in the courts not only the question of invention, but even that of priority of invention."

[1] We so understand the law. The question in interference proceedings is which of the contestants was the prior inventor. The question of invention is not involved and is in fact conceded. Each party contends for the prize of being declared the first inventor. No one, with the ordinary brain development, would offer proof to destroy his adversary's claims and his own as well. Both believe an invention has been made; each claims to be the inventor and when the decision is finally made it carries a strong presumption in favor of the successful party. As between Brooks and his privies and Hillard, the latter is to be deemed the prior inventor until that presumption is overcome by clear and convincing proof. *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657. We see no reason why the defendant may not avail itself fully of the defenses of lack of invention and non-infringement.

Hillard's application was filed January 9, 1893; no earlier date of invention has been shown. In May, 1892, a patent was granted to Clinton & McNamara showing a line-lock and releaser for accomplishing the same result as in the patent in suit. The line-lock is released by pushing one end of a lever and thus removing the hook at the other end from obstructive engagement with the stop.

Williams patent No. 501,753 shows a line-lock which arrests the movement of the keys when the carriage is at or near the end of its movement. The line-lock is released by a rocking key which disconnects the parts and unlocks the lock.

W. S. Cress also obtained a patent in 1893 on an application filed June 8, 1892. He says:

"Another object of the invention is to provide an improved attachment for typewriting machines which will stop the operation of the key levers when a proper number of words has been written upon a line."

The attachment was applied to a Caligraph typewriter, but the patentee says:

"When a word, or a portion of a word is to be added at the end of a line, the attachment may be readily manipulated in a manner to admit of the insertion of such matter. The attachment is capable of application to any machine, the principal operative parts being adjustable."

To release the line-lock Cress has a key at the front of the machine connected by mechanism to a locking bar. When the key is pressed down the bar is rocked into a horizontal position and the key levers are unlocked. Other instances might be cited where, prior to Hillard, devices intended to release the line-lock are described and shown, but in our view it is unnecessary to multiply these examples. The record proves beyond question that prior to the earliest date which can be assigned to Hillard's alleged invention, line-locks and lock releasers were well known. Indeed, the line-lock could not be used without the releaser. A lock implies a key and no lock is useful without some means for unlocking it. All the prior inventors understood this, of course, and each provided mechanism for releasing the line-lock. All accomplished the same result by means similar in principle but differing in detail; some of the differences being attributable to the character of the machine to which the devices were applied. Bearing in mind that the claims in controversy do not relate to the line-lock, but to the releaser, and that releasers were well known, the question for us to determine is—Did it require an exercise of the inventive faculties to produce the combinations of the claims, and, if so, can they, in view of the prior art, be construed to cover the defendant's construction?

In approaching this subject it is wise to disabuse the mind of the notion that an exceptionally high order of intellect is required because the improvements relate to typewriters. The Remington machines in evidence have a notice prominently printed thereon stating that "this machine is protected by 67 American and foreign patents." There is danger that the court in contemplating a machine so complicated and delicately organized may become imbued with the idea that no changes or additions can be made unless the party making them is possessed

of an extraordinary degree of ingenuity. Mechanical skill is not converted into invention because it is applied to a structure showing the highest degree of inventive genius. If the problem be to construct a key for a lock, it can make no difference whether the lock be attached to a typewriter or an ice box.

Turning now to the patent, the first form of releaser described is the key 25, which when depressed tilts the line-lock stop 24 above the arm 21. If the complainant's illustrative model, which is a Remington machine with the Hillard line-lock attached, correctly shows the patented devices, and it seems to do so, it is difficult to discover invention in the means employed for lifting the line-lock stop 24 above the arm 21. A neophyte would see at a glance that the arm 21 will not rock until the end of the lever at the right of the fulcrum is lifted up. As before stated, there are but two ways of doing this, both of them perfectly obvious—one is to push up the obstructing end, the other is to press down the opposite end. Given the line-lock and the necessity for opening it, we are unable to see how one who adopts the only possible methods of doing this can be regarded as an inventor. To form the short end of the lever into a key convenient for the finger of the operator was but an ordinary exhibition of mechanical skill. The other method of pushing up the long end of the lever by means of a key located in the keyboard is treated by the patentee, apparently, as an equivalent. He says, in substance, that it is "a more convenient means" for accomplishing the same result. If there be no invention in pressing down the short end of the lever, it is not easy to understand how there can be invention in pressing up the long end. In any event, we can see nothing patentable in moving the lever up or down by means of a key in the keyboard.

The problem is one which is continually presented where it is desirable to bring an operating part nearer to the hand of the operator. Similar expedients have been constantly resorted to. If a door be closed by a spring lock operated from the inside and the inmate of the room desires to open it to a visitor without rising from his desk, he naturally rigs up a connection by cords and pulleys and releases the lock by pulling on the cords. If it be desired to open or close a transom or a window which cannot be reached by hand, nothing is more common than the resort to pulleys and cords, cranks and levers. Such methods have been in vogue for years. The patentee conceived the idea that it would be more convenient to have the operating key located where it could be seen and reached by the operator while seated, and he therefore placed it in the keyboard connecting it by a well-known train of mechanism with the line-lock stop. It did not require an exercise of "the intuitive faculty of the mind" to do this. The writer had occasion to deal with a somewhat similar situation in Mann's Boudoir Car Co. v. Monarch Sleeping Car Co. (C. C.) 34 Fed. 130. See, also, Aron v. R. R. Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; Stephenson v. Brooklyn R. R. Co., 114 U. S. 149, 5 Sup. Ct. 777, 29 L. Ed. 58. If, however, the claims can be sustained at all it is clear, in view of the existing art, that it can only be for the mechanism described and shown—a broad construction is impossible. The most liberal view that can be taken of the claims is that they cover improve-

ments upon the then existing art. The defendant does not use these improvements.

The defendant's machines are built under patents granted to George B. Webb Nos. 599,428 and 618,154 and it is asserted that the alleged infringing devices have been in commercial use for 13 years. It is unnecessary to enter upon a minute description of the defendant's line-lock and release devices for the reason that they are exceedingly complicated and difficult to understand except in conjunction with the drawings or model. Some of the differences between the complainant's and defendant's structures are pointed out by Mr. Browne, the defendant's expert, as follows:

"In the defendant's machine, when the push knob is pressed in to rock the bar 28 and lift the obstructing stop 26 above the escapement stop to unlock the line the effect is to disconnect the pendant 33 from the ear 32 so that the pressure on the push knob can be immediately released and the further forward movement of the carriage can thereafter continue without there being any re-locking and without maintaining any further pressure on the push knob. This differs from the Hillard construction wherein the finger must be kept pressed on the key 27 (or key 25) during the further advance of the carriage."

"Defendant's releasing mechanism has accordingly important differences over the Hillard mechanism. Defendant's releaser and obstructing stop always maintain the same relation to each other and always move together; when the release has once been effected no further holding of the push knob 48 is necessary; and the restoration of the obstructing stop to its normal position is aided by a spring. On the other hand, in the Hillard mechanism the obstructing stop and releaser are independent, so that the stop moves independently of the releaser and is normally out of reach thereof; when the release has been effected the key 27 must be held down by the finger during any further forward movement of the carriage; and the restoration of the carriage or obstructing stop to its normal position is effected solely by gravity."

It thus sufficiently appears that the defendant does not use the Hillard devices, but a combination covered by patents owned by it which releases the line-lock, it is true, but by means essentially different and which are not covered by the claims in suit unless given a construction unwarranted by the prior art.

The decree of the Circuit Court is reversed with costs.

ASHLEY v. SAMUEL C. TATUM CO.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 213.

1. PATENTS (§ 116*)—DESIGN PATENTS—SUFFICIENCY OF DESCRIPTION.

A patent for a design is not invalid because it does not contain a written description of the design, although its absence may have a bearing upon the construction of the patent, and therefore on the question of infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 168½; Dec. Dig. § 116.*]

2. PATENTS (§ 328*)—DESIGNS—INFRINGEMENT—DESIGN FOR INKSTAND.

The Ashley design patent, No. 37,504, for a design for an inkstand, contains no written description, but covers "the ornamental design for an inkstand as shown," while the drawing shows a low square base, sur-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

mounted by a low dome, of a diameter somewhat less than the side of the base; the entire surface being plain, and without any applied ornamentation. The absence of such ornamentation must therefore be considered an essential element of the design, and it is not infringed by the design of the Hilles patent, No. 40,125, which shows such surface ornamentation.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Suit in equity by Frank M. Ashley against the Samuel C. Tatum Company. Decree for complainant (181 Fed. 840), and defendant appeals. Reversed.

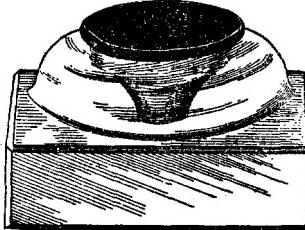
The suit was brought for infringement of complainant's design patent No. 37,504, granted to him August 8, 1905, for design for an inkstand. Defendant's inkstand is made under patent to S. E. Hilles, assignor to defendant, granted July 6, 1909, No. 40,125, for design for an inkstand.

Wood & Wood (E. R. Wood, of counsel), for appellant.

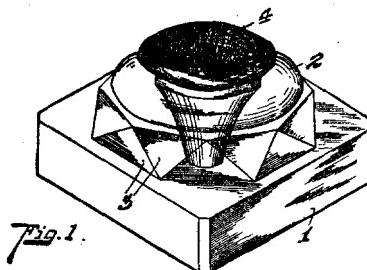
F. M. Ashley and Albert T. Scharps, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Complainant's patent contains no written description of his invention. It merely states that the figure of the drawing is "a plan view of an inkstand, showing my new design," and claims "the ornamental design for an inkstand, as shown." This design is here given:



The defendant's patent contains a description, which need not be quoted from, and a view of the design, which is here shown:



The two inkstands, when produced in glass, which seems to be the only material used for them, although neither patent refers to material, look much more alike than do the two drawings.

[1] The statute (Rev. St. § 4933 [U. S. Comp. St. 1901, p. 3399]) provides that "all the regulations and provisions which apply to obtaining or protecting patents for inventions or discoveries, not inconsistent with the provisions of this title shall apply to patents for designs." This reference includes section 4888 (page 3383), which provides that before any inventor shall receive a patent for his invention he shall "file in the Patent Office a written description of the same." This would seem to require that an application for a patent for a new design should include a "written description" of such design, and appellant contends that, since complainant's patent contains no such written description, it must be held void. If the proposition were a new one, the argument might be persuasive, especially in view of the unfortunate results that sometimes follow when the drawing is not accompanied by a written description. But in Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. 946, 30 L. Ed. 63, precisely this point was raised, and the court held that the patent was not void because of its failure to contain a written description. This assignment of error is therefore without merit.

In the case at bar a written description is absent by reason of the action of the Patent Office. How that came about may be briefly stated. In the Dobson Case the design was one to be applied to carpeting, and it was represented by a photographic illustration. This illustration was, as the court states, "a six-inch square, containing a single figure or design." Construing the claim, the court held that it "covered the design as a whole, and not any part of it as a part; and it is to be tested as a whole—as to infringement." The samples of complainant's and defendant's carpets which were offered in the court below were not before the Supreme Court, which found in the evidence of two experts sufficient to sustain the finding of the Circuit Court. Apparently the alleged infringement was of such a character that the case presented no difficulty of the sort experienced in Tompkins v. New York Co., *infra*.

Subsequently to the decision in the Dobson Case, the Commissioner of Patents rendered a decision (*Ex parte Mygatt*, 117 O. G. 598) holding that written descriptions in design patents were "not only unnecessary, but also confusing and misleading," and refusing to allow the applicant to place in the record a written description of his design. The Court of Appeals of the District of Columbia also held that in such patents "a superadded verbal description is generally useless and oftentimes confusing." *Ex parte Freeman*, 109 O. G. 1339.

In conformity to these decisions the Patent Office in 1904, before Ashley's patent was granted, made a rule prohibiting applicants for design patents from insisting upon a written specification as a part of their patents. This went far beyond the Dobson Case. All that the Supreme Court had held was that, if the inventor did not supplement his drawing with a written description, he should not thereby lose his patent; his "design" as shown being "tested as a whole." But by the arbitrary action of the Patent Office the inventor was deprived of the opportunity of adding a written description, even in cases where it might be essential to the preservation of his rights, or

to the proper enlightenment of the public as to what the patent covered.

Subsequently the question came before the Court of Appeals for the District of Columbia in *Ex parte Mygatt*, 121 O. G. 1676, and the practice of the Patent Office was condemned. Since then the rule has been abrogated, but complainant's patent was issued during the period when it was in force. The necessity of having a written description, in some cases even of a flat ornamental design applied to a plain surface, became apparent in a case which came before this court in 1907. *Tompkins Co. v. N. Y. Woven Wire Co.*, 159 Fed. 133, 86 C. C. A. 323.

[2] The absence of such a description in the case at bar has a necessary bearing upon the construction of the patent, and consequently upon the question of infringement. Referring to the drawing, we find that the effect upon the eye is produced by several elements. The form of the inkstand itself is prominent. There is a flat, broad base, surmounted by a low dome; the relative proportions of the parts presenting an artistic and pleasing effect. Moreover, the proportions, indicating, as they do, a low, broad, heavy base with a low height, suggest the adaptability of the structure to the purpose intended, as being calculated to insure it against accident and to keep it near the table. The inkstand, also, as indicated in the drawing, is devoid of any design applied to any part of its surface. In the language of the District Judge, "it makes no shallow appeal to the senses by any effort at inconsequential ornament." Finally it shows a dip tube colored black; the evidence indicating that prior dip tubes had always been of glass the same color as the rest of the structure.

The manufacture of glass inkstands of this general character has been going on for very many years, and the chance of any broadly new design being produced would seem to be slight. Nevertheless the exhibits in the case indicate that complainant's design shows a radical and distinctive change in type from those which preceded it; its dominant feature being the contour and relative proportions of parts, rather than the presence or absence of any applied ornamentation. It may be that upon the state of the art at the date of his application complainant would have been entitled to a claim calculated to secure to him the dominant feature of his device, with or without ornamentation, unless, indeed, the ornamentation was carried to such an extent as substantially to modify the effect produced by the contour and proportions. But there is no such claim, and no written description upon which it could be based. The circumstance that both are absent, possibly solely because the Patent Office refused to allow any written description to be filed, does not give this court the power to write such a description and claim into the patent. We must construe the claim according to the rule laid down in the Dobson Case as "covering the design as a whole, and not any part of it as a part; (testing it) as a whole—as to infringement."

We cannot, therefore, eliminate the element shown in the drawing, viz., the absence of any applied ornamentation. That element must

be held to be as essential as any other element. In defendant's inkstand, the general contour of base and dome in the same relative proportions is found; but around the lower half of the dome there is a series of circumferentially displayed facets which effect a substantial modification of appearance of the inkstand by suggesting the idea that it is made out of cut glass, instead of pressed glass. The difference between the two is readily apparent to any one—expert, or nonexpert—and there seems no likelihood that, whether looked at together or apart, the one could be mistaken for the other. In our opinion infringement of the claim has not been made out.

The decree is reversed, with costs, and cause remanded, with instruction to dismiss the bill, with costs.

MYGATT v. M. SCHAFER-FLAUM CO.

(Circuit Court, S. D. New York. February 8, 1911.)

1. PATENTS (§ 328*)—INFRINGEMENT—ELECTRIC LIGHT REFLECTOR.

The Mygatt patent, No. 821,306, for a prismatic reflector for electric lights composed of a single piece of glass having external reflecting prisms parts of which are cut away in definite patterns to permit the light to pass through, in view of the prior art, cannot be construed to cover any interruption of the reflecting prisms in definite patterns, but must be limited to the particular patterns shown. As so construed, *held* not infringed.

2. PATENTS (§ 328*)—INFRINGEMENT—DESIGN FOR LAMP REFLECTOR.

The Mygatt design patent, No. 37,983, for a design for a reflector for electric lights, *held* infringed.

In Equity. Suit by Otis A. Mygatt against the M. Schaffer-Flaum Company for infringement of patent No. 821,306 for a prismatic reflector, and design patent No. 37,983 for a design for a reflector. Decree for defendant on the first patent, and for complainant on the second.

See, also, 181 Fed. 399.

Mr. Taylor and Mr. Jackson, for complainant.

Mr. Dyrenforth and Mr. Lee, for defendant.

HOUGH, District Judge. While it is difficult, without reference to rather elaborate drawings, to describe with accuracy the object said to infringe the patents in suit, and to be the subject-matter of the same, it is admittedly a quite ordinary form of reflector-shade for electric lights, usually placed above the light bulb, and composed of a single piece of glass.

The mechanical patent relates to what this type of reflector does, and the design patent to how one particular reflector looks.

[1] In the language of the specification, the object of the mechanical invention is:

"To produce a reflector composed of glass in which reflection is accomplished by external prisms, but with the prismatic surface modified by the omission of parts of the reflecting prisms, the portions from the reflecting

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

prisms which are omitted permitting the passage of light. Where the reflecting prisms are omitted, the outer surface of the reflector may have light-directing facets, so that the light rays which pass through the glass are directed in determined directions."

Such being the object, these facts are then asserted by the patentee:

"By mutilating or removing parts of some of the prisms, light rays will be permitted to pass through the reflector at these parts, thus illuminating outside the reflector. By forming the outer surface of these parts of the reflector into light transmitting and directing facets or prisms instead of light returning or reflecting prisms, the light rays which pass through the reflector will be directed or distributed as desired. Such external illumination will be of course at the expense of the device as a complete reflector."

The result of these facets, and the attainment of the desired object, is thus described: The light-directing surfaces will "appear as bright bands, or as rows, or bright beadlike brilliants, or they may be made to represent characters." So that, finally:

"Highly-ornamental decorative effects may be produced by the present invention, as well as more complete control of the light rays. By permitting more or less light rays to pass through the reflector almost any distribution of light may be effected without changing the form of the reflector body."

The drawings accompanying the specification exhibit patterns of a very marked and definite character, placed upon the external reflector surface by cutting the reflector prisms. When not illuminated, the cuts or notches form a pattern; when illuminated, it would seem probable that such pattern would appear upon the outer surface outlined in points of light.

The claim relied upon is as follows:

"A reflector composed of a single piece of glass in form of a frustum and having an open mouth, the outer surface having approximately vertical reflecting prisms by which light rays are returned and directed out at the open mouth, said reflecting prisms interrupted in parts in definite patterns, whereby definite portions of light, from definite parts of the reflector body, are permitted to pass through the reflector."

It must be admitted that this invention is to be read and construed in the light of (especially) the De Grand (British) patent, No. 553, of 1857; the Blondel patent, No. 563,836; and complainant's own reissued patent, No. 12,358. Without reference to any other patents, or to standard scientific works, the enumerated documents show a complete apprehension of the nature of light reflection by and transmission through integral glass shades or covers for light sources.

The complainant therefore knew—and the public could use the knowledge—that any integral glass shade might by any one be covered externally with a series of reflecting prisms, which if properly arranged according to the known laws of optics would cause about 85 per cent. of the light from the light source to be reflected and allow about 15 per cent. to pass through. It was public knowledge also that the amount of light passing through might be greatly increased by changing the number, shape, and arrangement of the external reflecting prisms.

There was therefore comparatively small room left for the exercise of inventive faculty.

It was thought in Mygatt v. Gilbert (C. C.) 181 Fed. 400, that, when the reissued patent above mentioned and then in suit was taken out, there was room for invention in discovering a particular "combination of diffusion and reflection in an integral glass shade reflector"; but there certainly was not even then an opportunity to claim as an invention either the fact that an integral glass shade could be made both to diffuse and reflect, or any embodiment of that single fact. And confessedly this complainant's own earlier patent further narrowed the field for himself as well as for others.

When the patent in suit was applied for, it was necessary, therefore, to show as an addition to the sum of human knowledge, not any combination of diffusion and reflection, but some particular combination or arrangement of the same not only useful and new, but sufficiently ingenious to merit the name and receive the reward of invention. It seems evident from the quoted parts of his specification that what Mr. Mygatt had in mind in applying for this patent was this: He recognized the presumed public knowledge of the laws of optics, and recognized also what others as well as himself had done in the way of integral glass shades or reflectors, so that what he showed in his specification as new was the creation, by carefully arranged interruptions of prisms of certain devices or ornaments which would primarily attract and please the eye, would be caused or created by carefully directed light rays, and would incidentally increase transmitted illuminating rays as distinguished from reflected ones. This thought is fairly expressed in the claim above recited, for it is stated that the reflecting prisms are interrupted "in definite patterns."

The defendants have admittedly made or sold an integral glass shade or reflector; this they had a right to do. But they have also "interrupted" their reflecting prisms by a series of notches uniformly distributed along the top of each prism so that each of said prisms presents a serrated appearance. The complainant does not show in his application for the patent in suit any such construction as this; yet it is urged that defendant infringes because the effect of the serrations aforesaid is to "interrupt" the reflecting prisms "in definite patterns," and that the result of such interruptions is that "definite portions of light from definite portions of the reflecting body are permitted to pass through the reflector."

This assertion is correct, if the patent is broad enough to cover any diffusion or additional transmission of light through an integral glass reflector by means of any series of interruptions or mutilations in or upon external reflecting prisms. The question therefore becomes this: Can the patent cover any definite pattern created by any prism interruptions, or only patterns of the kind shown and produced by the sort of interruptions or mutilations specifically shown in the application? I think this question is sharply raised by the claim of infringement pressed.

There is what may be called a pattern on the upper or outer surface of defendant's reflector. Such pattern is formed by nicks or notches which are shallow interruptions or mutilations of the prisms upon which they are placed. To be sure, this pattern does not resemble any

pattern shown in the application, nor do the notches bear any close resemblance to the carefully cut facets or subprisms shown therein. Yet the result obtained is to exhibit a bespangled or bejeweled appearance upon the outer surface of the reflector when a light source is placed beneath and there is an obvious increase in transmission of light as the result of *any* deformation of the external reflecting prisms. Therefore, if broadly construed, the claim can probably be read upon defendant's reflector-shade.

There are at least two objections to construing the patent as broadly as complainant desires:

First. If any system of interrupted external prisms in an integral glass reflector be covered by this patent, then the patent cannot stand in the light of the previous art, for shades or reflectors known and described both commercially and in patents as prismatically ornamented have been introduced in evidence in great numbers.

Second. If patterns of any but the pronounced and simple forms shown in the application are to be covered by this patent, then the patent is not operative, for it is admitted that the light source for which the reflector in question is designed is the electric bulb of commerce (whether Tungsten or Edison). That light source is not a point, but a line of considerable length, and, when the diffusion or transmission of light in definite patterns as claimed is attempted in any but large and simple forms, the operation becomes provedly impossible. It is true that a ray of light from a very small light source can be reflected or transmitted almost at will; but, when the source is an inch or more in length, every prism face in the reflector must either reflect or transmit a light ray from every point on the light source. When this is true, such large and simple patterns as are shown in complainant's application may (and I incline to think would) be exhibited as brilliantly illuminated on the reflector's exterior; but, where the pattern consists merely of a multitude of notches on reflecting prisms originally calculated to throw back into the interior of the shade about 85 per cent. of the light output, the result must be, and has been proven to be, what complainant calls a "spraying of the ceiling," and defendant a "beady or jeweled exterior appearance." Both descriptions are apt; but neither applies to a "definite pattern" permitting definite portions of light from definite parts of the reflector body to pass through the reflector.

As construed, no infringement is shown. It is therefore unnecessary to pursue the question of validity further.

[2] As to the design patent, there is no denial that, if it be valid, it is infringed, for a more palpable imitation it would be hard to discover.

The present complainant has protected by such patents, a surprising variety of shapes in light shades of every kind, some of which differ from each other very slightly.

Whether it be politic or wise to protect by the formidable name of patent such and so numerous variants of a familiar article is no concern of this court. The abuse of a statute should be corrected by legislation, not construction.

The rules of construction have been recently and well stated in Phoenix Knitting Works v. Bradley, etc., Co. (C. C.) 181 Fed. 163, and Ashley v. Tatum Co. (C. C.) 181 Fed. 841.

Within these rules I do not think the eye of the average purchaser would be deceived by any antecedent form, and, in so far as such matters rest on adjudicated cases, the forms considered in Mygatt v. Zalinski (C. C.) 138 Fed. 88, and in Mygatt v. McArthur (U. S. C. C. Mem. Feb. 7, 1906) 143 Fed. 348, were as clearly akin as are any here under consideration.

Bill dismissed as to the mechanical patent and sustained as to design patent. Neither party will recover costs to and including this hearing. Costs of the reference (if any) to complainant.

MEYERS v. SKINNER et al.

(Circuit Court, E. D. New York. February 8, 1911.)

PATENTS (§ 308*)—INFRINGEMENT—PRELIMINARY INJUNCTION—WRONGFUL USE BY COMPLAINANT AS GROUND FOR DISSOLUTION.

The wrongful use by a complainant of a preliminary injunction against infringement of a patent, by sending notices of the same to the trade and to customers of a defendant, together with letters which are misleading as to its scope and effect, and calculated to injure defendant's legitimate business, affords ground for dissolution of the injunction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 505; Dec. Dig. § 308.*]

In Equity. Suit by Willard F. Meyers against John R. Skinner, Percy C. Skinner, and John J. S. MacFarland. On motion by defendant MacFarland to vacate a preliminary injunction. Motion granted.

Henry D. Williams, for complainant.

Johnson & Galston, for defendants.

Grafton L. McGill, for defendant MacFarland.

CHATFIELD, District Judge. The defendant MacFarland is one of three defendants in an action for infringement of patent No. 932,488, covering a device or mold for casting steel teeth containing diamonds for sawing stone. In the infringement suit, an application was previously denied by this court for an injunction pendente lite. Meyers v. Skinner (C. C.) 179 Fed. 860. Subsequently testimony was taken, and it appearing that as to certain claims of the patent the question of validity had been substantiated, and, on the other hand, no use of the device shown in those claims had been proven, an injunction pendente lite as to those claims was entered by consent, while the time to take testimony as to the other claims was extended. The defendant MacFarland now asks to have the injunction pendente lite vacated, and the bill dismissed, upon the ground that the complainant has used this injunction for advertising purposes, and interfered with his business, in what he claims would be legitimate sales, even if the validity of the patent is admitted.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

As is shown by the opinion upon the previous motion, the patent has to do with a form of mold for casting diamond saw teeth, and neither the product nor the method of use of the mold is covered by the patent; nor is the patent itself capable of being made the basis of a universal or comprehensive license system, for other molds can be rightfully used. Contributory infringement could be based only upon actual knowledge of the parties infringing, or upon an interference with a consistently and uniformly effective control over some product or device which could not be obtained, unless under license from the patentee of the particular form of mold herein under consideration. A discussion of the question with relation to such a license system and machine patent can be found in the case of *Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co.* (C. C.) 172 Fed. 225, and need not be taken up on this motion.

The complainant has apparently used the injunction pendente lite, obtained by consent upon the claims referred to, for the purpose of advertising, and for the legitimate purpose of warning the trade generally, as well as individual customers of the defendants, that he will protect his rights under the patent against infringers, but has intimated that he will seek to establish rights against so-called contributory infringers. He has thus warned customers of the defendant MacFarland that the complainant will seek to prosecute and punish any purchaser or user of a product of any machine which infringes the patent in suit, even though the product be not covered by the patent.

Not only would it seem with reference to such a patent, that there is no basis upon the record as it stands for a warning against becoming contributory infringers, so far as parties are concerned, who do not knowingly assist or participate in or encourage the infringing use of the patent itself, but the general condition of the testimony, and the relation which the defendant MacFarland seems to have had with the acts claimed to be infringements by the complainant, do not seem to justify the use which has been made of the injunction obtained by consent.

Although the defendant MacFarland did, however, consent to the issuance of this injunction, upon claim by him that he had no intention of infringing in any way, and as the consent was given after the court had refused to grant such an injunction upon an unadjudicated patent, if diligent action was taken toward final hearing, it seems to the court that he (defendant MacFarland) is justified in asking that, so far as he is concerned, the injunction pendente lite be vacated, upon condition that the case be promptly completed. The complainant may have the right to ask for immediate restoration of the injunction, if any action occur on the part of MacFarland which would indicate an attempt on his part to make use of any device that can legitimately be held to infringe the claims in question, or to improperly advertise this opinion and decision, beyond making it known that the injunction pendente lite has been vacated as to MacFarland, unless he be guilty of evident infringement, assuming that the complainant's rights will be fully established, both as to validity or prior infringement.

The motion, in so far as it seeks a dismissal of the bill, should be denied, as this question does not go to the merits of the action at all.

In re GARTMAN.

(District Court, E. D. Pennsylvania. March 4, 1911.)

No. 3,681, in Bankruptcy.

1. BANKRUPTCY (§ 6*)—BANKRUPT ACT—AMENDMENT—EFFECT.

Bankr. Act July 1, 1898, c. 541, § 47, cl. 2, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840, in so far as it vested trustees in bankruptcy with the rights and remedies and powers of a creditor holding a lien by legal or equitable proceedings on the bankrupt's property, was not retroactive, and did not apply to a bankruptcy proceeding begun at the time the amendment took effect.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 2; Dec. Dig. § 6.*]

2. BANKRUPTCY (§ 140*)—PROPERTY CONDITIONALLY SOLD—RIGHTS OF BANKRUPT'S TRUSTEE.

Where a bankrupt at the time of his adjudication held certain personal property under a conditional sale free from fraud, his trustee acquired no better title than the bankrupt, and was therefore required to surrender the property to the unpaid seller, under the Pennsylvania rule that title reserved by the seller in a contract of conditional sale free from fraud until payment of the price is good against all the world, except creditors of the buyer who have acquired a lien on the property by levy or attachment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 199; Dec. Dig. § 140.*]

In the matter of bankruptcy proceedings against Jacob M. Gartman. On certificate of a referee to review an order denying an application of the L. D. Caulk Dental Depot for possession of certain personal property sold to the bankrupt under a conditional sale. Reversed.

Randolph Stauffer, for trustee.

J. Howard Reber, for claimant.

J. B. McPHERSON, District Judge. [1] The bankruptcy case in which this controversy arose was pending when the act of June 25, 1910 (36 Stat. 838, c. 412), took effect, and section 8 of that amending statute is therefore not applicable. [2] Deciding the question upon the law previously in force, it is only necessary to say that the attention of the referee was evidently not called to *Davis v. Crompton* (C. C. A., 3d Circuit) 20 Am. Bankr. Rep. 53, 158 Fed. 735, 85 C. C. A. 633. It was there determined that, even when goods are possessed by a bankrupt as vendee under a contract of conditional sale, his trustee ordinarily takes no better title than he himself has acquired. To quote the syllabus:

"The title reserved by the vendor in a Pennsylvania contract of conditional sale, free from fraud, until payment of the purchase money, is good against all the world, except as to creditors of the vendee who had acquired a lien by levy or attachment upon the property while it was in the possession of the vendee, and under section 70a (5) his trustee takes title subject to the superior title of the vendor."

Here the transaction was free from fraud in fact; there was no lien by levy or attachment; the contract was of the usual type, capa-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ble of being construed either as a bailment or a conditional sale; and, as the referee construed it to be a conditional sale, I accept his ruling as correct for the present purpose.

His order must be reversed; and (unless possession has already been given to the claimant) it is now ordered that the trustee deliver to the L. D. Caulk Dental Depot within 10 days the cabinet and artificial teeth in controversy. The costs of this proceeding to be paid out of the bankrupt estate.

In re GULICK.

Ex parte GULICK-HALLE CO.

(District Court, S. D. New York. March 9, 1911.)

1. FACTORS (§ 1*)—DEFINITION.

“Factors,” by general definition, are agents to whom property is consigned for sale.

[Ed. Note.—For other cases, see Factors, Cent. Dig. § 1; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 3, pp. 2640-2642; vol. 8, p. 7660.]

2. BANKRUPTCY (§ 426*)—DISCHARGE OF BANKRUPT—EFFECT AS TO FACTORS.

Factors, though sustaining an express fiduciary relation, are not excepted from discharge by the bankruptcy act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 799; Dec. Dig. § 426.*]

3. BANKRUPTCY (§ 391*)—CORPORATIONS—“OFFICERS”—TRUST RELATION—DISCHARGE.

Officers of a corporation, where they get control, with an attendant fiduciary obligation, of property of the corporation, are “officers,” within Bankr. Act July 1, 1898, c. 541, § 17, subd. 4, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3428), exempting from discharge debts created by misappropriation or defalcation while acting as an “officer,” so that a continuance of a suit in a state court against corporate officers for the value of corporate property misappropriated by them will not be stayed on the application of the officers who had been adjudicated bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 637-655; Dec. Dig. § 391.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4933-4951; vol. 8, p. 7737.]

In the matter of Herbert Gulick. Application for an order enjoining the Gulick-Halle Company from further prosecuting certain actions in the state court between itself as plaintiff and the bankrupt as defendant. This order was obtained by the bankrupt on February 6, 1911, on the strength of the adjudication ex parte on the voluntary bankruptcy petition filed that day by the petitioner and the schedules thereto annexed. Motion papers included the amended complaint and answer of only one of the four state court actions, as to which the bankruptcy court was asked to vacate the stay, to recover for the alleged wrongful removal by Gulick, an officer of the corporation, of card indexes, correspondence, etc., vital to the continuance of the corporation’s business, and prayed for an accounting; it being claimed by the movant that the state court action was not one for a debt from

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes

which a discharge in bankruptcy would release the bankrupt, but that it was within the exceptions contained in Bankr. Act, § 17, subd. 4. Stay vacated until an interlocutory decree is entered, with leave to plaintiff thereupon to apply for further relief.

Olcott, Gruber, Bonynge & McManus, for bankrupt.
Root, Clark & Bird, for Gulick-Halle Co.

HAND, District Judge. I am by no means certain that I know what was meant in Chapman v. Forsyth, 2 How. 202, 208, 11 L. Ed. 236, by the phrases "express" and "technical" trusts which were alone covered by the act of 1841 (Act Aug. 19, 1841, c. 9, 5 Stat. 440). That case and that distinction has been the rule of construction under the act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) in Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565, and the act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]) in Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, in spite of changes in form in the phrase itself. It cannot mean that any relation of fiduciary and beneficiary is "express" which arises by express agreement of the parties, because agents become such usually by express agreement. It must mean, I think, either that the relation *ex vi termini* necessarily presupposed the holding of the beneficiary's property by the fiduciary, or that there was an express agreement to that effect. That would cover the cases of guardians, executors, and trustees, but not of agents or brokers, who may or may not have property of their principal in their possession. Yet it would cover the case of factors, who by general definition are agents to whom property is consigned for sale, and who are nevertheless not excepted from discharge. Chapman v. Forsyth, *supra*.

Whatever may be the true line of distinction, express trusts cannot extend to those in which the fiduciary, merely by virtue of his place, may or may not hold property of the beneficiary. In such cases the obligation arises from the incidental or implied obligations arising in the specific conduct of the business, and not from the agreement expressed by the assumption of the relation. The officers of a corporation—certainly the vice president and secretary—are not express fiduciaries in that sense. Their duties do not necessarily cover the control or custody of property, any more than do those of an agent or a broker. It is true that they may incidentally get such control or custody with an attendant fiduciary obligation; but, if they do, the obligation is implied from their representative relations to the principal, like that of a broker, and it is not inherent in their office as such.

Therefore, if the line is, as it certainly in fact is, between express and implied obligations, I cannot think that the officer of a corporation who gets possession of its property is within the clause. In that respect, I should not feel disposed to follow Harper v. Rankin, 141 Fed. 626, 72 C. C. A. 320. Still the question remains whether a corporation officer is an "officer" within the clause. I can see no answer to Judge McDowell's reasoning when Harper v. Rankin came before him in first instance. *Re Harper*, 133 Fed. 970. The words had been "public officer" in the act of 1841 and the act of 1867, and the change

has presumably some significance. As the restrictive adjective was stricken out, the intent must have been, if there was a change at all, to include such officers as were not public. Such officers can only be officers of private corporations or associations, and I think that this is what was meant. Certainly it is undesirable to look too scrupulously for exceptions in the natural meaning of the clause. There is no reason to strain the words, so as to protect those who avowedly are guilty of fraud, embezzlement, misappropriation, or defalcation. The "peculiar modes and habits of business" prevailing amongst our people (*Hennequin v. Clews*, 111 U. S. 676, 683 [4 Sup. Ct. 576, 580, 28 L. Ed. 565]) do not, I trust, involve any inevitable predilection for the preservation of debts arising from the abuse of trust and confidence, and, where there is a fair possibility for difference of opinion, a court ought surely to construe the statute contra spoliatorem. Although the question cannot be said to be free from doubt, the chances all seem to be that by the change Congress intended to widen the scope of section 17 (4). I shall follow *Re Harper*, *supra*, and vacate the stay.

However, the complaint is so broad that within its terms there may be a recovery which includes other claims than for the property misappropriated. That cannot be successfully considered until the extent of the accounting has been ascertained by the interlocutory decree, which shall fix its scope. The stay will therefore only allow prosecution till the entry of an interlocutory decree. If that contain provision for accounting for anything but the property misappropriated, or its proceeds, I shall have to stay an accounting pro tanto, or at least make some other provision. I cannot say that he may not be held liable for sums of money which cannot fairly be deemed the proceeds of the property misappropriated. The extent of the accounting will be for the state court, if it decides for the plaintiff at all.

Let the stay be vacated till an interlocutory decree is entered, with leave to the plaintiff thereupon to apply to this court for further relief.

In re COURTENAY MERCANTILE CO.

(District Court, D. North Dakota. March 27, 1911.)

1. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 39*)—RESTRICTIVE PROVISIONS—EFFECT.

An assignment for the benefit of creditors, restricting its benefits to such creditors as would assent to the same and consent to receive dividends thereunder in satisfaction of their claims, was valid as between the parties, and could only be assailed by nonconsenting creditors, whose rights were thereby prejudiced.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Cent. Dig. § 155; Dec. Dig. § 39.*]

2. BANKRUPTCY (§ 60*)—ACT OF BANKRUPTCY—"GENERAL ASSIGNMENT FOR THE BENEFIT OF CREDITORS"—RESTRICTIVE ASSIGNMENT.

An assignment of all of a debtor's property to an assignee to convert into money and apply to the discharge of debts owing to such creditors as assented thereto and agreed to accept the dividends thereunder in full of their claims, was a "general assignment for the benefit of creditors."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

within Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3422), providing that a general assignment shall constitute an act of bankruptcy; it being unnecessary that the assignment should be valid as to dissenting creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 60.*

For other definitions, see Words and Phrases, vol. 4, pp. 3052-3054.]

In the matter of bankruptcy proceedings against the Courtenay Mercantile Company. On objections to adjudication on an involuntary petition. Overruled.

A. E. Boyesen and H. H. Flor, for petitioning creditors.

Geo. H. Stillman, for bankrupt.

AMIDON, District Judge. This is an involuntary proceeding in bankruptcy against the Courtenay Mercantile Company, a corporation organized under the laws of North Dakota. The act of bankruptcy charged is the making of a general assignment for the benefit of creditors. The answer denies this charge. From a stipulation of facts it appears that the Mercantile Company, on the 10th day of November, 1910, executed and delivered to Percival S. Preston a deed assigning to him all of its property of every kind and nature, and authorizing him to collect its debts and convert its property into money. The grant of power to apply this money is as follows:

"To pay and discharge in full all the debts and liabilities due or owing by the parties of the first part, including interest thereon, to those of its creditors who shall become parties hereto, by signing this agreement or a copy thereof, and who shall, in consideration of the promises, undertake and agree upon payment made, whether in whole or in part, as herein provided, to fully release, discharge, and absolve the party of the first part from and of all indebtedness to them, or either of them, now due or owing; and if said proceeds shall not be sufficient to pay said debts and liabilities and interest in full, then to apply the same so far as they will extend, pro rata, to the payment of said debts and liabilities and interest; and if, after payment as aforesaid, there shall be any surplus, to pay such surplus to the party of the first part, its successors and assigns."

The trust was accepted by the assignee, who took possession of all the property of the corporation, and was proceeding to execute his trust, when this petition in bankruptcy was filed. Numerous creditors, holding claims amounting to \$3,000, accepted the assignment; others, holding claims amounting to \$7,000, declined to do so.

If the deed constitutes a general assignment for the benefit of creditors, within the meaning of section 3 of the bankruptcy act, it is conceded that an adjudication of bankruptcy should be entered; if it is not such an instrument, the proceeding must be dismissed. Counsel for the Mercantile Company contends that the restriction above quoted, limiting the creditors who shall receive the benefits of the deed to those who shall become parties to it and release their claims in full, destroys the character of the instrument as a general assignment, and converts it into a mere security for those creditors who shall decide to accept its benefits. [1] I cannot adopt that interpretation. As to the effect of such a restrictive clause upon a deed of assignment for the benefit of creditors, there is great conflict in the authorities. In some

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jurisdictions, it is held to render the instrument void; in others, it is considered valid. These authorities are collected in the last edition of the American and English Encyclopaedia of Law and Practice, at page 1028. In the present proceeding I do not deem it necessary to decide which class of decisions represents the sounder view of the law. In all jurisdictions it is held that the deed is valid as between the parties, and can only be assailed by creditors who do not consent to its provisions, and whose rights are thereby prejudiced. As against the assignor, it is uniformly treated as a general assignment. The only exception that I have found is the case of *Joas v. Jordan*, 21 S. D. 379, 113 N. W. 73. If that decision can be sustained at all, it must receive its support from the local statute.

On the face of the instrument here involved, it was a disposition of all the property of the assignor for the benefit of his creditors. All the creditors had a right to accept its benefits. The assignor could in no way control this discretion. Their right to do this would continue until the estate had been distributed. The character of the instrument should be judged as of the time of its execution and delivery. Otherwise the whole estate could be converted into cash, and administered under the deed, without its being possible to ascertain whether it was an assignment for the benefit of creditors, or a security for a part of the creditors. Such a construction of the instrument would make it possible for any creditor to escape the provisions of the federal bankruptcy act by the mere phrasing of a general assignment of his property. [2] When a debtor assigns all his property in trust for the benefit of his creditors, provided they elect to accept the terms of the deed, he makes a general assignment for the benefit of creditors, within the meaning of section 3 of the bankruptcy act. It is not necessary that the assignment be valid as to the dissenting creditors. *Griffin v. Dutton*, 165 Fed. 626, 91 C. C. A. 614; *Canner v. Webster-Tapper Co.*, 168 Fed. 519, 93 C. C. A. 541. If it is binding upon the assignor, and has the characteristics mentioned, it subjects the person or corporation making it to an involuntary proceeding under the federal bankruptcy act.

Let an adjudication be entered in accordance with the prayer of the petition.

UNITED STATES ex rel. CANFORA v. WILLIAMS, Immigration Com'r.

(District Court, S. D. New York. February 23, 1911.)

1. ALIENS (§ 53*)—WHO ARE—DEPORTATION.

The immigration acts as amended in 1903 (Act March 3, 1903, c. 1012, 32 Stat. 1213), prescribing the aliens liable to deportation as immigrants, applies to all aliens whether first arriving in the country or returning to the country after a temporary absence.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

2. ALIENS (§ 54*)—DEPORTATION—PROCEEDINGS—POWERS OF IMMIGRATION OFFICIALS.

Under the immigration acts, the immigration officials have exclusive power to determine whether an alien shall be deported as liable to be

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

come a public charge, and, so long as the procedure prescribed by such acts and the rules established for their administration are substantially followed, the courts cannot interfere.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

Habeas corpus by the United States, on the relation of Vincenzo Canfora, against William Williams, United States Commissioner of Immigration at the port of New York. Writ dismissed.

Philip S. Saitta, for relator.

Henry A. Wise, U. S. Atty., and Wolcott H. Pitkin, Asst. U. S. Atty.

HOLT, District Judge. This is a rehearing on a writ of habeas corpus granted to test the legality of the detention of Vincenzo Canfora, who is held under an order for his deportation. Canfora is an Italian 60 years old. He came to this country with his family in 1895, 16 years ago. He was early in life an engraver, and later a book-binder, both of which are arts which usually require artistic skill and intelligence. He has a wife and six children, all of whom but one are now adults. About six years ago gangrene developed in his foot, which ultimately made necessary the amputation of his leg. Last summer he went to Italy to visit his mother. Shortly before his return, the commissioner of immigration received the following letter:

"G. Vicario, Editor, 243 Canal St. New York.

"Dec. 16/10.

"Hon. Commissary of Emigration, Ellis Island, N. Y.—Sir: I beg to inform you that on the S. S. Cincinnati due from Naples Monday next will arrive in New York, as a passenger of second class cabin, the Italian Vincenzo Canfora, 60 years old.

"The same, when in New York, was recovered, on public charge, at the Bellevue Hospital, where a foot was amputated to him. He was deported nine months ago by the Italian Consulate as a destitute.

"He has no relatives here who can support him, while at Naples Canfora has brothers and sisters with means and can take good care of him.

"Very Respectfully, Joseph Ruggio."

Upon his arrival, therefore, he was detained, the usual proceedings for an investigation followed, and an order for his deportation was issued on the ground that he was liable to become a public charge. He has about \$200 deposited in a bank. Most of his children are adults, earning good wages. They are able and willing to support him, and they offer to give a surety company bond, in any amount required, to indemnify against his becoming a public charge. The facts in regard to the charge in Ruggio's letter that he was a charity patient at Bellevue Hospital when his foot was amputated, to which much weight was given by the inspector who reported in favor of deportation, were these: About seven months passed after the gangrene developed in his foot before the amputation. During that period he had expended about \$1,500 for medical services in an effort to be cured. Most of his children at that time were not self-supporting. The doctor advised that he should go to a hospital for the amputation. He went to Bellevue Hospital, and felt that under the circumstances he

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was justified in asking them to perform the amputation without compensation. The hospital authorities did so, and have never asked for compensation, or complained that it was not paid. The facts in regard to the charge in Ruggio's letter that he was deported by the Italian consul as a destitute are these: Canfora had an old friend who was an assistant in the Italian consul's office. Canfora had frequently made him presents of books which he had bound. When the friend learned that Canfora was about to go to Italy, he offered to get him transportation. Canfora at first refused, stating that he could purchase his ticket. But his friend urged him to accept it as a gift to a friend, and in recognition of Canfora's previous gifts to him. Canfora thereupon accepted the ticket, and went to Italy on it.

The alien's counsel urges that the fact that the alien had established a residence and lived for 16 years in this country makes the law inapplicable to him, and cites rule 4 of the rules relating to the exclusion of aliens, prescribed by the Department of Commerce and Labor, which states that the provisions of the immigration act do not apply to aliens who have once been duly admitted to the United States. That rule was adopted under the earlier immigration acts. Those acts described the persons who are liable to deportation as immigrants, and the courts in construing those acts held that the term "immigrants" only applied to aliens on their first arrival in this country, and did not apply to aliens who had been duly admitted to the country and had established a residence here, and who had left the country for a temporary absence. In 1903 Congress amended the immigration acts (Act March 3, 1903, c. 1012, 32 Stat. 1213), and substituted the term "aliens" for the term "immigrants." The courts thereupon held that under such amendments the law applied to all aliens whether they had previously entered this country or not. *Taylor v. United States*, 152 Fed. 1, 81 C. C. A. 197; *Ex parte Hoffman (Matter of La Pina)*, U. S. Cir. Ct. of Appeals for the Second Circuit, 179 Fed. 839, 103 C. C. A. 327. The provisions of rule 4 have remained unchanged, but the rules, of course, are subordinate to the acts of Congress, and the provision of that rule which is relied on has been superseded by the later immigration acts.

I consider that, if this order of deportation is carried out, it will be an act of cruel injustice. If this alien had remained in this country, he probably never would have been molested. If he had not lost his leg, he probably would not have been detained on his return. No offense is charged against him. It is proposed to deport him because he has suffered a pitiable misfortune, and notwithstanding a proposition to give a satisfactory bond, which would appear to be a complete protection to the government from his becoming a public charge. But the immigration acts confer exclusive power upon the immigration officials to determine such questions, and the courts, so long as the procedure prescribed by the immigration acts and the rules established for their administration is substantially followed, have under the decisions of the United States Supreme Court no jurisdiction to interfere. I am therefore compelled to dismiss this writ. But I desire to express the hope that the immigration authorities will reconsider this case. I cannot believe that on a candid reconsideration of this record

this man, who is charged with no offense, will be sent away, because he has suffered a grievous calamity and has been denounced by a malicious enemy, to pass his last years and to die in a distant land, far from his wife and children, and from the home in this country in which he has lived a blameless life for so many years.

EASTFIELD S. S. CO. v. McKEON et al.

(District Court, S. D. Alabama, S. D. April 1, 1911.)

No. 1,070.

ADMIRALTY (§ 41*)—PARTIES—SUIT FOR BENEFIT OF ANOTHER.

In admiralty, the party entitled to relief should always be made libelant, and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases, such as suits by the owner to recover for loss of cargo, which was partially insured, where the insurance has been paid, and the insurer is entitled by subrogation to a part of the recovery.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 350-368; Dec. Dig. § 41.*]

In Admiralty. Suit by the Eastfield Steamship Company against J. T. McKeon and others. The court having decreed that libelant could not recover, on the ground of having parted with all interest in the suit, libelant moved to amend the libel by making it read: "Eastfield Steamship Company sues on its own behalf and for the use of Field Line, Cardiff, Limited." Motion denied, and libel dismissed.

Convers & Kirlin and Bestor, Bestor & Young, for libelant.
Pillans, Hanaw & Pillans, for respondents.

TOULMIN, District Judge. The party really entitled to the relief should always be made libelant. The practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, and of making one person libelant as the representative of another, does not obtain in admiralty, except in certain cases, as of salvage and other cases somewhat analogous, as suits for seamen's wages having a like cause of complaint, and suits where the owner of goods claims damages for their injury or destruction while transported on a vessel. The goods being partially insured, the owner may maintain a suit in behalf of himself and for the use of the insurance company for their respective losses, on the ground of avoiding a multiplicity of suits; for, if the insurance company paid the owner for his loss to the extent of the insurance on the goods destroyed, it would be subrogated to the right of the owner to a like extent, and be entitled to enforce that right against the vessel, the wrongdoer. All persons entitled on the same state of facts to participate in the relief, and no others, should be joined as libelants, whether the suit be in personam or in rem. Benedict's Admiralty, § 380.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In *Fretz v. Bull*, 53 U. S. 466, 13 L. Ed. 1068, the Supreme Court said:

"In admiralty, the party entitled to relief should always be made libelant, and the practice of instituting a suit in the name of one person for the benefit of another, to whom the right has been transferred, only obtains in particular cases. But all persons entitled on the same state of facts to participate in the same relief may join as libelants, whether the suit be in *personam* or in *rem*."

The case of *The Detroit*, 1 Brown, Adm. 141, Fed. Cas. No. 3,832, was a suit for towage services, brought in the name of John K. Harrow, who was supposed to be the owner of the tug. After answer filed, and testimony had been taken, it was discovered that James P. Harrow was the owner of the tug, and an amendment was permitted, substituting James P. Harrow for John K. Harrow as libelant by order of the District Court. On appeal to the Circuit Court it was held by Mr. Justice Swayne that there was no authority to make this order, and that the substitution of one sole libelant for another is substantially the institution of a new suit.

Where two or more parties named in a libel have respectively a claim arising out of the same state of facts, all are entitled to relief and are permitted to be joined as libelants. *The Anchoria* (D. C.) 9 Fed. 840. And a libelant may sue for himself and for the use of another, where both are entitled to recover upon the same state of facts, and the right of the latter has arisen from subrogation to part of the right of the former. *The Anchoria*, *supra*.

The counsel for libelant cites, in support of his application, the case of *Burk v. The Brig Rich*, 1 Cliff. 312, Fed. Cas. No. 2,161, and the case of *The Manhasset*, 19 Fed. 430. As I understand the opinions in these cases, they do not militate against the rule announced in *Fretz v. Bull*, *supra*, and in Benedict's Admiralty, *supra*, or in any respect vary or alter that rule. The case in 1 Cliff. 312, Fed. Cas. No. 2,161, as I understand it, was substantially this: A suit in *rem* was instituted by the libelant to recover the amount of a bottomry bond upon the brig Rich, given by the master, on which a sum of money was advanced to repair the vessel. Subsequently the libelant filed a supplemental libel, alleging that H. H. & Co. were mortgagees of a portion of the vessel. Subsequent to this said H. H. & Co. were informed that the vessel was about to be sold at auction to satisfy the bond, and that unless they took measures to have the bond transferred from libelant they would lose their claim. H. H. & Co. thereupon paid the amount due libelant and took an assignment of the bond, and the suit continued and was prosecuted in the name of the libelant for the benefit of said H. H. & Co. H. H. & Co., however, appeared in the suit and filed a supplemental libel, which was answered by the respondents, who had already answered the libel filed by the libelant. The parties then proceeded to issue and trial. Different defenses were interposed, among them a denial of libelant's right to maintain the suit. The court said that a bottomry bond was, in a qualified sense, a negotiable instrument, which may be transferred and put in issue by the person so acquiring it, and that it was competent for the assignee to enforce payment in admiralty in his own name. As a general rule, the libel should

be in the name of the real party in interest. And it cites the case of Fretz v. Bull, supra. It said that none of the cases decide whether the assignee may maintain the suit in the name of the assignor, and added:

"Be that as it may, still in this case the real parties in interest appeared in the progress of the suit and filed a supplemental libel, setting forth all the grounds of their claim. Answer was made by the respondents to that libel, and the parties proceeded to issue and trial. All the parties are before the court."

The case of The Manhasset, supra, was a suit where the administratrix of one Black (who was the widow of said Black) filed a libel in rem against the vessel to recover damages for causing the death of said Black. The libel was founded on a statute which provides that, where a person who would be entitled to damages for an injury inflicted by another dies of that injury, his administrator may sue for the damages due the deceased, for the benefit of the wife, parent, and child of the deceased. The court said this action, which the statute gives, is against the damfifier himself, and is an action in personam. It did not create a maritime right of action in rem against the vessel; and the court dismissed the libel for want of jurisdiction, but without prejudice. The judge, however, stated that he conceded that a right existed under the maritime law in the wife to sue for the killing of her husband, and it may be sued upon in an admiralty court. And the judge stated that if a libel in rem was brought by the widow, for herself and in behalf of the minor children of the deceased, he would entertain it, and suggested that it might be competent to allow the present libel to be amended, so as to make it one in which the widow and minor children of the deceased should sue in their own right and for their own benefit. Whereupon the libelant moved the court for leave to dismiss the original libel as to herself as administratrix, and to file an amended libel in her individual character as widow of Black, and in her character as guardian of the minor children of said Black. This was allowed. The judge said the res is the same and the tort is the same, and, where the original libel set out matter enough by which to amend, a libel may be amended as to parties by changing the character in which the libelant sues. The Manhasset, 18 Fed. 918; Id., 19 Fed. 430.

Guided by the well-settled rules of pleading and practice which obtain in the courts of admiralty, and in view of the facts in this case, as shown by the evidence in it, and as admitted by the able and diligent counsel for the libelant in the case, I must deny the motion to amend the libel; and, being of opinion that the libelant is not entitled to recover, the court sustains the motion to dismiss the libel.

And it is so ordered.

**MONETT ELECTRIC LIGHT, POWER & ICE CO. v. INCORPORATED
CITY OF MONETT, MO., et al.**

(Circuit Court, Judicial District, Missouri, at Joplin, S. W. D. January 9, 1911.)

No. 134.

1. MUNICIPAL CORPORATIONS (§ 285*)—“CONTRACT”—GRANT OF EXCLUSIVE FRANCHISE.

Under Rev. St. Mo. 1889, § 1589, authorizing cities of the fourth class to grant an exclusive franchise to furnish electric light to the city and its inhabitants for a term not exceeding 20 years, an ordinance granting such right, duly passed, signed by the mayor and accepted by the grantee, constitutes a contract binding on the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 757; Dec. Dig. § 285.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

2. CONSTITUTIONAL LAW (§ 128*)—“IMPAIRMENT OF OBLIGATION OF CONTRACT”—GRANT OF EXCLUSIVE FRANCHISE BY CITY.

Where a city has granted an exclusive franchise to an electric light company to furnish lights to the city and its inhabitants for a term of years, under legislative authority, and the grant has been accepted and acted on, it is an impairment of the obligation of the contract so made within the constitutional meaning of the term for the city to enter into competition with the company before the expiration of the grant.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 372-389; Dec. Dig. § 128.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3412-3417.]

3. MUNICIPAL CORPORATIONS (§ 122*)—PRESUMPTIONS—VALIDITY OF ORDINANCES DULY SIGNED.

A city ordinance duly signed by the mayor was presumptively regularly passed and presented to him for his approval.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 284-286; Dec. Dig. § 122.*]

4. EVIDENCE (§ 186*)—SECONDARY EVIDENCE—COPY OF CITY ORDINANCE.

Where a city ordinance has been lost, a copy made and compared by the clerk and certified by him with the corporate seal of the city attached is admissible as secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 661-673; Dec. Dig. § 186.*]

5. MUNICIPAL CORPORATIONS (§ 106*)—ENACTMENT OF ORDINANCES—STATUTORY REQUIREMENTS—RECORDING OF VOTE.

Rev. St. Mo. 1889, § 1597, applying specially to cities of the fourth class, provides that “no ordinance shall be passed except by bill, and no bill shall become an ordinance unless on its final passage a majority of the members elect shall vote therefor and the yeas and nays entered on the journal,” and such provisions as construed by the Supreme Court of the state are mandatory, and a compliance therewith is essential to the validity of an ordinance. At a meeting of the council of a city having six aldermen, the record showed the presence at roll call of four, who were named. The journal further recited that a bill was “presented * * * and upon motion adopted. Yeas five, nays none.” Held, that such record did not, either literally or substantially, comply with the statute, since it failed to show the vote of any particular one of the six aldermen elect, and that the ordinance was void.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 221-228; Dec. Dig. § 106.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. MUNICIPAL CORPORATIONS (§ 341*)—ILLEGAL CONTRACT—EFFECT OF PART PERFORMANCE.

A city having power to grant an exclusive franchise to an electric light company for a term of years undertook to do so by an ordinance which was void because not passed in conformity to law. The grantee accepted the ordinance, built a plant, and furnished light and power to the city and its inhabitants for the greater part of the term, receiving payment therefor. *Held*, that the fact that the contract had been performed for such length of time did not render it valid nor give the company the right to enforce it in equity for the remainder of the term.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 341.*]

In Equity. Suit by the Monett Electric Light, Power & Ice Company against the Incorporated City of Monett, Mo., Perry Short, as Mayor, Leroy Jeffries, J. F. Moses, John Walsh, W. J. Mills, R. C. Farrow, G. N. Patterson, G. P. Gammon, and C. W. Vaughn, as the Board of Aldermen, and D. S. Breese, as Clerk of said City, W. K. Martin, and L. G. Knapp. Decree for defendants.

Joseph M. Hill, James Brizzolara, and H. L. Fitzhugh, for complainant.

Thomas D. Steele and Fielding P. Sizer, for defendants.

VAN VALKENBURGH, District Judge. This is a suit in equity to restrain the city of Monett, Mo., and its officers from building and operating a municipal light plant in said city. The facts as disclosed by the proofs are as follows:

On the 4th day of February, 1893, the city of Monett, being then a city of the fourth class, acting under authority of the statutes of the state of Missouri pertaining to cities of that class, undertook to grant to one H. Ward Hicks, his successors or assigns, the exclusive right and privilege to erect, construct, operate, furnish, and maintain electric light works and an electric power plant to furnish electric lights and electric power for the use of said city and its inhabitants for a period of 20 years. This was by ordinance numbered 107. Pursuant to law, this action of the city council was made subject to ratification by the qualified voters of the city voting at a special election to be called for the purpose and to be held February 16, 1893. On the same day the council essayed to pass an ordinance calling a special election to submit this proposition to the voters, which ordinance was numbered 108, and thereunder the notice provided was duly given, and the special election held. February 18th the common council undertook to pass an ordinance numbered 110, declaring the result of the special election held on the 16th day of February, 1893, as aforesaid, in which it was recited that 326 votes were there cast; 267 being in favor of the franchise and 59 against it. By Ordinance No. 110 it was further declared that H. Ward Hicks, his successors or assigns, had received the grant of said franchise under Ordinance No. 108, and was empowered, authorized, and entitled to the exercise of all the rights and privileges subject to the limitations and duties set forth and embodied in said grant or franchise. Thereupon, to wit,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

on the 28th day of February following, said Hicks filed with the city his formal acceptance of the franchise thus granted, and subsequently assigned it to the complainant herein. A lighting and power plant was constructed, and service to the city and its inhabitants began in due course. As heretofore stated, the ordinance sought to vest in the grantee the exclusive right to furnish electric light for the use of the city and its inhabitants for a period of 20 years in accordance with the power conferred upon cities of the fourth class by section 1589 of the Revised Statutes of Missouri of 1889. The complainant continued to enjoy its exclusive franchise for some years thereafter, but lately disagreements arose between it and the city. Complaints were made of the character and sufficiency of the service, with the result that numbers of the citizens withdrew their patronage, and provided themselves with lights from other sources, not, however, in conflict with the franchise here in controversy. In February, 1909, the company desired to repair its plant and extend its service lines, and for that purpose contemplated a new location for many of the poles carrying its wires, and in this connection a conflict arose between the company and the city over the points at which the company would be permitted to locate its poles, the company desiring to transfer portions of its system from streets then occupied to certain alleys and the city seeking to restrict the locations to the points formerly occupied; it being apparent from the testimony that the city contemplated the use of these alleys and perhaps other points sought to be appropriated by the company for its proposed improvements and extension for use in the erection of a municipal lighting plant. The outcome of this controversy was that the company attempted to make locations of its poles without authority as contended by the city, and the city stopped such work on the part of the company and caused the poles to be removed; the city resorting to arrests of the officers and employés of the light company in the enforcement of its claims, and the company appealing to the courts to enjoin the city and its officers from such alleged unlawful interference. It clearly appears from the testimony that the plant at that time had been in operation for about its natural life, and it had become necessary, in the opinion of the company, to rebuild the entire system. Naturally the conflict between the company and the city respecting the extension and location of the light mains resulted in the abandonment of any attempt at improvement of the plant, so that in the spring of 1909 we find a greatly impaired and worn out lighting system, inadequate to meet the demands of the city under normal conditions, the city and its people dissatisfied and unwilling to grant further extension and changes of locations which might tend to embarrass the city in the establishment of its own plant either presently or at the end of the twenty-year franchise, and both parties in such an attitude of antagonism and hostility as to preclude any probable adjustment of the difficulties or the furnishing of satisfactory lighting service. At that time the franchise had less than four years to run. The physical property of the company was badly out of repair, and the entire plant could be rehabilitated only by the expenditure of large sums of money apparently essential to its practical re-

building. In no event could the existing franchise endure longer than 1913. No renewal was provided by its terms, nor would such a provision have been binding if made; and exclusive franchises for cities of the fourth class are now no longer authorized by the law of this state.

In this extremely unsatisfactory situation, the mayor and common council of the defendant city in June, 1909, passed an ordinance by which it was provided that said city should erect an electric light system, and should itself furnish the city and its inhabitants with electric light and electric power, and should be given the use of all the streets, alleys, and public places in said city as required for the placing of poles and the hanging of wires for the aforesaid purposes; that to pay therefor the city should issue its interest-bearing bonds whereby all property in said city would be taxed for the purpose of rebuilding, equipping, and operating said electric light plant in practical competition with complainants. This ordinance was submitted to the voters of the city by special election held therefor on the 26th day of June, 1909, and on the 13th day of July, 1909, the council passed an ordinance declaring the result of the election, ratifying and approving the ordinance. This was followed by a contract between the city and the defendants Knapp and Martin for the erection and construction of the new municipal plant, and providing for the placing of poles and wires along, over, and through the streets and alleys of the defendant city. The complainant, contending that the granting and passage of the ordinance authorizing the defendant city to build and operate such electric light plant is in violation of the contract claimed to exist between the city and the complainant, under and by virtue of which the complainant constructed and is now operating its plant, filed this suit on the 20th of July, 1909, alleging the impairment of the obligation of its contract in violation of the rights guaranteed to it by the Constitution of the United States. Both parties appear to have been content to permit the matter to remain in *statu quo* until final determination. No restraining order was issued.

Defendants by their answer deny that the city at any time entered into a contract with H. Ward Hicks which subsequently injured to the complainant, claiming that such a contract to be binding must be in writing, dated when made, and subscribed by the parties thereto or their agents authorized by law and duly appointed and authorized in writing, and denying that the ordinances referred to constituted any such contract, or that such ordinances were passed in accordance with law. Defendants further contend that there is no proof before the court of the existence of such ordinances, nor that said ordinances were ever presented to the mayor for his approval, nor that he ever did approve the same; that the record does not show that said purported ordinances were passed by bill; that a bill of any character was ever introduced by any member of the board of aldermen; that the yeas and nays were entered on the journal, nor that the bill was read three times before its final passage, as required by statute. Defendants insist that Ordinance No. 107 granted no exclusive rights except to the furnishing of electricity for mechanical purposes; also, that com-

plainant has abandoned its suit in this court by voluntarily thereafter bringing a suit in the state court involving the same issues. Complainant urges that an ordinance when accepted by a public service corporation constitutes a contract; that the ordinances were passed by bill and duly approved by the mayor; that the statutory provision requiring the yeas and nays to be called and entered on the journal was substantially complied with, and that, in any event, the municipality is now estopped from pleading the irregularity, if one exists; that the suit subsequently brought in the state court was merely to prevent criminal prosecution against the officers of the complainant company growing out of an ordinance alleged to conflict with the rights granted to complainant, and to prevent annoyance and a multiplicity of suits while the present action was pending; that the two bills are radically different in object and scope. It also asserts that the ordinance contract between complainant is abundantly proved, and that the exclusive rights extend to all the instrumentalities enumerated in the ordinance.

[1] Little difficulty is experienced in disposing of most of the contentions urged by the defendants. Under section 1589 of the Revised Statutes of Missouri, then in force, the city of Monett in 1893 had undoubted authority to contract with the complainant, giving and granting the exclusive right to furnish a system of electric light works for the use of the city and its inhabitants for any length of time not to exceed 20 years. *Water Company v. City of Aurora*, 129 Mo. 540, 31 S. W. 946; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65-82, 22 Sup. Ct. 585, 46 L. Ed. 808; *Water, Light & Gas Company v. Hutchinson*, 207 U. S. 385-393, 28 Sup. Ct. 135, 52 L. Ed. 257; *Water Company v. City of Neosho*, 136 Mo. 498, 38 S. W. 89. If, therefore, the city has entered into such a contract with the complainant or its assignor, such contract is protected by the Constitution of the United States against state legislation to impair it. *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1-10, 19 Sup. Ct. 77, 43 L. Ed. 341. And an ordinance legally adopted, accompanied by all legal requirements and properly accepted, constitutes a contract within the meaning of the Missouri statute conferring this power upon municipalities. *Vicksburg v. Waterworks Company*, 202 U. S. 453-462, 26 Sup. Ct. 660, 50 L. Ed. 1102; *Aurora Water Co. v. City of Aurora*, 129 Mo. 540, 31 S. W. 946. The signature of the mayor to the ordinance was a sufficient signing of the contract by the city; he being its lawfully authorized agent, and the acceptance of the terms of the contract contained in the ordinance by letter by the person contracting with the city was all that was necessary to complete the contract, it being unnecessary that the terms of a contract be contained in one paper signed by the party to be charged, in order to make it binding. *Water Company v. City of Aurora*, 129 Mo. 540, 31 S. W. 946.

[2] When such power is given to a municipality and a contract is made with an individual or a corporation to perform the public service exclusively, then it is an impairment of the obligation of the contract within the constitutional meaning of the term, when the municipality elects to enter the public service itself. *Walla Walla City*

v. Walla Walla Water Co., 172 U. S. 1-11, 19 Sup. Ct. 77, 43 L. Ed. 341; Vicksburg v. Waterworks Co., 202 U. S. 453, 465, 470, 26 Sup. Ct. 660, 50 L. Ed. 1102; Vicksburg v. Waterworks Co., 206 U. S. 496-508, 27 Sup. Ct. 762, 51 L. Ed. 1155.

So-called Ordinance No. 107 provides:

"Be it ordained by the Board of Aldermen of the City of Monett, Mo.:

"Section 1. The exclusive rights and privileges be, and the same are hereby granted (subject to ratification by the qualified voters of the city of Monett, Mo. voting at a special election to be called for the purpose, and to be held on February 16th, 1893) to H. Ward Hicks of Monett, Mo. and to his successors or assigns, to erect, construct, operate, furnish and maintain electric light works, and electric power plant to furnish electric light and electric power for use, for mechanical purposes, by necessary and suitable means, material, machinery and apparatus for the furnishing of such electric light and electric power, in the city of Monett, Mo."

This ordinance is signed as follows:

"Passed February 4th, 1893, T. H. Jeffries, Prest. Board of Aldermen; approved Feb. 4th, 1893, A. W. Brown, Mayor. Attest: A. V. Darroch, City Clerk. [Municipal Seal.]"

It is obvious that this ordinance undertook to grant exclusive rights and privileges to the grantee, his successors, or assigns; and by section 5 of the ordinance it was provided that said "rights and privileges in the franchise granted, shall continue and remain in force for a term of twenty (20) years." Defendants claim that the exclusive rights referred to are limited to electricity for mechanical purposes. It is difficult to perceive any plausible ground upon which this contention can be sustained. The ordinance is entitled, "An ordinance granting to H. Ward Hicks, his successors or assigns, the exclusive right to construct, operate, furnish and maintain electric light and electric power, within the City of Monett, Missouri," and the body of section 1, though somewhat loosely drawn and exhibiting scant regard for the niceties of punctuation, clearly evinces the purpose of extending the exclusive rights and privileges contemplated to all the electrical uses and instrumentalities therein enumerated.

[3] Moreover, the ordinance purports to be duly signed by the mayor, which sufficiently establishes the presumption that it was regularly presented to that officer for his approval, and that he did, in fact, approve it, as recited upon the copy of the ordinance shown in evidence. Saleno v. City of Neosho, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653. Ordinances 108 and 110 are similarly signed. It is shown in the proofs that complainant, through its officers and agents, made attempts at various times to obtain the original ordinances for use as evidence in this and other litigation; that it was then developed that these ordinances were lost or misplaced, at least, could not be found in the possession of their proper custodian. The complainant company, however, had in its possession copies made at the time of all the ordinances, together with other proceedings connected with the acceptance of this franchise, all of which had been carefully compared by the original grantee and the then city clerk of the city of Monett, in whose custody they were properly lodged. The clerk then and there certified them to be true copies,

and further attested the same by affixing thereto the corporate seal of the city. He also testified from his personal recollection both of the ordinances and of the circumstances attending the comparison of these copies with the originals.

[4] While the certification is not formal, it is considered, under the circumstances detailed in the proofs, that the copies offered were sufficiently authenticated and identified as true copies of the lost originals, and no weight is given to the defendants' contention in this regard. The journal entries produced also sufficiently establish that the council certainly attempted to pass such ordinances upon the dates when they purport to have been adopted.

The suit in the state court of Barry county, Missouri, by the bringing of which, defendants contend, complainant abandoned this action and deprived itself of the benefit of the federal jurisdiction, was brought to restrain the city of Monett, its mayor and common council, city attorney, and police judge from arresting or causing the arrest of the officers and employés of complainant for any alleged violation of a certain ordinance of that city purporting to regulate telephone, telegraph, and electric light companies in the matter of locating their poles and extending their wires over or through the streets, alleys, and avenues of said city. Complainant claims that it was rightfully exercising the powers granted by the franchise here involved. The purposes of the bill and the relief prayed were in no way identical with those sought under the bill filed in this case, nor were they in any sense inconsistent therewith. Under the holding in *Harkrader v. Wadley*, 172 U. S. 164, 19 Sup. Ct. 119, 43 L. Ed. 399, complainant conceived that its remedy to protect itself against criminal prosecutions, growing out of issues which were in litigation in the federal court, lay in the state court whose protection was thus invoked. Without discussing the effect of a voluntary appeal by complainant to the state court upon the same issues upon which it had theretofore invoked the federal jurisdiction, it is sufficient, for our present purposes, to say that such a question is not here presented.

[5] The objection to the validity of the ordinances, because of irregularities incidental to their passage, presents much more serious considerations. The contract between complainant and the city consisting entirely of the ordinances and its acceptance, if the ordinance is invalid the contract must necessarily fall. Section 1597, Revised Statutes of Missouri 1889, applying specially to cities of the fourth class, provides:

"No ordinance shall be passed except by bill, and no bill shall become an ordinance, unless on its final passage a majority of the members elect shall vote therefor, and the yeas and nays entered on the journal; and all bills shall be read three times before their final passage."

The journal entry recording the proceedings of the board of aldermen of the city of Monett on the 4th day of February, 1893, is as follows:

"The board of aldermen of Monett met on the above date at 8 o'clock p. m. with the following officers present: A. W. Brown, mayor, John Gillis, Pat Martin, J. J. Davis and A. W. Lyman, aldermen.

"Among other business and proceedings, the following was had:

"Ordinance No. 107. An ordinance entitled an ordinance granting to H. Ward Hicks, his successors or assigns the exclusive right to construct and maintain electric light and electric power within the city of Monett, Missouri, was presented, passed to its second and third reading and upon motion adopted.

"Yeas, five, and nays, none.

"An ordinance entitled 'An ordinance calling a special election to submit to the qualified voters of Monett, Missouri, a proposition to grant to H. Ward Hicks, his successors or assigns, the exclusive right to construct, operate, furnish and maintain electric light and electric power within the city of Monett, Missouri' was presented, passed to the second and third reading and was on motion declared adopted. Yeas, five, nays, none."

The yeas and nays were not entered on the journal. It therefore becomes necessary to the validity of this ordinance to establish from the record that the object of the statute has been substantially fulfilled. Before proceeding to a consideration of this question, the composition of the board of aldermen and its custom of transacting business should be noted. The board was evidently composed of six aldermen. This appears from the following matters of evidence: The proclamation calling the special election to vote upon the granting of this franchise designates polling places in three wards of the city. Ordinance No. 110, declaring the result of that election, gives the vote by wards, and specifies three wards. It therefore sufficiently appears that there were three wards, and only three wards, in the city at that time. We may further reasonably infer from the record that each ward was represented by two aldermen. As many as five are named in connection with the proceedings of the council in this matter, and the total number is further indirectly shown in the testimony of the witness Darroch, city clerk at the time these ordinances were before the council. I quote from his testimony as follows:

"Q. Did you know that the statute required that the ayes and noes should be recorded of the passage of all ordinances? A. I wish to make an explanation of what I understand. The mayor would say 'All in favor of this say aye.' Four would say 'Aye.' Then he would say 'Opposed, no.' And two would say 'No.' The clerk would put it down 'Ordinance carried four ayes and two noes.' But, if some member said 'I want the vote recorded,' then the clerk would put down 'Mr. _____ aye,' and 'Mr. _____ aye,' and 'Mr. _____ no.' The party's name who voted 'No' would go down and his vote would go down with it.

"Q. But in the passage of the Ordinance 107 you did not do that? A. No, sir; when an ordinance was passed unanimously, there was no record of the name, but just 'six ayes.' * * * A. I wish to state that what I mean and what was the general custom at the time about the ayes and noes being called and recorded. If one or more members of the board of aldermen demanded it, the ayes and noes were called. If a member voted 'No,' his name was recorded with the word 'No' after it. If a member voted 'Aye,' his name was recorded and the word 'Aye' after it. Otherwise, the mayor would in a general way declare 'the ordinance is carried, four ayes and two noes.'

"Q. If all voted 'aye,' how would it be recorded? A. Six ayes."

From this testimony it further sufficiently appears that the board was composed of six aldermen, and that it was not the custom to record the ayes and nays upon the passage of ordinances, as required by statute, unless a roll call was demanded.

It will be observed that the statute makes the entering of the yeas

and nays upon the journal a condition precedent to the existence of a valid ordinance. It says "no bill shall become an ordinance" unless on its final passage this is done. Does the record show a substantial compliance with that statute? Complainant asserts that it does, and cites in support of his contention the language of Justice Cooley in *Steckert v. City of East Saginaw*, 22 Mich. 104. There the minutes showed the ordinance was adopted unanimously on roll call, and the discussion was under a Michigan statute similar to that of Missouri. Counsel quoted from the opinion as follows:

"The purpose, among other things, is to make the members of the common council feel the responsibility of their action when these important measures are upon their passage, and to compel each member to bear his share in the responsibility by a record of his action, which should not afterwards be open to dispute. Now, if the record in the present case shows precisely who voted for the resolution in question, it is apparent that the object of the statute has been fulfilled, and we may be able to sustain the action, notwithstanding the compliance with its provisions has not been exactly literal."

This language, standing alone, seems to convey a message of hope and promise to the complainant in this case, but counsel evidently neglected to read the remainder of Justice Cooley's argument, or failed to apprehend his final conclusion. His discussion of the subject is so complete, and so convincing, that it may fairly be said to announce the settled law upon this question, and is worthy of being set out in full in a matter of this importance. He said:

"The argument is that the record shows, first, the names of the several aldermen who were present when this action was had; second, that the roll was called on the vote; and, third, that each of them when the roll was called voted for the adoption of the resolutions. This being so, the vote is, in effect, entered at large on the minutes, and the repetition of the names of the aldermen in the minutes, when the precise position of each upon the resolutions submitted was already recorded, would have been only an idle ceremony, accomplishing no useful purpose.

"We have found ourselves unable to take the same view of this record that is taken by the counsel for defendants. There can be no doubt that the provision of the statute which requires these votes to be entered at large on the minutes was designed to accomplish an important public purpose, and that it cannot be regarded as immaterial, nor its observance be dispensed with. *Spangler v. Jacoby*, 14 Ill. 297 [58 Am. Dec. 571]; *Supervisors of Schuyler Co. v. People*, 25 Ill. 183. * * *

"We are of opinion that the record does not show with sufficient certainty that all the members present at roll call, at the opening of the meeting in question, voted for the resolutions; and, if it does not show that all did, it does not show that any particular one of them did. What it does show is that at roll call when the meeting was opened certain members named were present, and that afterwards, before the meeting adjourned, certain resolutions were adopted unanimously on call. Now if it were a legal presumption that all the members who were present at the call to order of such a meeting remained until its adjournment, and that no others came in and took their seats afterwards, and if it were also a presumption that every member voted on each resolution on roll call, the argument of defendants would be complete, and we could say with legal certainty from this record that these resolutions were passed with the affirmative vote of each of the members named as present in the clerk's minutes of the meeting in question.

"But surely there are no such presumptions of law, and, if there were, they would be contradictory to the common experience of similar official bodies. It is very well known that it is neither observed nor expected that, when a legislative body of any grade has commenced its daily session, the doors will be closed to prevent the ingress of members not prompt in arrival, or the

egress of others who may have occasion to leave. The actual attendance on such a body will frequently be found to change materially from hour to hour, so that a record that a vote was passed unanimously would be very slight evidence that any particular member present at the roll call voted for it, or that any member not then present did not. And, even if the record could be held to afford a presumption on that subject, its character must be so faint, doubtful, and unreliable as to subserve no valuable purpose. Moreover, the members actually present are usually allowed to vote or not to vote at their option, except in cases of close votes, or where an appeal is to be made to the people; and, if the vote of a quorum is in favor of a resolution and no vote is cast against it, the record may still be that it was 'adopted unanimously on call,' though some of the members present abstained from voting.

"What is designed by this statute is to fix upon each member who takes part in the proceedings on these resolutions the precise share of responsibility which he ought to bear, and that by such an unequivocal record that he shall never be able to deny either his participation or the character of his vote. But manifestly we cannot determine in the present case with any certainty that any one of the aldermen named—Alderman Buchout, for example—actually voted for the resolutions in question. We know he was present when the council convened, but we have no record which points specifically to his individual action afterwards. Suppose he were to contest the tax as illegal, and the city authorities were to insist upon an equitable estoppel arising upon his vote in its favor, and he should deny such vote, we should look in vain in this record for anything absolutely inconsistent with such denial. Suppose his constituents, dissatisfied with this vote, undertake to call him to account for his participation, and he were to say to them, 'I was not present when these resolutions were adopted. I was indeed present when the council convened, but was called away soon after on private business.' This record plainly could not be relied upon to contradict his assertion. The persons arraigning him would be obliged, in order to fix his responsibility, to resort to the parol evidence of his associates or of bystanders. But the Legislature understood very well the unsatisfactory character of that kind of evidence, and they did not intend that the power to call an alderman to account for misconduct, delinquencies, or errors of judgment in the performance of this official duty should be left to depend upon it. They have imperatively required that there should be record evidence of a character that should not be open to contradiction, or subject to dispute; and their requirement cannot be complied with according to its terms, nor satisfied in its spirit and purpose, without entries in the minutes showing who voted on each resolution embraced by the section quoted from the charter, and how the vote of each was cast. In other words, the ayes and noes on each resolution must be entered at large on the minutes, so that presence or participation of any member shall not be left to conjecture or inference."

His conclusion is that such a journal entry does not comply with the statute, which is mandatory in this regard, and therefore invalidates the ordinance.

The journal entry in the case at bar is still more open to criticism. That of February 4th, on which date Ordinances No. 107 and 108 were before the council, recites that there were present when the board met at 8 o'clock: A. W. Brown, mayor, John Gillis, Pat Martin, J. J. Davis, and A. W. Lyman, aldermen. In each case the record upon the third reading was yeas, five, and nays, none. As there were but four aldermen named as being present, it conclusively appears that at least one additional member of the council, name unknown, joined the meeting later and voted. It cannot be determined which of the two remaining councilmen it was. Again, it is possible that one of those present at the opening may have retired, and both of the remaining council may subsequently have appeared, thus making

up the five who voted. Nor, if one of those originally present did retire, can it be stated which one so absented himself. In other words, each one of the then six aldermen of Monett could plead an alibi, covering the passage of those ordinances, with no possible danger of contradiction by any record. In the light of Judge Cooley's reasoning the weakness of this entry clearly appears. In the case of Ordinance No. 110 the discrepancy, while not so glaring, is nevertheless apparent. Counsel for complainant further say that "similar statutory provisions to the one in question have been before the courts, and they are usually held to be directory." Unfortunately the authorities cited do not justify this view. In *Wiggin v. New York*, 9 Paige (N. Y.) 16, the question was not directly passed upon; it being held that if the proceedings were absolutely void in law, and that fact appears upon the face of the ordinance itself, a sale for the assessment upon the complainant's lots would not even create a cloud upon his title, and therefore equity would not relieve. What the court did say was that:

"The publication of the report and of the ayes and noes upon the question of the adoption of the ordinance for the proposed improvement was directory. The neglect to make such publication did not, therefore, of itself, render the proceedings void, if the ordinance was not void upon the face of the record of its adoption."

City of Logansport v. Dykeman et al., 116 Ind. 15, 17 N. E. 587, had under consideration a relation between the parties far different from that here presented, as will hereafter be considered. However, the court there did say:

"Where the statute requires that the contract be made in a certain form, or in pursuance of a certain mode, in such cases the common council exercise a special statutory power in relation to the contract, and where a mode of procedure is prescribed, and the conditions and form of the contract are matters of statutory regulation, both the mode of procedure and form of the contract must be substantially observed."

State ex rel. v. Mead, 71 Mo. 266, has to do with certain constitutional forms of affecting legislative acts which are not declared to be essential in order that a bill shall become a law. The court said:

"We are convinced that the initial clause of the section that 'no bill shall become a law until the same shall have been signed by the presiding officer of each of the two houses in open session' is mandatory, though it is quite evident that the mandate of the Constitution would be obeyed, so far as concerns proper authentication of the bill, when it receives the signature of the respective presiding officers in open session. But we do not regard the other clauses of the section under review as mandatory; for it is to be observed that those clauses do not declare officers or the members fail to perform the duties which the residue of the section imposes, but the only penalty directly expressed is that contained in the initial clause just noted." Loc. cit. at page 271, of 71 Mo.

That case refutes rather than supports the argument of counsel. This precise question was more directly passed upon by the Supreme Court of Missouri in *Water Company v. City of Aurora*, 129 Mo. 540-577, 31 S. W. 946, 955, where the court said:

"Nor does it invalidate that ordinance because, as it is claimed, it was not read three times before its final passage. Section 1597, Revised Statutes 1889, provides: 'No ordinance shall be passed except by bill, and no bill shall be-

come an ordinance, unless on its final passage a majority of the members elect shall vote therefor, and the yeas and nays entered on the journal; and all bills shall be read three times before their final passage.' It is to be observed that the above section does not declare a sentence of nullity against a bill which is not read three times before its final passage. Such declaration is altogether confined to the preceding clauses of the section, and does not apply to the last clause."

So that it may be stated as the settled law, as announced by the highest court of this state, that under this section of the statute the failure to enter the yeas and nays upon the journal is fatal to the validity of the ordinance.

[6] Evidently anticipating this conclusion, counsel submit argument and cite authorities in avoidance of its necessary effect. They say:

"If it be conceded that the statutory requirements calling the ayes and noes and entering the ordinance of record or any other statutory provisions were not complied with, still no defense is shown against the enforcement of this contract. It has long been established that, when a municipal corporation irregularly enters into a contract which it is authorized to enter into and the contract becomes executed and the municipality has received the benefit of the contract, it cannot thereafter set forth the irregularity or lack of statutory requirements in the entering into of said contract."

And for this announcement Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659, is cited as authority. In that case the city council was vested with power to cause sidewalks in the city to be constructed, and entered into a contract with Hitchcock and Byrnes for the doing of the work. By the same contract the city engaged to pay the plaintiffs in bonds of the city, which would have amounted to more than \$50,000, a sum beyond the amount that the charter authorized the council to borrow for general purposes. The bond issue being ultra vires, the city declared the entire contract void and refused to pay for the public improvement which had already been furnished and of which the city had received the benefit. The court said:

"It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. * * * Having received benefits at the expense of the other contracting party, it (the city) cannot object that it was not empowered to perform what it promised in return, in the mode in which it promised to perform."

The city clearly had the power to contract for these improvements. It received the benefits, and this raised the implied obligation to pay for them. That is the entire scope of the holding in Hitchcock v. Galveston, supra. This has been made clear by numerous later decisions of the same court.

In Louisiana v. Wood, 102 U. S. 294, 26 L. Ed. 153, the city put out some bonds with a false date, and thus represented that they were valid without registry. The court said:

"The bonds were bought and the price was paid under the belief that they had become valid before the registry law went into effect. It would certainly be wrong to permit the city to repudiate the bonds and keep the money borrowed on their credit. * * * While, therefore, the bonds cannot be enforced, because defectively executed, the money paid for them may be recovered back."

In other words, the contract was invalid as such, but the implied obligation remained to return the money unlawfully had and received.

In Chapman v. County of Douglas, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378, the decision of the court in Hitchcock v. Galveston is cited and approved; its meaning being indicated by the following language:

"The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought now to pay over, and which may be recovered in an action for money had and received. * * * The corporation is the only one at fault in exceeding its corporate powers by making the express contract. The plaintiff is not seeking to enforce that contract, but only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. He is doing nothing which must be regarded as a necessary affirmation of an illegal act."

This principle is again enunciated by the Supreme Court in Marsh v. Fulton, 10 Wallace, 676, 19 L. Ed. 1040, in which it was held:

"Where county bonds to a railroad company are issued without any authority, they are invalid in the hands of an innocent purchaser. The authority to contract must exist before any protection as innocent purchaser can be claimed by the holder. * * * We do not mean to intimate that liabilities may not be incurred by counties independent of the statute. Undoubtedly they may be. The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way."

In Central Transportation Co. v. Pullman's Car Co., 139 U. S. 24-57, 11 Sup. Ct. 478, 487, 35 L. Ed. 55, the court said:

"In Salt Lake City v. Hollister, above cited, it was said that, in cases of contracts upon which corporations could not be sued because they were ultra vires, 'the courts have gone a long way to enable parties, who had parted with property or money on the faith of such contracts, to obtain justice by recovery of the property or the money specifically, or as money had and received to the plaintiff's use.' 118 U. S. 263 [6 Sup. Ct. 1055, 30 L. Ed. 176]. The true ground of relief in such cases is clearly shown in a line of opinions, two of which were cited by Mr. Justice Miller in support of the proposition just quoted, in which municipal corporations, having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they had received."

The proposition is again succinctly stated in Logan County Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107, as follows:

"So in Parkersburg v. Brown, 106 U. S. 487-503 [1 Sup. Ct. 442, 27 L. Ed. 238], involving the liability of a municipal corporation upon bonds issued in its name and secured by deed of trust given by the person to whom they were loaned, and which bonds were held to be void for want of authority to execute them, the court said: 'But, notwithstanding the invalidity of the bonds and of the trust, the O'Briens had a right to reclaim the property and to call on the city to account for it. The enforcement of such right is not an affirmation of the illegal contract, but is a disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act.'

In *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950, a somewhat analogous situation arose. A railroad company made a lease beyond its powers for a period of 20 years. The lease provided that the company might at any time terminate the contract and retake possession of the railroad, and that in such case, if the plaintiff so desired, the company would appoint an arbitrator, who, with one appointed by them, should decide upon the value of the contract to them, and the loss and damage incurred by reason of such termination. About 4 years later the lessor terminated the lease, which by its terms had still 16 years to run, and the lessee requested arbitration, which was refused, and suit was brought. The contract was a valuable one for the balance of the term to the lessees. It was held that a lease by a railroad company of all its road, rolling stock, and franchises for which no authority is given in its charter is ultra vires and void. The court, through Mr. Justice Miller, said:

"In regard to corporations, the rule has been well laid down that the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it. But what is sought in the case before us is the enforcement of the unexecuted part of this agreement. So far as it has been executed, namely, the four or five years of action under it, the accounts have been adjusted, and each party has received what he was entitled to by its terms. There remains unperformed the covenant to arbitrate with regard to the value of the contract. It is the damages provided for in that clause of the contract that are sued for in this action. Damages for a material part of the contract never performed; damages for the value of a contract never performed; damages for the value of a contract which was void. It is not a case of a contract fully executed. The very nature of the suit is to recover damages for its nonperformance. As to this, it is not an executed contract. Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make."

Respecting the right to insist upon performance under such conditions, the court said:

"To hold that they can is in our opinion to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts. We cannot see that the present case comes within the principle that requires that contracts which, though invalid for want of corporate power, have been fully executed, shall remain as the foundation of rights acquired by the transaction."

These quotations from the decisions of the court of last resort make clear the distinction between cases in which relief may be granted and those in which it must be denied. As was said in *Marsh v. Fulton*, *supra*:

"The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains money or property of others without authority, the law, independent of any statute, will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way."

To the former class belong the cases cited by counsel for complainant, to wit, *First National Bank v. Guardian Trust Co.*, 187 Mo. 528, 86 S. W. 109, 70 L. R. A. 79; *Water Co. v. City of Aurora*, 129 Mo. 583, 31 S. W. 946; *Chicago v. Union Stockyards*, etc., 164 Ill. 224,

45 N. E. 430, 35 L. R. A. 281; *City of Logansport v. Dykeman*, 116 Ind. 15, 17 N. E. 587; *Forrest City v. Orgill*, 87 Ark. 389, 112 S. W. 891; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659. To the latter class belong *Thomas v. Railroad Company*, 101 U. S. 71, 25 L. Ed. 950, and the case at bar.

It may be urged that here the authority to contract existed, but was irregularly exercised. But we are here dealing with a subject-matter to which the rule of strict construction is uniformly applied. Courts will not give effect to ultra vires contracts of municipal corporations. The party dealing with the corporation is under no obligation to enter into the contract, and does so at his peril. No force or restraint or fraud is practiced on him. These powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. 8 Michie's Encyc. of U. S. Supreme Court Reports, p. 577, and cases cited. A contract stipulating away governmental functions is strictly construed. *Rogers Park Water Co. v. Ferguson*, 180 U. S. 624-628, 21 Sup. Ct. 490, 45 L. Ed. 702. The charter and statutory method of the contract must be specifically followed and proved, and the obligation must be created in the way the statute provides, and no other. *Fanning v. Gregoire*, 16 How. 523-533, 14 L. Ed. 1043; *Bloomfield v. Charter Oak Bank*, 121 U. S. 121-135, 7 Sup. Ct. 865, 30 L. Ed. 923; *Marsh v. Fulton*, 10 Wall. 676-684, 19 L. Ed. 1040. And such a contract is to be governed by the local law. *City of Memphis v. Brown*, 20 Wall. 289, 22 L. Ed. 264. Exclusive franchises are not favorites of the law.

"Restraints upon governmental agencies will not be readily implied. There are presumptions against the granting of exclusive rights and against limitations upon the powers of government." *City of Joplin v. Southwest Missouri Light Co.*, 191 U. S. 150, 24 Sup. Ct. 43, 48 L. Ed. 127.

"Only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public. Whatever is not unequivocally granted is withheld; and nothing passes by implications." *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 26 Sup. Ct. 224, 50 L. Ed. 353; *Vicksburg v. Waterworks Co.*, 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102.

"Grants by the state to municipal corporations, like grants to private corporations, are to be strictly construed." *Water, Light & Gas Co. of Hutchinson v. City of Hutchinson*, 207 U. S. 385, 28 Sup. Ct. 135, 52 L. Ed. 257.

If it be said that this decision is based upon technical grounds a sufficient answer is that the complainant seeks to enforce rights and privileges which are most jealously guarded by courts and legislative bodies, and which are uniformly most strictly construed in favor of the public. It devolved upon the grantee herein to assure himself, not only of the right of the city to contract, but that it had exercised its powers in accordance with law. The safety of his investment depend-

ed upon his vigilance. While complainant has expended a considerable sum in the construction and operation of this plant, it has also for a period of nearly 18 years enjoyed the benefits of what has been, in effect, an exclusive grant. The city has received and appropriated to its own use no money or property of the complainant. The service rendered to it and its inhabitants has been paid for. There are no unsettled balances between the parties, so far as the record discloses, nothing which, under the rule laid down in *Hitchcock v. Galveston*, should in equity and good conscience be returned to the complainant. The plant, well-nigh worn out, requires rebuilding. It is complained that the present service is unsatisfactory. The city and the public service corporation appear to be hopelessly at cross-purposes, and the city insists that it be permitted to install its own lighting plant, and that a contract void from the beginning shall not be enforced as an exclusive one during the remaining two years of its assumed life. No question of confiscation is here presented. The mere right of municipal competition is asserted. But, even though this construction might involve some hardship to the complainant, no court can afford to relieve a hard situation at the expense of unsound interpretation to invade the province of the Legislature and set at naught the plain mandate of a statute founded alike upon the will of the lawmakers and consideration of sound public policy.

It follows from the conclusion reached that the bill must be dismissed, and it is so ordered.

UNITED STATES V. MUNDAY et al.

(Circuit Court, W. D. Washington, N. D. April 6, 1911.)

No. 1,921.

1. CONSPIRACY (§ 23*)—ELEMENTS OF OFFENSE—FEDERAL STATUTE.

The elements of a criminal conspiracy under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), are: (1) An object to be accomplished, which must be either the commission of an offense against the United States or to defraud the United States; (2) a plan or scheme embodying means to accomplish the object; (3) an agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means; and (4) an overt act by one or more of the conspirators to effect the object of the conspiracy.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 30-39; Dec. Dig. § 23.*

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

2. MINES AND MINERALS (§ 34*)—ENTRIES OF ALASKA COAL LANDS—TRANSFER OF RIGHTS—STATUTES.

Act April 28, 1904, c. 1772, 33 Stat. 525 (U. S. Comp. St. Supp. 1909, p. 556), amending Act June 6, 1900, c. 796, 31 Stat. 658 (U. S. Comp. St. 1901, p. 1441), extending the coal land laws to the district of Alaska, by section 1 provides that "any person or association of persons qualified to make entry under the coal land laws of the United States who shall have opened or improved a coal mine or coal mines on any of the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

unsurveyed public lands of the United States in the district of Alaska may locate the lands on which such mine or mines are situated in rectangular tracts, containing 40, 80 or 160 acres * * * by marking the four corners thereof with permanent monuments," and shall within one year after such location file a notice thereof in the Land Office. Section 2 provides that "such locator or locators, or their assigns who are citizens of the United States shall receive a patent to the lands located" on application therefor within three years, giving prescribed notices, furnishing proof of the same, "and such other proof as is required by the coal land laws" and the payment of \$10 per acre. Section 4 provides that "all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska." *Held*, that the provision of Rev. St. § 2350 (U. S. Comp. St. 1901, p. 1441), a part of the coal land laws, that "the three preceding sections shall be held to authorize only one entry by the same person or association of persons," was not imported into the Alaska statute, being limited by its terms to entries made under the three preceding sections, and that under the Alaska statute a person who has opened or improved a coal mine and located a claim as therein provided may lawfully sell the same, and his vendee is entitled to receive the patent on compliance with the statute as to notice, proof, and payment; the only limitation on such right being that the vendee must be a citizen of the United States or an association of citizens.

[*Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 81-86; Dec. Dig. § 34.**]

3. CONSPIRACY (§ 43*)—INDICTMENT—FEDERAL STATUTE.

An indictment averring that defendants conspired to defraud the United States of coal lands in Alaska by inducing persons to locate and acquire title to claims thereon under the statute to be later transferred to a corporation, so as to enable it to thereby acquire a greater quantity of coal land than allowed by law, and that defendants, pursuant to such conspiracy, aided such claimants in making proof and payment for their lands, is insufficient to charge the crime of conspiracy to defraud the United States under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), where it does not show that the claimants were dummies, but avers that they were qualified to make the entries, and does not charge that they did not fully comply with the law to entitle them to make proof and obtain patents.

[*Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79-99; Dec. Dig. § 43.**]

4. WORDS AND PHRASES—"DUMMY."

In land office practice dummies are either fictitious persons, or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfactorily.

Criminal prosecution of Charles F. Munday, Archie W. Shiels, and Earl E. Siegley by indictment charging defendants with conspiracy by a scheme to fraudulently acquire coal lands in Alaska. Indictment quashed.

B. D. Townsend and S. R. Rush, Sp. Asst. Attys. Gen.

Blaine, Tucker & Hyland and Walter S. Fulton, for defendant Munday.

Kerr & McCord, for defendant Siegley.

Dorr & Hadley, for defendant Shiels.

E. C. Hughes, for defendants.

HANFORD, District Judge. The government prosecutes the defendants by an indictment founded upon section 5440 of the Revised Statutes of the United States, charging them as criminal conspirators. A jury having been impaneled and sworn to try the case, counsel for the government made an opening statement, giving an outline of the facts which the government relies upon to sustain the charge. His statement, however, consisted of a mere reading of the indictment. After a witness had been called and sworn to testify, counsel for the defendants interposed an objection to the introduction of any evidence, on the ground, as they allege, that the indictment is insufficient to support a judgment adverse to their clients, and by argument supporting their objection they have presented the concrete question whether the conspiracy charged is criminal or innocent. In the consideration and decision of the question submitted, it will be assumed that the indictment is a fair and complete statement of the government's case; that is to say, it specifies the crime intended to be charged with definiteness and certainty, and contains a general outline of the chain of circumstances and the facts which the evidence to be offered will prove, or tend to prove.

Elements of Criminal Conspiracy.

[1] The only crimes punishable under federal law are those defined by the laws enacted by Congress. Therefore it must be kept in mind that the prosecution in this case is for an alleged statutory crime. The elements of the crime of conspiracy under the laws of the United States are: (1) An object to be accomplished which must be (a) the commission of an offense against the United States; (b) to defraud the United States. (2) A plan or scheme embodying means to accomplish the object. (3) An agreement or understanding between two or more persons whereby they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means. (4) An overt act by one or more of the conspirators to effect the object of the conspiracy.

The Indictment Analyzed.

The indictment names the three defendants on trial and one Algeron H. Stracey as the persons implicated in the conspiracy charged. King county, in the state of Washington, and the 1st day of May, 1905, are specified as the place and time of the formation of the alleged criminal combination.

The general charge of the indictment is that the four persons named, with divers other unknown persons, did unlawfully (omitting other adjectives) combine, confederate, and agree together to defraud the United States of America of the use and possession of, and title to, large tracts of valuable coal lands then and there part of the public domain of the United States, situated within the Kayak recording district of Alaska, being contiguous tracts and parcels of coal lands collectively and commonly known as the "Stracey group." The indictment specifies that the lands referred to were subject to location and entry under the coal land laws of the United States ap-

plicable to Alaska and subject to the several attempted locations and entries in a subsequent part of the indictment specified, except for the unlawful, fraudulent, false, feigned, and fictitious character of said attempted locations and entries; and that the value of said lands is \$10,000,000.

The indictment contains other specifications of the nature of the intended fraud, some of which, however, are comprehended within the general charge of the purpose to defraud the United States by divesting the government of its title to, and proprietary rights in, the coal lands designated, and therefore do not merit additional mention. Other specifications of fraud are to the effect that the scheme included interference with the administration of the land business of the United States by deceiving the officers and agents of the government, in order to induce them to approve the several locations and entries and issue patents conveying the title to the coal lands designated.

The gravamen of the charge is an unlawful conspiracy to obtain coal land in Alaska for the Alaska Development Company, a corporation of the state of Washington, and the Pacific Coal & Oil Company, reputed to be a corporation organized and existing under the legal authority of some foreign government, to wit, the Dominion of Canada or one of its provinces; the quantity of land so to be obtained for said corporations being in excess of the quantity which the law permits. The several tracts of coal land to be acquired pursuant to the alleged conspiracy are 40 in number, each being specifically described and identified as a coal claim bearing the name of the individual locator and claimant thereof and by a serial number and by the area thereof expressed in acres and fractions of an acre; each claim being approximately one-fourth of a section.

The plan or scheme embodying the means whereby the object of the alleged conspiracy was to be accomplished are set forth with particularity in articulated paragraphs which I have epitomized as follows: The objects and purposes of said unlawful conspiracy were to be furthered and effected by means of unlawful, fraudulent, false, feigned, and fictitious locations, notices of locations, preferential rights to purchase, applications to enter and purchase, and final entries and purchases under the coal land laws of the United States; by cunning persuasion and promises of pecuniary reward and other corrupt means persons severally qualified by law (except as stated) should be procured and induced to make the fictitious locations and fraudulent entries of said tracts of coal lands ostensibly for the exclusive use and benefit of themselves, respectively, but in truth and in fact for the use and benefit of the Alaska Development Company and the Pacific Coal & Oil Company. The possession of all of said coal lands was to be held and the use thereof enjoyed by persons ostensibly as the agents of and for the benefit of the individual claimants, respectively, but in truth and in fact as the agent of, and for the use and benefit of, said corporations. Each claimant should be induced, persuaded, and procured to support his unlawful location and fraudulent entry by affidavits regular in form but containing false representations;

that each of them, respectively, had opened and improved a coal mine and expended moneys in that behalf and staked out and located a coal claim, including within its boundaries said coal mines, and had taken and held possession of said coal claims and intended to purchase from the United States under and pursuant to the coal land law applicable to Alaska the tract of land so pretended to have been located. By said means, the officers of the United States having charge of public land matters should be deceived and induced to accept, file, and record notices of location and affidavits in the land office, and to segregate said coal lands from the public domain, and withdraw the same from public entry under any of the public land laws of the United States, and rights should thereby be acquired ostensibly for the benefit of the persons making such false affidavits, but, in fact, for the said corporations. Thereafter said coal land claimants, respectively, should hold and exercise their pretended and unlawful preferential rights to purchase said coal lands ostensibly for their own use and benefit, but in fact for the said two corporations. Thereafter said claimants should, in the form and manner provided by law, make applications to enter and purchase said coal lands ostensibly for their own use and benefit, but, in fact, for the said two corporations, and thereby the said corporations should receive and enjoy the benefits of a greater number of locations and entries of coal lands, and for a greater quantity of coal lands than allowed by law. The respective shares and interests of said Alaska Development Company and of said Pacific Coal & Oil Company in the fruits and benefits of the unlawful conspiracy were to be adjusted so that said Alaska Development Company should receive and enjoy the title, use, and value of all of said coal lands subject to a contract entered into between said two corporations prior to the transactions, and which was in full force and effect at and during all of the times mentioned, by which it was provided that, as between said corporations, the Pacific Coal & Oil Company should be entitled to take and hold possession of said coal lands, operate the mines thereon, and extract the coal therefrom, paying a royalty therefor to said Alaska Development Company, and have an option to purchase all of said coal lands within certain stated times and for certain stated prices.

Overt acts are charged, substantially, as follows: That after the formation of said unlawful conspiracy, and in pursuance of, and to effect its object, Archie W. Shiels, one of the defendants, did unlawfully on specified dates cause each of the said coal claims to be surveyed by a mineral surveyor of the United States. Said survey being intended for use in applications to enter and purchase the said coal claims by the respective claimants thereof, and thereafter in further pursuance of, and to effect the object of said unlawful conspiracy, the said Shiels did knowingly on specified dates file and cause to be filed in the office of the Surveyor General of the United States for Alaska each and all of the said official surveys and the field notes thereof. The indictment then sets forth in tabulated form a list of the claims surveyed with the dates on which the surveys were made and the filing dates, said claims being 40 in number and identified

by the names of the claimants as the same claims previously mentioned. The indictment then alleges a number of other overt acts in furtherance of and to consummate the conspiracy, indicating that the scheme was carried out to the extent of filing applications to purchase said claims by each of the locators and payment of the government's price to the officers of the local land office for the district of Alaska in which the lands are situated, and that in the transaction of said business the defendants or one of them acted as attorney or agent of all of the locators. The indictment alleges other transactions subsequent to the 1st day of January, 1910, including written communications referring to money advanced by the Pacific Coal & Oil Company for which security was to be taken in the form of mortgages to be executed by the several entrymen and payments of money to the receiver of the land office at Juneau in payment of the government price for a number of said coal claims. Finally, the indictment charges that on a specified date subsequent to January 1, 1910, one of the defendants paid to the receiver of the Land Office at Juneau the government price for 38 of said coal claims.

It is to be specially noted that the indictment does not charge that the several locators were dummies; on the contrary, it is expressly averred that they were each of them competent to make entries of coal lands in Alaska, and not disqualified except for particular reasons in the indictment specified, and it is not charged as one of those particular reasons that their locations were illegal because of any failure to do the things which the law makes essential to the acquisition of rights as locators of coal land, nor that more than one coal right was to be, or had been, exercised by any one locator. To avoid possible complications from the enactment of the Criminal Code which went into effect on the 1st day of January, 1910, counsel for the government voluntarily announced an abandonment by the government of the charges contained in the indictment of overt acts subsequent to that date as elements of the crime with which the defendants are charged.

Provisions of the Statute Affecting Coal Claims in Alaska.

[2] For convenience of reference, I will use Pierce's Federal Code, being a compilation of all the statutes of the United States of a general and permanent nature in force March 4, 1907, with a supplement continuing the compilation to January 1, 1910. In this volume the coal land laws of the United States necessary to be considered in the determination of the question—whether the defendants intended or attempted to perpetrate a fraud—are set forth in a group in sections numbered consecutively from 10,044 to 10,054, inclusive; the same being an accurate reprint of the laws comprised in sections 2347 to 2352 of the Revised Statutes of the United States (U. S. Comp. St. 1901, pp. 1440, 1441), and in 31 U. S. Stat. at L. p. 658 (U. S. Comp. St. 1901, p. 1441), and in 33 U. S. Stat. at L. p. 525 (U. S. Comp. St. Supp. 1909, p. 556). Sections 10,044 to 10,049, inclusive, being identical with sections 2347 to 2352, inclusive, of the Revised Statutes, comprise the general coal land law of the United States enacted by Congress in the year 1873. Referring to the sections by the Code numbers, the statutes contain the following provisions:

Section 10,044 prescribes a rule for the acquisition from the government of coal lands being part of the public domain of the United States by cash entry. By said rule the right to make entries is limited to persons and associations whose qualifications are defined in the following words:

"Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above."

And the maximum quantity of coal land which may be entered by a single individual or an association is fixed, and the minimum price to be paid therefor is also fixed.

Section 10,045 provides for a preference right of entry in favor of any person or association of persons severally qualified as provided in the preceding section who have opened and improved or shall open and improve any coal mine or mines on the public lands and shall be in actual possession of the same, and further provides that, when any association not less than four persons severally qualified as above shall have expended not less than \$5,000 in working and improving any such mine or mines, such association may enter not exceeding 640 acres, including such mining improvements.

Section 10,046 relates to the presentation of claims for preferential rights and details of procedure to secure the same.

Section 10,047 reads as follows:

"The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

Section 10,048 relates to conflicting claims upon coal lands on which improvements shall have been commenced.

Section 10,049 is a saving clause of rights which may have attached prior to the enactment of the law.

Section 10,050 is the act of Congress approved June 6, 1900 (31 Stat. 658), extending to the district of Alaska so much of the public land laws of the United States as relate to coal lands, namely, sections 2347 to 2352, inclusive, of the Revised Statutes.

Sections 10,051-10,054, inclusive, comprise the act of Congress approved April 28, 1904 (33 Stat. 525), entitled, "An act to amend an act entitled 'An act to extend the coal land laws to the district of Alaska,' approved June sixth, nineteen hundred," which reads as follows:

"10,051. That any person or association of persons qualified to make entry under the coal land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which

such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located, or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same.

"10,052. Sec. 2. That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the Surveyor General for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

"10,053. Sec. 3. That during such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein.

"10,054. Sec. 4. That all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska."

The statute comprised in these four quoted sections is specially applicable to Alaska, and was enacted by Congress to meet an urgent demand, amounting to necessity and because the previous statute of June 6, 1900, extending the general coal land law of the United States to Alaska, was impracticable because conditions made it impossible to acquire any rights under it by compliance with its requirements.

In a letter addressed to the registers and receivers in the district of Alaska, dated June 27, 1900, the Commissioner of the General Land Office announced the enactment of this law, and explained that under sections 2347 to 2352, inclusive, of the Revised Statutes, which the act purported to extend to Alaska, coal land filings and entries must be by legal subdivisions as made by the regular United States survey, and that under section 2401 of the Revised Statutes as amend-

ed by the act of August 20, 1894 (U. S. Comp. St. 1901, p. 1477), no application for a special survey shall be granted unless the township proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys, and that, as no township or subdivisional surveys have been made nor any standard lines or bases for township and subdivisional surveys established within Alaska, therefore until the filing in the local land office of the official plat of survey of a township, no coal filing nor entry can be made. This was, in fact, an official declaration of the attempt, and failure of Congress to make provision by a practicable law for the acquisition by individuals and associations of rights in and to coal lands in Alaska.

Instead of attempting to state the provisions of the law of 1904 in different phraseology, I have quoted it because it is the opinion of the court that it is not in any particular ambiguous. It means what the words selected by Congress express according to the common and general understanding of people accustomed to use the English language. It needs not to be construed, and there is no authority to interpolate into its provisions restrictions and limitations of rights which it grants by judicial interpretation or construction. In the case of Newhall v. Sanger, 92 U. S. 765, 23 L. Ed. 769, Mr. Justice Davis said: "There is no authority to import a word into a statute in order to change its meaning."

By the arguments made it appears that this prosecution is founded in part at least upon a theory that the restrictions of section 10,047, above quoted, are to be deemed as being imported into the law of 1904. That contention is untenable, for the reason that by the express words of that section which I have quoted those restrictions apply only to persons and associations claiming or exercising rights under the three preceding sections, which were and are inapplicable to conditions in Alaska and never did have potential force there. The statute of 1904, applicable only to Alaska, is a declaration of the will of Congress subsequent to the act of June 6, 1900, extending the law of 1873 to Alaska, and therefore is the paramount law. The later law does not in words nor by reference to, and adoption of, the provisions of the older law, restrict persons or associations to a single exercise of the right granted to locate coal claims and secure patents therefor. The argument that section 10,047 must be read into the Alaska statute is that the right to locate is given only to persons and associations qualified to make entry under the coal land laws of the United States, and that these words exclude persons and associations having the qualifications prescribed, but disqualified by reason of having once exercised the right. By this argument there is interpolated into the statute words additional to and expressing a meaning different from the plain declaration of the law itself. The prescribed qualifications are age and citizenship. By the law of 1873 a person 21 years of age and a citizen of the United States is qualified to make an entry of coal land, and having the same qualifications, and having, also, opened or improved a coal mine on unsurveyed public land in Alaska, he is entitled to become a locator of a coal claim, including

the mine which he has opened or improved. This is so according to the letter of the law. And, having located a coal claim, he may sell it, and his vendee, if a citizen of the United States or an association composed of citizens, are entitled to receive a patent conveying the complete title from the government by compliance with the requirements of section 10,052. To say that a vendee of a qualified locator to be entitled to receive a patent must be a citizen or association of citizens qualified as prescribed to make an entry of coal land, and not disqualified by having exercised a right to acquire coal land from the government, infringes legislative power, for in the guise of construction a radical change in the law would be effected by the addition of requirements and restrictions which the lawmaking power did not put there. The words of the law are:

"That such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting.

* * *

By having made *citizenship* a requisite condition of the right to receive a patent, the law makes *citizenship* the only requisite condition to the right. This is so by the rule declared by the Supreme Court in the words of Mr. Justice Davis above quoted, which is a fundamental rule for the construction and interpretation of statutes. "Expressum facit cessare tacitum."

Congress intended to enact a practicable, workable law, and, if its second attempt to do so be not made futile by misconstruction, we have such a law. It is not a law made to serve the purpose of monopolists who would keep the coal of Alaska locked within her mountain walls, nor is it based upon any fantastic notion that trusts can be annihilated by giving coal rights to no one except the man who by personal toil may dig the coal and carry it to market upon his back or upon his head. It is the duty of the court to not misconstrue the law, nor stigmatize the Congress which enacted it and the President, who approved and signed it, by imputing to them a lack of either sense or honesty. This law by its words and intent limits the rights of a qualified locator who has opened or improved a coal mine in Alaska by prescribing the maximum area and the form of the tract which he may secure by doing the things which the law exacts, and by making the opening or improving of a coal mine the initiatory step, and the marking of boundaries and corners and the posting and recording of notices essential to a valid location. These requirements necessitate expense and trouble, and it is not for the court to say that as restrictions and limitations they are not sufficient. The responsibility of determining all such questions belongs to the legislative branch of the government. To become entitled to a patent, the locator or his assigns must publish and keep posted the notice prescribed by the second section of the act and furnish proof of such publication and posting; "and such other proof as is required by the coal land laws." We now look to the coal land laws to find what other proof must be furnished. We search the law to find what other proofs are required rather than regulations promulgated by departmental officers, because the words of the act refer to the law, and do not leave the locator, who has

opened and improved a coal mine, under the necessity of complying with the personal will of Bureau officers authorized to change the regulations as often as they may think that they discover reasons for more exacting conditions. Section 10,047 of the Code contains this clause:

"All persons claiming under section twenty-three hundred and forty-eight shall be required to *prove their respective rights* and pay for the lands filed upon. * * *

[3] This is undoubtedly the other proof referred to, and by the selection and adoption of that particular clause there is plainly manifested a definite purpose to not graft the other provisions of the same section upon the Alaska coal land laws. Locators of coal claims in Alaska under this law have the right to use business sense, to look ahead and make arrangements for working capital and to contract in advance for transportation facilities, and to sell or mortgage their claims. By mandatory words the law prescribes that the locator who meets the requirements prescribed shall receive a patent. He may sell his claim before obtaining the patent, and, if he does so, his vendee, if a citizen of the United States or an association of citizens, shall receive the patent. It is not to be inferred that the law will permit the acquisition of coal lands in Alaska through the medium of dummy entrymen. [4] In land office practice dummies are either fictitious persons, or those who, having no interest in the transaction, permit the use of their names for the perpetration of a fraud and sign papers and make affidavits perfunctorily. A man who opens or improves a coal mine in Alaska and locates a claim in the form prescribed by the statute, including his improvements, and marks its lines and corners so that its boundaries can be readily traced on the ground, and posts and records a notice in conformity to the requirements of the statute, and is then competent and entitled to deal with the claim as his own property, to sell it, lease it, mortgage it, or keep it, and derive for himself all the profits and benefits to be derived from the most advantageous use or disposition of such property, is not a dummy entryman.

This understanding of the law does not make it inconsistent with its title. It is an amendatory statute. It amends not by changing any provisions of previously enacted laws, but by making additions thereto especially applicable to local conditions in Alaska. This appears the more obvious when all of the laws affecting the acquisition of rights to coal lands are grouped in chronological order as they appear in Pierce's Federal Code.

Nothing is to be implied from the peculiar phraseology of the fourth and last section. By its words all the provisions of the coal land laws of the United States not in conflict with the provisions of this act shall continue and be in full force in the district of Alaska. This continues the existing status as to all the provisions of the coal land laws of the United States not in conflict with the new enactment. If there be conflicting provisions, the older enactments yield to the new. Provisions which do not conflict continue in force, and, when conditions shall be changed so that their requirements may be complied with, it will be legal and practicable to make cash entries and acquire preferential rights. A foreign corporation cannot lawfully acquire or hold

a coal claim in Alaska either in its corporate name or in the name of any agent or trustee. Therefore, for the reason that the indictment charges a conspiracy to acquire coal claims or proprietary rights to coal claims in Alaska for a foreign corporation, it must be sustained as a valid indictment, and the objection to the introduction of evidence must be overruled. The court will, however, instruct the jury that, to justify a conviction of the defendants under it, the evidence must prove that the object of the conspiracy, if any, must have been to perpetrate a fraud by securing coal claims or proprietary rights in coal claims in Alaska for the Pacific Coal & Oil Company.

Addenda.

After the announcement by the court of its decision and ruling on the objection to the introduction of evidence, as indicated in the foregoing opinion, in order to facilitate a review of the decision by the Supreme Court, the trial was terminated, pursuant to a stipulation, by and between counsel for the government and counsel for the several defendants, by the following proceedings:

(1) The government does now and here abandon for all time the charges in the indictment of the foreign or alien character of the Pacific Coal & Oil Company as an element of the crime sought to be charged by the indictment.

(2) Defendants now move the court that the indictment be quashed and that the defendants be discharged, upon the following grounds: (1) That the indictment in this case does not charge the defendants, or any of them, with any crime or offense against the United States, nor with the violation of any law of the United States. (2) That the said indictment does not charge the defendants, or any of them, with the crime or offense of conspiracy to defraud the United States. (3) That said indictment fails to allege the doing or committing of any overt act or acts by any of the defendants to effect the object of any conspiracy to defraud the United States.

This motion is based upon the general grounds that the laws of the United States regulating the disposition of coal lands in the district of Alaska during the times set forth in the indictment did not prohibit the transactions, or any of them, charged in the indictment, as contemplated by and a part of the alleged conspiracy therein set forth. In order to obviate any question of double jeopardy, and for the purpose of making the record in such form that a writ of error will lie to the Supreme Court in favor of the government, under Act March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. Comp. St. Supp. 1909, p. 220), the government now moved that the court withdraw one of the jurors before ruling upon the motion just interposed on behalf of the defendants. The defendants and each of them, being personally present, consent to the withdrawal of the juror by the court, as requested by counsel for the government, and Mr. Funk, one of the jurors, is thereupon excused and withdrawn from the jury by the court.

PER CURIAM. The motion made on behalf of the defendants is granted by the court, the indictment is quashed, and the defendants are discharged. This ruling is based upon a construction of the coal

land laws of the United States applicable to the district of Alaska, and the grounds of the court's ruling are as set forth in the written opinion or opinions filed or to be filed herein.

Counsel for the government asks that an exception be noted to the ruling of the court, and the exception is allowed by the court.

UNITED STATES v. AMERICAN DRUGGISTS' SYNDICATE.

(Circuit Court, E. D. New York. April 11, 1911.)

1. DRUGGISTS (§ 12*)—MISBRANDING DRUGS—STATUTES.

Under Act June 30, 1906, c. 3915, §§ 2, 8, 34 Stat. 768, 770 (U. S. Comp. St. Supp. 1909, pp. 1188, 1191), prohibiting the introduction into any state from any other state of any article of drugs which is adulterated or misbranded, and declaring that the term "misbranded" shall apply to drugs, the packages or label of which bear any statement which shall be false or misleading in any particular, and that in case of drugs an article shall be misbranded if it be an imitation of or offered for sale under the name of another article, if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed therein, or if the package fail to bear a statement on the label of the quantity or proportion of enumerated articles, a statement regarding a drug cannot be false or misleading unless it relates to some one or more of the various particulars expressly enjoined or prohibited, and any statement regarding a drug which does not have reference to the ingredients or substances contained therein, or to any of the particulars specified, is not within the act.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 12.*]

2. DRUGGISTS (§ 12*)—MISBRANDING DRUGS—STATUTES.

Under the act, a label on an article containing peroxide in a very small quantity, which states that the article contains peroxide, need not state the quantity or proportion thereof.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 12.*]

3. DRUGGISTS (§ 12*)—MISBRANDING DRUGS—STATUTES.

The purpose of the act is to protect the public against deception in the purchase of drugs by punishing adulteration and misbranding as therein defined, and a manufacturer of a face cream is not liable for misstatements as to its curative or remedial effects.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 12.*]

4. DRUGGISTS (§ 12*)—MISBRANDING DRUGS—STATUTES.

The act merely embraces any statement, design, or device regarding an article which appears on the outside of the package in which the article is offered for sale, whether such statement is printed on or otherwise affixed to the package, or impressed on a separate label affixed to the package, but does not include an advertising circular inclosed with an article inside the carton in which it is offered for sale.

[Ed. Note.—For other cases, see Druggists, Dec. Dig. § 12.*]

The American Druggists' Syndicate was charged with misbranding a drug. Demurrer to the information sustained.

William J. Youngs, U. S. Atty. (W. P. Allen, Asst. U. S. Atty., of counsel).

Philbin, Beekman, Menken & Griscom (S. Stanwood Menken and Benj. E. Messler, of counsel), for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

VEEDER, District Judge. The defendant has demurred to both counts of a criminal information charging it with misbranding a drug in violation of Act June 30, 1906, c. 3915, § 2, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1188), known as the "Food and Drugs Act." Section 2 of the act prohibits "the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia of any article of food or drugs which is adulterated or misbranded within the meaning of this act," and provides that any person who shall ship or deliver for shipment, as therein described, any such article so adulterated or misbranded, shall be guilty of a misdemeanor. The offense of misbranding is defined in section 8 as follows:

"That the term 'misbranded,' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the packages or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded:

"In the case of drugs:

"First, if it be an imitation of or offered for sale under the name of another article.

"Second, if the contents of the package as originally put up shall have been removed, in whole or in part, and other contents shall have been placed in such package, or if the package fail to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate, or acetanilide, or any derivative or preparation of any such substances contained therein."

The remainder of the section deals in similar detail with the case of foods.

The first count of the information alleges that the defendant shipped from the state of New York to the District of Columbia a certain article and drug, which was a mixture of substances for external use, upon which there was a label reading:

"A. D. S. Peroxide Cream. Cleansing, Soothing and Healing to the Skin, Antiseptic; Cooling and Refreshing."

Elsewhere upon the carton, and upon the package or jar inclosed therein, were immaterial variations of this statement of the properties and purposes of the preparation. It is charged that this was a misbranding within the meaning of the act, "in that the label then and there bore statements, designs, and devices regarding the said article and the ingredients and the substances contained therein which were false and misleading, in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of same peroxide which said quantity is insignificant."

[1] The scope of the general terms of the definition of misbranding in section 8, "any statement, design or device regarding such article,

or the ingredients or substances contained therein which shall be false or misleading in any particular," must be ascertained by construing them in connection with the subject-matter and other provisions of the act. It includes in the first place, not only statements concerning the ingredients or substances contained in the article, but certain other statements "regarding such articles." What such statements appear in the case of drugs in the paragraph immediately following the definition of misbranding; for instance, drugs in imitation of or offered for sale under the name of another article. The only possible ground for doubting this construction arises from the manner in which the general definition of the term misbranding is followed, in the case of drugs, by specifications which purport to be additions. The remainder of section 8, dealing with the case of food, is perfectly clear. The first three paragraphs specify the particulars other than statements regarding the ingredients or substances contained therein which shall be deemed misbranding, and then follows the general provision covering any statement "regarding the ingredients or the substances contained therein which shall be false or misleading in any particular." Having regard to the fact, however, that the general definition of the term "misbranded" is expressly applicable to both food and drugs, it does not appear that the difference in phraseology and form of arrangement of the specific provisions for the two articles affects their substantial equality in scope. It is clear that the section does not apply to any statement regarding a drug which does not have reference to the ingredients or substances contained therein, or to any of the particulars specified in the section in the case of drugs. The same process of reasoning discloses the scope of the phrase "false or misleading in any particular." If there is any appreciable difference in the import of the words false and misleading, the scope of the latter term is to be found in the specific provisions of this section in the case of drugs; for instance, where the label fails to state, as required, the quantity or proportion of alcohol contained therein. No statement regarding a drug can therefore be false or misleading in any particular within the meaning of the act, unless it relates to some one or more of the various particulars expressly enjoined or prohibited by the act.

[2] It appears upon the face of the information that the preparation in question contained some peroxide. There was no statement on the label as to the quantity or proportion, nor does the act require any such statement in the case of peroxide. Certainly, then, the label was not false. *In re Wilson* (C. C.) 168 Fed. 566; *United States v. Boeckmann* (C. C.) 176 Fed. 382. But the information alleges that the label is "false and misleading, in that the words 'Peroxide Cream' represent that peroxide is an important ingredient, and tend to lead the purchaser to believe that peroxide is an important ingredient of the article, whereas, in truth and in fact, the article then and there contained only an indication of a very small quantity of same peroxide, which said quantity is insignificant." It is asserted (and it is a fair inference) that the label tends to lead purchasers to believe that peroxide is present to such an extent that the antiseptic and healing qualities of peroxide may be obtained from its use; and it is argued that

such is not the fact, and therefore the label is misleading. In other words, the government contends that the statement on the label with reference to the remedial effect of the article is a misbranding within the meaning of the act because the article is, in fact, ineffectual for the purpose indicated. Assuming that the information is sufficient as a pleading to raise such an issue, this contention is based upon an entire misconception of the scope and purpose of the act.

[3] The purpose was to protect the public against deception in the purchase of drugs and food by punishing adulteration and misbranding as therein defined. If the label on a drug is not false or misleading in any of the particulars enjoined or prohibited by section 8, no offense is committed under that section. By no possible construction can the terms of the act be extended to such a boundless field of inquiry as that involved in the reality of the remedial effects claimed for a drug. Such an inquiry could be pursued only through the opinions of contending experts and the experience of those who had used the article, and a conclusive determination could seldom, if ever, be reached. At all events, it is sufficient to say that the act discloses no purpose to hold manufacturers and vendors of preparations like the one in issue to criminal responsibility for misstatements as to their curative or remedial effects. United States v. Johnson (D. C.) 177 Fed. 313.

[4] The second count of the information alleges that there was inclosed with the article a circular entitled "A. D. S. Toilet Dainties," containing the following words, under the heading "A. D. S. Peroxide Cream": "It is a pure skin cerate, in which a harmless and efficient whitening agent has been successfully incorporated"—and asserts that this was a misbranding, "in that the circular accompanying the article bore statements, designs, and devices regarding the said article, and the ingredients and substances contained therein, which were false and misleading, in that the statement 'is a pure skin cerate' is false and misleading in that it represents the article to contain wax, whereas, in truth and in fact, the said article did not then and there contain wax, and was not then and there a cerate." In other words, the information shows that the alleged false and misleading statement constituting misbranding appeared, not upon the label of the article itself, or upon the package in which the article was contained, but upon a separate circular (the title of which indicates that it advertised other articles) which was inclosed with the article in the enveloping package.

The terms "brand" and "label" as used in this connection are perfectly clear and definite. They indicate a statement, design, or device affixed to an article. Confusion can only arise from the failure to employ uniform phraseology throughout the different paragraphs of section 8 to express the same idea. In the second numbered paragraph relating to food the phraseology is "if the package fail to bear a statement on the label." In the fourth numbered paragraph relating to food the phraseology is, "if the package containing it or its label shall bear any statement." Doubtless these variations in expression were employed in view of the fact that such articles are commonly sold either in bottles, jars, or cans, in which case the statement, design, or

device would ordinarily appear on a printed label attached thereto, or in an enveloping carton or package, when the statement would ordinarily be printed on the package. But the clearest provision in the section (the third numbered paragraph relating to food) omits the word "label" altogether:

"If in package form, and the contents are stated in terms of weight or measure they are not plainly and correctly stated on the outside of the package."

The plain sense of the language in question is that it embraces any statement, design, or device regarding the article, which appears on the outside of the package in which the drug is offered for sale, whether such statement be printed upon or otherwise affixed to the package itself or impressed upon a separate label which is then affixed to the package. An advertising circular inclosed with an article inside the carton in which it is offered for sale neither induces the sale nor deceives the prospective purchaser, and is not within the purview of the act.

The demurrer is sustained.

UNITED STATES v. NORD DEUTSCHER LLOYD.

(Circuit Court, S. D. New York. April 8, 1911.)

1. ALIENS (§ 40*)—IMMIGRATION—DEPORTATION—SECURITY FOR RETURN—STATUTES—CONSTRUCTION.

Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 458), provides that if the owner of any vessel bringing an alien not entitled to enter shall make any charge for the return of such alien, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor. *Held*, that such provision applies only to acts done within the United States, since to construe it as applicable to acts occurring wholly within foreign territory would render it violative of international law.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 40.*]

2. ALIENS (§ 59*)—DEPORTATION—CHARGE FOR RETURN PASSAGE—OFFENSES—INDICTMENT—“CHARGE.”

Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 458), provides that if the owner of a steamship shall make any “charge” for the return of any alien brought to the United States and not entitled to enter, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor. An indictment alleged that defendant steamship company at Bremen collected return passage money from proposed immigrants who were within the excluded classes, and that it afterwards brought them to New York, and, knowing of their proposed deportation, holds the money as security for a charge to be made for deportation. *Held*, that the word “charge” as so used did not import a continuing act, but meant an overt act, by which the charging party manifested his purpose to demand the money charged from the person charged, excluding the subsequent relations which were consequences of the act, and that the indictment was therefore fatally defective for failure to allege that the forbidden “charge” was made with the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

intent to apply the amount so collected to the return of the aliens under deportation.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 2, pp. 1064-1072; vol. 8, pp. 7599, 7600.]

3. ALIENS (§ 59*)—IMMIGRATION—OFFENSES—SECURITY FOR DEPORTATION—INDICTMENT—“TAKING SECURITY.”

Under Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 458), providing that if any shipowner shall make any charge for the return of any alien brought to the United States and not entitled to enter, or shall take any security from him for the payment of the charge of deportation, he shall be guilty of a misdemeanor, an indictment alleging that defendant at Bremen collected return passage from certain proposed immigrants who were within the excluded classes, and held the money as security for a charge to be made for deportation, did not charge the taking of the money as security within the United States, since to retain money taken in a foreign country was not a continuous repetition of the “taking” within the United States by reason of the fact that the aliens were brought to the United States and ordered deported because not entitled to enter.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 59.*

For other definitions, see Words and Phrases, vol. 8, pp. 6851-6863; vol. 8, p. 7813.]

Indictment against the Nord Deutscher Lloyd for violating the immigration act in making a charge for the return passage of aliens brought to the United States and ordered deported on being found not entitled to enter. On demurrer to the indictment. Sustained.

William S. Ball, for the United States.

Joseph Larocque, for the defendant.

HAND, District Judge. [1] The defendant asserts, and the government does not deny, that the act means to make criminal only such acts as occur within the territory of the United States. It is therefore unnecessary to consider what would be the effect of an act which subjected to punishment a corporation doing business in our territory for acts occurring wholly in the territory of the city of Bremen. Such legislation would be clearly violative of the general principles of international law (American Banana Co. v. United Fruit Company, 213 U. S. 347, 29 Sup. Ct. 511, 53 L. Ed. 826); but whether it would be a matter for the court to say that it was void is not now up for consideration. The question is whether any act has occurred here which is within the words of the statute. Those words are: “Shall make any charge for the return of any such alien, or shall take any security from him for the payment of such charge.” The “security” intended is for the “charge”; the “return” intended is a “deportation” under the act as an excluded alien. So much will, I believe, be conceded by both sides.

The allegations of the indictment may be paraphrased as follows: (a) That the defendant is a foreign corporation transporting passengers to and fro, between this country and Germany. (b) That on a day mentioned it brought two aliens from Bremen into the port of New York. (c) That theretofore and at Bremen the defendant col-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lected of the aliens passage money and return passage money; for the latter giving a receipt exchangeable for a return ticket. (d) That the aliens were brought in in violation of law and are within the excluded classes. (e) That the defendant still holds and retains the return passage money, "making charge thereof for the return of such aliens, and being taken and continuously held by the said defendant, as security * * * for the payment of such charge." It is very difficult to understand what the pleader means by the last words, for the defendant could hardly at once make charge for the return by retaining the rubles and be taking them as security for such a charge. I shall construe the words as adding nothing to the substantial allegations of the "charge," but as asserting that the defendant is holding the rubles as security for a future "charge." Stripped therefore of all verbiage, the indictment charges only that the defendant at Bremen collected return passage money from proposing immigrants, who were in fact within the excluded classes, and that it afterwards brought them to the port of New York, and, knowing of their proposed deportation, holds the money as security for a charge to be made for deportation. The questions raised are, therefore: First, whether in doing so the defendant "charged" the aliens in New York for a return passage; and, second, whether, in New York, it "took security" for such a charge.

This first question has two aspects: First, whether the defendant at any place "charged" the aliens within the terms of the act; and, second, whether such a charge took place in New York. It is certainly true that the defendant at Bremen charged the aliens for a return passage, and that the next return passage of the aliens will be under order of deportation. Unless, therefore, the statute requires that the forbidden "charge" must be made with intent to apply to a return under deportation, the indictment alleges a crime committed at Bremen. I think, however, that the statute does require such an intent, and that merely to take prepayment of return passage money from an alien subsequently excluded is clearly not within the statute, unless the return contemplated was a return under deportation. A contrary construction would involve the construction that the charge is "for" the return under deportation, though no one so supposes at the time. The word "charge" normally involves the idea that the charging party has in mind apportioning the sum charged against a specific item, and, unless the item be a return under deportation, he can hardly be said to have charged "for" such a return. In this respect, therefore, the indictment is deficient from any point of view. Nor it is enough, even though from the allegations it might be inferred evidentially that the defendant entertained such an intention, for no indictment may lay only the evidence, from which the necessary allegations shall be inferred. The eventual facts must themselves be stated, and this indictment lacks any statement that the charge made at Bremen was for a return under deportation.

[2] But that is only one difficulty, because, even if there had been adequate allegation of a charge for "such return," the only charge took place at Bremen. If, because of the subsequent deportation, the

defendant at New York insists upon taking up the receipt, or upon canceling the aliens' right to a return passage, or in any other way changing his rights under the receipt, then perhaps it charges the aliens here. That question is, however, not raised by any allegation in this indictment, for the defendant has done nothing in our territory but bring in the aliens. However, the government says that this is a continuing offense, and that it was completed here. *Armour & Co. v. U. S.*, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. No doubt Congress could make it an offense to bring in an alien of the excluded classes whose passage had been prepaid, and punish a company for doing so. *U. S. v. Craig* (C. C.) 28 Fed. 795; *U. S. v. Lavarello* (C. C.) 149 Fed. 297. Whether that would be strictly a continuing offense or not is not important, for so much of it as happened here would in any case be sufficient to justify the action of Congress. But that is not what Congress has in fact forbidden, unless it can be said that the defendant is continuously charging the aliens for their return passage every moment from the time the money is received until they return. I do not mean that any difficulty arises from the whereabouts of the money, for it would be enough if the defendant took up the receipt in New York, no matter where the money may be. The trouble is rather that to interpret the word "charge" as a continuing act is to introduce a fiction and to violate its ordinary, and so its proper, meaning. The word means some overt act by which the charging party manifests his purpose to demand the money charged from the party charged; it does not include the subsequent relations which are consequences of the act. In short, it is not a legal relation, which continues wherever the two parties may come. For instance, we should all recognize the unreality of saying that a man was charged for goods sold, not only where the bargain was made and the charge entered, but at all other places where he went before he had paid for them. Yet there can be no continuing offense here, unless we assume that the charge is being made wherever the aliens come, till the whole matter is finally settled or "discharged." While the question is after all only of the meaning of words, the surest way to miss their meaning is to engage in casuistical analyses of their logical implications.

I have assumed throughout, as I said at the outset, that the added words, "making a charge thereof," are not to be construed as alleging that the defendant has done any act in New York but fail to give up the rubles after knowing that the deportation was ordered, and that, so far as its acts are concerned, it has not yet committed itself towards the aliens in regard to a charge for the return passage. That was the way in which the case was argued, and, moreover, if the indictment means to rely upon such an allegation, it should specify what are the acts in New York which constitute a charge.

[3] The second question is whether the defendant in New York has taken security for such a charge. The allegation is that it now "retains" the money after the aliens have reached New York, and that, as I have said, is a good enough allegation of retaining it in New York, though the rubles never passed out of Bremen and were never meant to. Now the indictment squarely alleges that the defendant retains the rubles as security for the deportation charges, and that therefore

eliminates the first point raised in regard to the "charge," and raises the single question whether to "retain" the security is to "take" it under the act. Granted that retaining presupposes some form of previous acceptance, and that any kind of acceptance is a taking, the real point is that the taking is over when the taker has got possession of the thing taken. His subsequent retention is in no sense a continuous repetition of his original taking, and it is only to abuse words to say so. Just as in the matter of the "charge," the contention of the government confuses the results of the act forbidden with the act itself. The only even remote analogy that I can think of is the rule that a thief commits larceny in every county into which he carries the stolen goods; but, aside from the historical reasons for that rule which make it no safe basis of general analogy, even that depends upon the carriage of the goods from place to place. I can see no more reason to say that the defendant takes security in New York when the alien arrives here, than to say that a trespasser de bonis asportatis commits a new trespass in every place to which his victim or he himself may subsequently come.

The real strength, and the only strength, of the position is that there is here disclosed a very easy way of avoiding an equitable provision of the immigration act. Whether it is used or not, it is an obvious way of avoiding a perfectly proper provision which puts on the steamship companies the risk of importing aliens within the excluded classes. Certainly that was the purpose of Congress, and this is an ingenious way of circumventing that purpose, which it is unfortunate that the law does not meet. However, if the expressed intent of Congress has not anticipated the possible inventions to defeat its purpose, while the purpose may help us to read the words, the words in the end can be the only vehicle of the intent. The court even in a good cause may not impose on words a meaning that they will not bear.

Demurrer sustained, and indictment quashed.

THE MT. DESERT.

(District Court, E. D. New York. February 3, 1911.)

1. ADMIRALTY (§ 54*)—STIPULATIONS FOR RELEASE OF VESSEL—CONSTRUCTION.

A stipulation for value given by the claimant for the release of a libeled vessel, pursuant to a rule of the court in admiralty, takes the place of the vessel itself for all purposes of the suit, and is available for the payment of all sums decreed in favor of the libellant against the vessel, including interest and costs, notwithstanding the fact that an additional stipulation for costs has been given, and the amount recoverable thereon, and for which execution may issue, includes interest on the agreed value of the vessel from the date of the stipulation where it is so conditioned in accordance with the practice of the court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 443-447; Dec. Dig. § 54.*]

2. ADMIRALTY (§ 54*)—STIPULATION GIVEN BY CLAIMANT—LIABILITY OF SURETY.

Where a stipulation for value given by the claimant of a libeled vessel was conditioned for the payment of the amount awarded by final decree

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the trial court "or by any appellate court if an appeal intervene, with interest," the waiving by libelant of further security on an appeal does not release the surety on the stipulation from the further payment of interest thereon, in accordance with its terms, or of costs of the appellate court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 443-447; Dec. Dig. § 54.*]

3. ADMIRALTY (§ 54*)—STIPULATION GIVEN BY CLAIMANT—LIABILITY OF SURETY.

Under a stipulation given by a claimant in admiralty, conditioned that, if the stipulators fail to pay the amount of any decree against them, execution may issue against both claimant and his surety, both are principals, and no demand is necessary upon the claimant in order to justify a demand on the surety.

[Ed. Note.—For other cases, see Admiralty, Dec. Dig. § 54.*]

In Admiralty. Suit by the Consolidation Coal Company against the steamer Mt. Desert. On motion by libelant for judgment for costs against the surety on claimant's stipulation for value. Motion granted.

Davies, Stone & Auerbach, for libelant.
Wing, Putnam & Burlingham, for claimant.
Wallace Stevens, for American Bonding Co.

CHATFIELD, District Judge. The libelant, who brought action for certain supplies furnished to a steamer, the Mt. Desert, has made a motion for the payment of \$121.98 costs, with interest, out of a stipulation for value given by the claimant and its surety. This is opposed by the surety on various grounds which will be taken up in turn.

It appears that under rule 7 of the District Court of this district (which has been in force for many years, and which, in common with other rules, this court had authority to promulgate, regulating practice in admiralty [The Fred M. Lawrence, 88 Fed. 910]), any person wishing to appear in the action is compelled to give a stipulation for costs upon filing his appearance. Further, under rule 17, similarly adopted, the claimant is required to give a stipulation for the fair value of the vessel, if he wishes to release the vessel from custody, but does not desire to pay the amount of her value into court, or give a general bond under section 941, R. S. (U. S. Comp. St. 1901, p. 692). The claimant thus obtains the use of his vessel, while the claimant or the surety has the use of the money represented by the undertaking during the same period.

Under these circumstances, the wording of rule 17 and questions as to the allowance of interest upon a claim, when finally embodied in a decree (whenever the award exceeded the amount of the stipulation), have resulted in an insertion in the stipulation that the agreed value, with interest from the date of the stipulation, may be recovered under an execution, if the decree be not paid.

In the present action the claimant gave a bond for \$250 costs, with individual sureties, upon the 11th day of April, 1907, and both the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

claimant and the sureties are admitted, for the purposes of this motion, to have no property which can be reached under an execution. The claimant also gave, upon the 12th day of April, 1907, a bond conditioned upon the payment by the claimant and the surety of the "amount awarded by final decree rendered by this court, or by any appellate court, if an appeal intervene, with interest," and the stipulation itself provided that, in the case of default on the part of the claimant or its sureties, execution for the value of the vessel (namely, \$1,500), with *interest thereon* from the date of the stipulation, might be collected.

It appears from the record that upon the 14th day of April, 1909, a decree was entered awarding to the libelant \$1,253 damages and \$157.66 interest to the date of the decree, with costs amounting to \$121.98, or a total of \$1,532.64, and condemnation of the vessel was decreed for the recovery of that amount. It was also provided that, unless an appeal be taken, the stipulators perform their agreement or show cause within a certain time why judgment should not be entered and execution issued. These stipulators, it will be remembered, include both the claimant of the vessel and its sureties. An appeal was taken, but by the stipulation dated May 6, 1909, further security on appeal was expressly waived. The appeal was ultimately dismissed, and after the decision of the appeal, but before the entry of the mandate, the surety company paid the amount of damages and interest to the date of payment, namely, November 11, 1910. This amount then aggregated \$1,543.94. The item of costs, both on the original decree and in the Circuit Court of Appeals, was withheld from the payment, and the present motion is to compel the payment of these costs, with interest, on the ground that the surety who executed the stipulation for value is jointly liable for the costs, as a part of the award originally granted by the decree, under the language of the conditions of that stipulation.

The surety company has opposed the application, because no attempt has been made to collect these costs from the stipulators for costs. They also suggest that no demand has been made upon the claimant, and hence that it is not in default or has not been contumacious, and for this reason, and because no additional security was required upon appeal, that the surety has been released from the payment of interest beyond the date of the original decree, or date of the waiver of further costs on appeal.

A stipulation for costs is required by the rules of this district, in order to avoid the unwarranted appearance of parties who do not intend to participate in the litigation in good faith and upon substantial grounds.

A release of the vessel, under rules 17 and 20 of this district, requiring that before such release the marshal shall be paid his charges and fees (while inconsistent with the idea of requiring additional security for costs, if the stipulation for value were demanded first) is not at all inconsistent with the requirement of a bond for costs, prior to or independent of the release of the vessel, as such matters actually happen in practice.

It is shown by the case of *The Wanata*, 95 U. S. 600, 24 L. Ed. 461, citing many authorities both in this country and in England, that the stipulation for value, like a payment of a sum stipulated into court, takes the place of the vessel itself, for all purposes in the action, and that the fund so stipulated is available for the purposes of a decree, to the same extent as the vessel would be if still in the marshal's custody for sale. The fact that an independent or additional stipulation for costs is on file would have nothing to do with the payment, out of the fund derived from a sale of the vessel, of all amounts properly awarded in the decree against the vessel itself, and hence both interest and costs, to the amount of the value of the vessel, or of the fund in court, would be paid out of that fund before resorting to any other stipulation unless a decree, awarding costs against the party giving the independent costs stipulation, had been separately imposed for items not included in the decree against the vessel. *The Madgie* (D. C.) 31 Fed. 926.

This disposes of the principal contention of the surety company herein, and the case at bar would be substantially like *The Wanata* Case if the claimant and its stipulators had given a bond on appeal. But, by waiving that bond, the libelants left the amount of their total security as it had been before the appeal was taken. In *The Wanata* Case, the stipulators apparently bound themselves to pay the flat sum of \$16,000 as the stipulated value of the vessel, and, in the case of their neglect or contumacy, to pay any costs and interest occasioned thereby.

The stipulation in question here is not so worded. In the present case the stipulators agreed that the vessel was worth \$1,500, and they bound themselves, not for that amount, but, in case the stipulators (that is, the claimant and the surety company as well) did not pay the decree in question as ordered, that then they should be liable for the sum of \$1,500, with interest from the 12th day of April, 1907.

It was not until the 11th day of November, 1910, that they stopped the running of this interest by a payment of the item of damages and interest thereon. So on this point the language of the stipulation determines the question. In *The Wanata* Case, interest was not included, as the damages apparently amounted to more than the agreed sum covered by the stipulation, and the award, therefore, was simply for that amount. In the present case the damages amounted to considerably less than the amount of the stipulation, and the entire amount stipulated was therefore available for the payment of the decree, to the same extent that the amount would be available if the vessel had been sold and the funds were in the hands of the marshal.

The stipulation in question further provided that the stipulators—that is, the claimant and its surety—should pay the amount of any decree awarded by this court, or any appellate court if an appeal intervened, and, while the waiver of additional security would estop the libelant from claiming anything as to which the original surety had been released by such a waiver of further protection, nevertheless, again, the language of the bond obligated the surety in the original stipulation, even as to an appeal, if an appeal was taken without the additional bond.

The giving of an additional bond might have changed the rights and liabilities of the sureties, and therefore the additional bond might be available, if one had been given; but the waiver leaves the parties as they were, and the claimant is bound to carry out his agreement.

It is further urged that it would be inequitable to compel the surety company to pay the amount of the decree, with interest from the time of the stipulation until the present, inasmuch as the libelant waived the additional security on appeal, and also failed to make a demand, either then or at the time of affirmance, for the payment of the decree. But, under the theory of the stipulation in question, the surety is a principal. The condition is that, if the claimant or the surety pay the amount of the decree, the stipulation shall be void, but that otherwise the person entitled may have judgment and execution against both parties. On such a stipulation no demand is necessary upon the claimant, in order to justify the demand upon the surety, and the use of the money is supposed to be equal to the interest accruing.

This determination also answers the last objection of the surety company, to the effect that a fruitless levy against the stipulators for costs should be shown as a basis for any demand for costs against the stipulators for value. But as appears from the decision in The Wanata Case, supra, the possibility of looking to the stipulation for costs, or to an additional stipulation upon appeal, to help out in the case of a deficiency in the fund representing the vessel, will not relieve that fund from primary obligation for the payment of the decree, to the extent that it exists for that purpose.

The motion to compel the surety company to pay the balance left unpaid on November 7, 1910, together with the additional amount of costs provided in the decree upon the mandate of the Circuit Court of Appeals, must be granted, and the libelant may have judgment therefor, if payment be not made within such time as may be specified in the order upon this motion.

UNITED STATES v. TEN BARRELS OF VINEGAR.

(District Court, E. D. Wisconsin. April 19, 1911.)

FOOD (§ 10*)—PURE FOOD LAW—"MISBRANDED."

The pure food law (Act June 30, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. Supp. 1909, p. 1191]) prohibits misbranding of articles of food, and section 8 declares that the term "misbranded" shall apply to all articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device, regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular. Subdivision 4, par. 2, declares that an article of food which does not contain any poisonous or deleterious ingredients shall not be deemed misbranded if labeled so as to plainly indicate that they are compounds, imitations, or blends, etc., provided that the term "blend" shall be construed to mean a mixture of like substances. *Held*, that the proviso was not limited to cases where the blend was claimed without disclosing the ingredients, but applied as well to cases where the component parts of the blend were disclosed, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

hence a label attached to vinegar, which was in fact distilled vinegar to which a small quantity of pure boiled apple cider had been added for coloring, describing the substance as "Saratoga Brand vinegar, a blend of pure boiled apple cider and distilled vinegar," was misbranded as misleading the public to believe that it was composed of pure boiled apple cider vinegar and distilled vinegar.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 10.*

[What constitutes a violation of pure food regulations, see notes to Brina v. United States, 105 C. C. A. 559.]

Libel by the United States of America against Ten Barrels of Vinegar. Demurrer to libel overruled.

This is a case arising under the "pure food act," so called. Act June 30, 1906, c. 3915, 34 Stat. 768 (U. S. Comp. St. Supp. 1909, p. 1191). A demurrer has been interposed to the libel, which raises the question whether the vinegar in question was misbranded, under the terms of section 8 of said act, which provides substantially that the term "misbranded," as used in the act, shall apply to all drugs or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device, regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, etc. The vinegar in question was labeled as follows:

Gal.

Established 1875.
Dayton, O.

We Warrant B. T. CHANDLER & SON
OUR 27 East 55th Street CHICAGO.
VINEGAR to test 40 Grains Manufacturers and Wholesale Dealers in
in strength.

SARATOGA BRAND VINEGAR.
a blend of
PURE BOILED APPLE CIDER
and
DISTILLED VINEGAR.

We guarantee the Vinegar sold under our brand to comply with the requirements of the NATIONAL AND STATE PURE FOOD LAWS.

-FOR-

Guy D. Goff, U. S. Atty.
Gorham & Wales, for claimant.

QUARLES, District Judge (after stating the facts as above). The contention of the government is that the label is so framed as to mislead the average customer who reads the same casually. The eye naturally rests upon the words in large print, "SARATOGA BRAND VINEGAR," then, in smaller type, "PURE BOILED APPLE CIDER," and in the third line, in larger print, "DISTILLED VINEGAR." With-

*For other cases see same topic & **NUMBER** in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

out the aid of marks of punctuation, it is contended that the words "A Blend of Pure Boiled Apple Cider and Distilled Vinegar" may naturally describe two brands of vinegar that are blended, and the words "Pure Boiled Apple Cider" are merely descriptive of one of such ingredients.

It is matter of common knowledge that cider vinegar is far superior to distilled vinegar. The popularity of cider vinegar is so general that this brand, not subjected to critical examination, would naturally arouse the expectation that cider vinegar has been blended with distilled vinegar. That, like the Delphic Oracle, the label, in the absence of punctuation, may be read either way, and the average buyer might naturally be misled in the premises.

If, as matter of first impression, the label naturally conveys the idea that cider vinegar is one of the ingredients, then it is calculated to deceive, although a deliberate reading of the label might correct such impression. It is matter of common observation that the average retail purchaser of such commodities does not delay to make a careful analysis of the label, but contents himself with a hasty glance or cursory examination. If, therefore, this label would lead such purchaser at first blush to the conclusion that here was a blend of two vinegars, one of which was cider, it would fall within the definition of "misbranding" under section 8. In other words, the ordinary purchaser reading this label would not be led to suppose he was buying distilled vinegar compounded with a foreign element. He is comforted with the assurance: "We guarantee the Vinegar sold under our brand to comply with the requirements of the National and State Pure Food Laws."

There is another subdivision of the pure food act which must be considered in pari materia with the clause already under consideration. Section 8, subd. 4, par. 2, is in substance as follows: An article of food which does not contain any poisonous or deleterious ingredients shall not be deemed misbranded if labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word "compound," "imitation," or "blend," as the case may be, is plainly stated on the package in which it is offered for sale. Up to this point the label in question conforms with the act, and, if the legislative conditions ended here, there could be no just cause of complaint. But Congress added another requirement in the case of a blend—"provided that the term blend as used herein shall be construed to mean a mixture of like substances," etc. If the substances so blended are not similar, the statement on the label that they are blended is not sufficient to secure immunity.

The defendants contend that this restrictive proviso applies only where the blend is claimed without disclosure of ingredients, and has no application where, as here, the component parts of the blend are disclosed. This construction seems to be too narrow. One prime object of this legislation is to prevent the public from being misled or deceived. In view of the language of the act we are justified in saying that the term "blend," as here displayed on the label, is an assurance to the public that the mixture consists of like substances; and in the present case it is an assurance that the "Saratoga Brand Vinegar"

consists of two like substances, that is, distilled vinegar and a vinegar derived from apple cider. In this regard the label is false and misleading.

We have seen how naturally the buyer might be misled by a casual examination of the label. The use of the term "blend" coupled with a specific reference to the pure food act, is well calculated to confirm such mistake, in view of the guaranty that the vinegar sold under this brand meets all the requirements of the national pure food law. Special significance is thus given to the statutory definition of the term "blend." It is true that boiled apple cider might be used as a harmless agent to give color or flavor to the distilled vinegar; but in such a case the boiled cider would be an infusion as distinguished from a "blend," and the public would be entitled to notice of its use for that qualified purpose. Here it is presented to the public as a blend, which is falsely misleading, because it is conceded that no cider vinegar whatever is contained in these packages.

Defendants cite, in support of their contention, *In re Wilson* (C. C.) 168 Fed. 566; *United States v. Boeckmann* (C. C.) 176 Fed. 382; *United States v. Sixty-Eight Cases of Syrup* (D. C.) 172 Fed. 782.

The Wilson Case is not in point, because there the substances comprising the "Gold Leaf Syrup" were both like substances, and under the terms and provisions of the act could properly be blended. The ingredients were maple and white sugar, and it is apparent that there was no misbranding in that case.

In the Boeckmann Case, supra, the product was labeled "Compound" "Pure Comb and Strained Honey and Corn Syrup." It will be observed the representation in that case was that it was a compound, as distinguished from a blend. So that has no bearing on the instant case.

In *United States v. Sixty-Eight Cases of Syrup*, supra, the court treated the extract of maple wood as a saccharine substance which might be blended with refined cane sugar, and that they constituted a blend within the meaning of the act. In the case at bar we have not two similar substances, but only one substance, namely, distilled vinegar, which has been mixed with a product wholly unlike distilled vinegar. While the reasoning in that case is not satisfactory, a careful examination will show that it does not rule the instant case.

The government cites the case of *United States v. Scanlon* (D. C.) 180 Fed. 485. This is a very interesting and well-reasoned case and goes far to sustain the conclusion we have already reached in this case. The defendant in that case manufactured syrup of cane sugar flavored to imitate maple syrup by the introduction of an extract from maple wood after it had been chopped down. The syrup was put up in bottles labeled "Western Reserve Ohio Blended Maple Syrup." The words "Ohio" and "Maple Syrup" had between them the word "blended," and then in small type the statement, "This syrup is made from the sugar maple tree and cane sugar." The court held that the label was misleading, in that purchasers would ordinarily understand that the article contained in part maple syrup made from the sap drawn from live maple trees, and therefore the article was misbranded.

I am constrained to hold that the vinegar in this case was misbranded within the meaning of the pure food act, and therefore the demurrer will be overruled, with leave to respondent to answer within 20 days if so advised.

LEWIS v. KOLLER & SMITH, Inc.

(Circuit Court, S. D. New York. April 20, 1911.)

1. MASTER AND SERVANT (§ 155*)—INJURIES TO SERVANT—NEGLIGENCE—FAILURE TO WARN.

A master was not negligent in failing to warn an experienced carpenter of the liability of a box or case, forming one of a stack of three, to fall from another when the stack was pushed along the floor, as the master could presume that the servant had full knowledge of such danger; there being no obstruction that the cases would be liable to strike, and the only apparent danger of falling consisting of the tilting of the stack in process of movement.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 310; Dec. Dig. § 155.*]

2. NEGLIGENCE (§ 1*)—DEFINITION.

Negligence is the failure to do something which in the exercise of ordinary care ought to have been done, or the doing of something which in the exercise of ordinary care ought not to have been done.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743–4763; vol. 8, pp. 7729–7731.]

3. MASTER AND SERVANT (§ 149*)—INJURIES TO SERVANT—METHODS OF WORK.

Where there is a safe and unsafe way of doing certain work, and the master directs the employé to do it in the unsafe way, the danger of which the master knew or ought to have known, and the employé follows the master's directions in ignorance of the dangers of doing it that way and is injured, the master is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291–295; Dec. Dig. § 149.*]

4. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—PRESUMPTIONS.

Where a servant was injured by the fall of one of a stack of cases he was directed to move in a specified manner, negligence of the defendant in giving the directions as to moving the cases without instructions or warning as to the dangers could not be presumed, nor could it be inferred from the happening of the accident and the consequent injury, but must be proved affirmatively.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877–908; Dec. Dig. § 265.*]

5. MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—DIRECTIONS—ACTS OF SUPERINTENDENCE—QUESTION FOR JURY.

Where plaintiff was injured by the fall of one of a stack of packing cases he was directed to move by a superintendent, whether the giving of directions as to how the stack should be moved was an act of superintendence within the New York employers' liability law (Consol. Laws, c. 31, §§ 200–204) was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 287.*]

6. MASTER AND SERVANT (§ 219*)—INJURIES TO SERVANT—ASSUMED RISK.

Plaintiff, an experienced carpenter, who had been a superintendent in the construction of buildings, was directed by defendant's superintendent to move a stack of cases by placing his back against the cases and ex-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tending his legs so as to move the cases by sliding them along the floor. There was no obstruction in the way, and while so engaged the top case fell and struck plaintiff's extended leg, causing the injury complained of. *Held*, that the danger was apparent, and that plaintiff assumed the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

Assumption of risk incident to employment, see note to *Chesapeake & O. R. Co. v. Hennessey*, 38 C. C. A. 314.]

Action by William B. Lewis against Koller & Smith, Incorporated. On motion to set aside a verdict for defendant directed by the court. Denied.

Frederic Worthen Frost, for plaintiff.

Frank V. Johnson, for defendant.

RAY, District Judge. Plaintiff was employed by defendant to repair, fix up for shipping, and pack and box up cases of goods.

Defendant's shipping room was in a crowded condition, with cases piled in rows one upon another, with alleyways between. There was one window and an electric light near where the accident happened. The defendant had an order for a cabinet case which prior to shipment needed some changes by a carpenter or cabinet maker in line with the work the plaintiff was employed to do. The defendant's superintendent informed the plaintiff of the order, and that it was necessary to make some changes in and pack or box the cabinet ordered at once, or the defendant would lose the order. The plaintiff stated there was no room for him to do the necessary work in changing and boxing the cabinet. The superintendent told him to make room and showed him that by pushing back three cases of goods, piled the one upon the other, into a narrow space, on each side of which other cases were stocked, he could make the necessary room. The plaintiff asked how he should or could do this—that is, push back the three cases so piled one on the other—and the foreman showed him and told him he could do it by putting his feet against the side of the room and his back against the cases and pushing. The superintendent then went away. The plaintiff then attempted to push the three cases so piled into the open space indicated by placing his body as indicated and extending his legs so as to move such cases by sliding them on the floor, or by sliding the lower one, which carried the others, on the floor into such open space. While engaged in pushing said pile of cases or crates in the manner indicated, the top one fell or came off and struck plaintiff's extended leg, which was broken, and the plaintiff was laid up a long time, and suffered pain and has a permanent shortening of that limb. There is no proof as to how or why the top case fell off, except as we may infer from the nature of the work, the particular thing plaintiff was then doing.

These piled up cases containing the cabinets were each about 3 feet long, about 2 feet wide, and 22 inches high, making a total height of about 66 inches, or 5½ feet. There is no evidence they did not lie flat together, the one upon the other; that is, that the top one would be liable to fall off if the three were pushed along steadily and care-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fully on an even floor. There is no evidence of any obstruction in or on the floor to the free movement of the cases. The evidence is that the floor was smooth. It is evident that, if in pushing the cases along the lower one was tilted up, the top one would be liable to fall off; also that if the top one came in contact with a solid or stationary object, and the lower one was kept moving, the top one would be pushed off; also that a sudden, forcible push of the lower one might drive the lower ones from under the upper one, or that a striking of the one on the floor when in motion against an obstacle might cause the top one to topple over. How or why the top case fell off is matter of conjecture. There was no special, hidden, or concealed danger in doing what the plaintiff did, and no danger if ordinary care was used. The plaintiff was a carpenter and joiner and cabinet maker, and had been in the business many years. He says he had seen such a pile or stack moved before, but not by one person alone; that he had never alone moved such a pile or stack, or a similar one. If the plaintiff was ignorant of all the above-mentioned dangers, there is no evidence that the defendant or its superintendent knew of them or ought to have known of them or had reason to suspect their existence.

[1] I think it fairly may be presumed by the employer that an experienced carpenter and joiner knows how to move such a stack of cased goods and knows the liability of the one box or case to fall from another when the stack is pushed along on the floor. I do not see how it can be held negligence in an employer not to warn a carpenter and joiner and cabinet maker of the dangers mentioned, assuming them to exist, which I do and which I think is as much a matter of common knowledge as that a stone if left unsupported will fall to the ground or that to knock the foundation from under a building will cause it to fall. Was this superintendent negligent in giving the direction to do this work of moving these cases in this particular way?

If negligent in giving the order without warning of danger, was it an act of superintendence for which defendant is liable? There was no danger, so far as appears, in doing the work of moving this stack of cases in the mode directed if carefully and properly done; that is, the bottom case or cases must not be suddenly and with force pushed from under the top case. The lower case or cases must not be pushed along on the floor with an existing obstruction above preventing a corresponding movement of the top case. The bottom case as pushed along must not be brought suddenly against an obstruction. The cases must not be tilted up so as to allow the top one to slide off on the side occupied by the one moving them. Was the superintendent negligent in not warning the plaintiff of these ordinary and perfectly obvious dangers? There was no dangerous condition to remedy so far as the proof shows. There was no obstruction so far as appears to the free movement of the top case with the others and the lower one met no obstruction. There is no evidence that any such conditions caused the accident or contributed to it. [2] Negligence is the failure to do something which in the exercise of ordinary care ought to have been done, or the doing of something which in the exercise of ordinary care ought not to have been done. The defendant's superintendent did nothing affirmatively in moving the cases. As stated, the act

directed to be done, if carefully done, was safe enough. If carelessly or negligently done, there were dangers. The plaintiff was engaged in preparing a place in which to do certain work by moving therefrom certain boxed goods which were in the way. The place in which he was doing this work was safe enough. There were no defects, dangerous places, or obstructions to plaintiff's movements.

[3] If there is a safe way of doing certain work and an unsafe way, and the master, by his superintendent, directs the employé to do it in the unsafe way, the danger of which he knew or ought to have known, and the employé follows the directions given in ignorance of the dangers of doing it that way, and is injured, the master is liable. But even then there must be evidence that the servant was not as familiar with the dangers as the master or as the master ought to have been. If this plaintiff had been young or inexperienced, the case would be different. It was not negligence not to warn this plaintiff, a cabinet maker and carpenter of mature years and experience, that if in moving these three cases by pushing them along on the floor in the manner indicated he tilted them up the top one or ones might or probably would slide off; or that, if he pushed the lower one suddenly and forcibly, he might drive it from under the others and allow them to fall; or that, if the stop one came in contact with some stationary object while the others were moving, the top one would be pushed off. I think all these dangers were obvious to a person of mature years and ordinary intelligence, especially to a cabinet maker and carpenter and joiner. They were as well known to the plaintiff as to the defendant.

[4] Negligence of the defendant through its superintendent in giving the directions as to moving the cases without instructions or warnings as to the dangers cannot be presumed. Such negligence must be proved. Such negligence cannot be inferred from the happening of the accident and the consequent injury to the plaintiff. Assume it to be true that it was no part of the ordinary duties of the plaintiff to move such cases or to move things out of the way which interfered with his work in making changes in cases before shipment, still he assumed and undertook to do the work without objection and assumed the necessary risks incident to that work. [5] I think it clear that the giving directions as to how the stack should be moved was one of superintendence, or, at least, it was for the jury to say. *Gallagher v. Newman*, 190 N. Y. 444, 447, 448, 83 N. E. 480, 16 L. R. A. (N. S.) 146. If the act of giving directions without warnings or instructions as to possible dangers was, in any view, under the evidence, a negligent one, then this was a case for the jury as the question of contributory negligence under the employer's liability act is for the jury. If defendant's superintendent representing the defendant owed any duty to the plaintiff by way of giving warning of danger in doing this work, or further instructions as to the manner of doing it, then the case was for the jury. I cannot see that the jury under the evidence was authorized to find any such duty not performed.

[6] The plaintiff made no protest when told to move the stack of cased goods or suggested that he needed instructions or was ignorant.

It is the duty of an employer or his superintendent who has knowledge of a hidden or latent danger or defect affecting the safety of an employé to communicate such knowledge to him. *Connolly v. Hall & Grant Construction Co.*, 192 N. Y. 182, 84 N. E. 807, reversing 117 App. Div. 387, 102 N. Y. Supp. 599. So a master who hires an inexperienced servant to work on a dangerous machine must instruct him in its operation and warn him of dangers in operating it, and is liable for the negligence of his superintendent in failing to instruct or warn such servant. *Greco v. Pratt Chuck Co.*, 127 App. Div. 798, 802, 111 N. Y. Supp. 1000. However, this duty does not extend to instructions and warnings as to dangers in modes of doing work and dangers in doing work which are as obvious and well known to the servant as to the master or to giving warnings as to the dangers of doing work in a negligent manner. This plaintiff testified that he had been a superintendent in the erection and construction of buildings, and I think it obvious from the evidence he knew the dangers of doing the work in the manner in which he did it and assumed the risks of doing it in that way. I do not see that any question of an unsafe place in which to work is involved here.

There is no evidence of the existence of any obstruction to the movement of the stack of cases in or on the floor. There is no evidence that there was any obstruction above the floor to the movement of the stack of cases. The plaintiff was engaged in clearing a place already constructed in which to do certain work he had been instructed to perform. He found this stack of three cases incumbering the place which he desired to use in doing the contemplated work. The work of clearing this place consisted in moving this obstruction. He attempted to remove it by pushing it along on the floor. By reason of the movement given the stack, the top case fell off and injured the plaintiff. True, the place was not very well lighted, but it had the usual lights, and plaintiff had worked there a long time. The absence of a better light is not shown to have had anything to do with the accident.

I think this a case where a worthy man was severely and permanently injured while engaged in the performance of his duties to his employer, but that such injuries were due to an accident liable to occur growing out of the mode adopted for doing the particular thing being done when this accident occurred and the dangers of which were inherent in the mode, and, while known to the superintendent of the defendant who directed that the work could be done that way, were much better known to and understood by the plaintiff himself, who adopted that mode or way of doing the specific thing required to be done at the suggestion of defendant's superintendent, but with a full knowledge of the dangers he would encounter, and that the plaintiff voluntarily assumed the risks when he attempted to do the work in the way he did.

I do not see any theory on which the defendant can be held liable.
Motion denied.

In re CHASE.

(District Court, D. Massachusetts. January 31, 1910.)

No. 11,045.

1. BANKRUPTCY (§ 413*)—DISCHARGE—OBJECTIONS—WAIVER.

Specification of objections to a discharge in bankruptcy may be disregarded where leave to file them has not been obtained, and where the objector does not appear on hearing of the application for discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 413.*]

2. BANKRUPTCY (§ 404*)—DISCHARGE—WHEN IMPROPER.

A discharge in bankruptcy cannot be granted within six years following a former discharge in earlier voluntary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

3. BANKRUPTCY (§ 415*)—DISCHARGE—APPLICATION—TIME FOR MAKING.

Whether a bankrupt was unavoidably prevented from applying for a discharge within a year is determinable within the judge's discretion, and without notice to the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

4. BANKRUPTCY (§ 415*)—DISCHARGE—APPLICATION—DELAY.

Inquiry whether a bankrupt was unavoidably prevented from applying for a discharge within the year should be had within the additional six-month period during which filing may be allowed on such showing.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 415.*]

5. BANKRUPTCY (§ 410*)—DISCHARGE—RIGHT TO.

A bankrupt should not be discharged on an application filed out of time where there is no proof that he was unavoidably prevented from applying in time, where he could not have been discharged had be applied within the year, on account of a former discharge, and where he has permitted lapse of the time within which inquiry as to whether he was unavoidably prevented from applying.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 410.*]

In the matter of Louis N. Chase, bankrupt. On application for discharge. Application denied.

Robert A. Jordan, for bankrupt.

DODGE, District Judge. This debtor was adjudged bankrupt February 5, 1906, upon his own petition. His schedules disclosed liabilities to the amount of \$6,396.99 and no assets. On March 10, 1906, in answer to the usual interrogatories, the bankrupt made oath that he had previously been adjudged bankrupt in this court on April 1, 1901, and discharged on May 28, 1901. Before the case was closed, on April 13, 1906, the trustee reported to the referee that he believed the bankrupt had made a full disclosure, and that the statements in his schedules were substantially correct. The report ended with a recommendation that the bankrupt receive his discharge. No discharge had then been applied for. On April 14th the referee transmitted the report of the trustee, and stated that no reason was known to the referee why the bankrupt's application for discharge should not be granted. This report was transmitted to the court with the other papers in the case when the case was closed, and was filed in this court

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

May 7, 1906, but at that time it was still true that the bankrupt had made no application for discharge.

On August 2, 1907, the bankrupt for the first time filed such an application, in which he alleged "that he was unavoidably prevented from filing this petition within the year." Specifications of objections to the discharge were duly filed by one creditor on August 17, 1907. Another creditor on September 6, 1907, applied for leave to appear, object, and file specifications of objection which were presented, and in support of the application alleged that she had had no notice of the application for discharge. [1] No leave to file these specifications was ever obtained from the court, however, and there has been no appearance on behalf of the creditor presenting them at the present hearing. They may therefore be disregarded. The specifications filed August 17, 1907, were filed in time, but they have been permitted to lie for more than two years without any action upon them being sought, nor has the creditor who presented them now appeared to support them. I find nothing in them set forth with sufficient definiteness to require the court to notice it as an objection to the discharge, except the allegation that a former discharge had been obtained, in voluntary proceedings, within six years. They do not raise as an objection the fact that this application was not filed within 12 months subsequent to adjudication.

This fact, however, is admitted by the bankrupt himself. That he obtained a discharge in this court on May 28, 1901, he has also admitted. The records of the court show that he obtained it in voluntary proceedings. His counsel frankly state to the court that his desire to have this application now revived and acted on proceeds from the fact that he has filed still another voluntary petition in this court, wherein the granting or refusal of this application may become important.

[2] If the bankrupt had filed his present application for discharge within a year following the adjudication—i. e., on or before February 6, 1907—it could not lawfully have been granted when filed, nor could it lawfully have been granted before May 28, 1907, because the six years following his discharge in the earlier voluntary proceedings did not expire until the latter date. At any hearing before that date, it must have been denied; but, if heard after that date, it would seem that it might have been granted. According to *Re Jordan*, 142 Fed. 292, *Re Haase*, 155 Fed. 553, "within six years" in section 14b (5) of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427] as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1909, p. 1310]) means six years measured backward from the time of the hearing.

The suspicion of a motive on the bankrupt's part to delay his application until after May 28, 1907, seems to me not unwarranted under the circumstances. The statement in his application dated August 2, 1907, that he was unavoidably prevented from filing it within the year, he has signed, but not sworn to, nor has it been sworn to by any one.

[3] The question whether he was unavoidably prevented or not is one for the judge's discretion, and one which he might have decided with-

out notice to the creditors. *Re Fritz*, 173 Fed. 560, 562. I should not feel justified in holding the statement to be true without further inquiry into the facts. [4] If such inquiry was to be had, I think it ought to have been had within the additional six months beginning May 28, 1907, during which its filing might have been allowed by the court if satisfied that filing before that date had been unavoidably prevented. It is true that, according to the practice heretofore followed, the question is one which has been heard and decided with the objections, if any, specified to the granting of the discharge. But in this instance not only have the six months referred to been allowed to expire without submitting the question to the court; the six months referred to expired more than two years ago.

[5] No proof whatever having been submitted that the bankrupt was really unavoidably prevented from applying in time, and in view of the fact that he could not lawfully have been discharged within the year following adjudication had he so applied, I do not think a discharge ought now to be granted.

The application for discharge is denied.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al.

SAME v. HUDSON RIVER ELECTRIC POWER CO.

MORTON TRUST CO. v. GAY et al.

(Circuit Court, N. D. New York. March 11, 1911.)

PLEADING (§ 238*)—ANSWER—APPLICATION TO AMEND.

A trustee in a mortgage executed by an insolvent corporation to secure bonds having been permitted to file a cross-bill to foreclose in insolvency proceedings against the insolvent, a judgment creditor intervened and answered the trustee's cross-bill, denying any knowledge or information sufficient to form a belief as to the truth of the cross-bill. After taking proofs, such creditor moved to amend its answer, and alleged that the mortgage was without consideration, was given when the corporation was insolvent, with the intent to prefer the trust company as trustee over other creditors, and with the intent to hinder, delay, and defraud the insolvent's other creditors, including defendant. The affidavit with reference to delay alleged that neither the creditor nor the deponent, its attorney, had knowledge that the mortgage was given without consideration, or was fraudulent, until the taking of the testimony in support of the cross-bill; but there was no showing that the creditor by the exercise of diligence could not have secured such information before answer, nor were any facts stated showing that the creditor at the time of the application had knowledge that such was the fact. *Held*, that the showing was insufficient to justify leave to amend.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 238.*]

Insolvency proceedings by Eben H. Gay and others against the Hudson River Electric Power Company and others, and by the Morton Trust Company, cross-complainant, against Gay and others. On motion for an order permitting the filing of an amended answer by the National Contracting Company to the cross-bill in the Morton Trust Company suit to foreclose a mortgage. Denied.

See, also, 182 Fed. 904.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

L. Laflin Kellogg and Philip M. Brett, for the motion.
Geo. B. Curtiss (Charles Hotchkiss, of counsel), opposed.

RAY, District Judge. In the creditors' action first above entitled, by permission of this court, the Morton Trust Company was permitted to intervene and file a cross-bill in foreclosure, seeking a sale of the properties of the Hudson River Water Power Company under mortgages thereon given to and held by the Morton Trust Company as trustee to secure the payment of certain bonds now outstanding, and which, so far as appears, are held in good faith by various owners. It seems that at a time when the Hudson River Water Power Company was engaged in the construction of its dam at Spier Falls, on the Hudson river, N. Y., it guaranteed the payment of certain bonds of the Hudson River Electric Company and agreed that it would execute such further agreements and instruments as the purchaser of the Electric Company bonds might reasonably request in order to more fully secure such guaranty, or a lien on the property, etc., of the Hudson River Water Power Company, or otherwise, as such purchaser, or any successor or holder of such bonds, might request. It seems that thereafter the holder of such bonds of the Electric Company did request a mortgage on the property, etc., of said Hudson River Water Power Company as further security for the payment of such bonds so guaranteed, and thereupon, or on or about July 19, 1902, the mortgage was given. This is one of the mortgages now in process of foreclosure. If all the mortgages on the property, etc., of the Hudson River Water Power Company are held valid to the extent of the bonds issued and outstanding under them, it seems probable that general creditors will get little, if anything.

In or about 1900 the National Contracting Company made a contract with the Hudson River Water Power Company to construct its said dam across the Hudson river at Spier Falls, and it proceeded with the work for a time; but differences arose, and the Contracting Company abandoned the work, and about 1901 the National Contracting Company commenced an action in the Supreme Court of the state of New York against said Hudson River Water Power Company to recover damages for breach of the contract. That action has been in the courts ever since; but, as it now stands, the National Contracting Company has a judgment on such claim against the Hudson River Water Power Company for about \$323,387.55, rendered December 23, 1909, but which cause of action accrued about November, 1900. It is, of course, of interest to the Contracting Company to get rid of such mortgages, or any one or more of them, if possible. It has had a judgment in the said action once before, which was reversed on a technical point. The National Contracting Company was permitted to intervene and file an answer to the said cross-bill of the Morton Trust Company, and it did so, denying any knowledge or information sufficient to form a belief as to the truth of the allegations of such cross-bill regarding the mortgage referred to.

The motion papers allege that during the taking of proofs in the case in support of the cross-bill no proof has been given that the mortgage referred to was given pursuant to any agreement on the part of

the Hudson River Water Power Company at the time of the guaranty of said bonds, and the Contracting Company now desires to amend its said answer and allege that said mortgage of the Hudson River Water Power Company was given wholly without consideration, at a time when said company was insolvent, with the intent to prefer the said Morton Trust Company as trustee (it then, as now, holding another and prior mortgage to secure a bond issue) and the holders of bonds under the mortgage issued to it by the Hudson River Electric Company over and above the fair and honest creditors of said Hudson River Water Power Company, and with the intent, to hinder, delay, and defraud the just and honest creditors of the said Hudson River Water Power Company, including the defendant. The affidavit of Mr. Brett, upon which the motion is based, states as a reason for the delay as follows:

"That the reason why this application was not sooner made is because neither said National Contracting Company nor this deponent had knowledge of the fact that said mortgage by the Hudson River Water Power Company was given without consideration, and with the fraudulent intent to hinder, delay, and defraud its creditors, until after the taking of the testimony in support of the cross-bill aforesaid, when the entire lack of any consideration for said mortgage became apparent."

I do not find in these motion papers anything to show that the allegations of the proposed amendment to the answer are true, or that grounds exist for making the allegations. Even if grounds do now exist, it is not shown that before answering the cross-bill diligence was used in investigating the matter, and that information on the subject was denied by those who possessed it, or would have been liable to possess it, or that untrue statements were made, or that facts have appeared on the trial showing the truth of the proposed amendment which are a surprise to the National Contracting Company and of which it was before ignorant. Many months have gone by since the cross-bill was filed and the answer was interposed. The allegation that the National Contracting Company did not know is not accompanied by any statement of facts showing that it now does know. The existence of the mortgage was well known, and the condition of the Hudson River Water Power Company could easily have been ascertained, as could the conditions surrounding the said company and the giving of the mortgage. Bankruptcy proceedings were pending against it, and have been since 1905, on the petition of said Contracting Company and others, and an examination of its officers and others could have been had at any time since the filing of the bill in the creditors' action. I do not think the delay excused, or that the affidavit shows facts which justify the court in allowing the interposition of an answer attacking the security of the bonds in question at this late day.

Motion denied.

In re CITY BANK OF DOWAGIAC.

Appeal of SPAULDING.

(District Court, W. D. Michigan, S. D. June, 1910.)

TRUSTS (§ 352*)—MINGLING OF FUNDS BY TRUSTEE—TRACING OF FUNDS.

Where a bank made loans within three days after receiving a trust fund, mingled with its own money, the presumption is that the loans were made out of its own funds, which presumption can only be met by proof that at the close of the bank on the days the loans were made it did not have remaining in its vaults money equal to, and out of which it could repay, the trust fund; and unless the presumption is thus met a lien for the trust fund can only be impressed on the cash of the bank.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 520-525; Dec. Dig. § 352.*]

In the matter of the bankruptcy of the City Bank of Dowagiac. There was an order of the referee disallowing in part the claim of one Spaulding, a creditor, and he prays for a review thereof. Affirmed.

Charles E. Sweet, for claimant.

Wm. F. McKnight, for trustee.

DENISON, District Judge. On January 6, 1908, Spaulding deposited in the City Bank money and securities amounting to the net sum of \$2,163. The instructions were to collect the securities and then remit the entire proceeds immediately by Chicago draft to Spaulding at his residence in Iowa. The bank took the cash that he deposited, issued, without authority, a certificate of deposit, payable to "Spaulding deal," and retained the certificate in its possession. On January 9th it received the cash from collecting the securities, mingled the same with its own funds, and without authority issued and retained a certificate of deposit payable to "Spaulding deed and draft." It had not remitted at the time of its failure, February 8th.

The referee allowed the claim as for a trust fund, and impressed its lien upon the cash on hand when the bank closed, but refused to find it to be a lien against any other assets. Spaulding, on this review, insists that it should be allowed as a lien against certain notes, which were investments made by the City Bank out of its funds after January 6th, and particularly that the cash received on January 6th should be allowed as a lien against investments made January 6th and 7th, and that the cash received January 9th should be so allowed against investments made on January 9th; and he relies in general upon the rule stated by the Court of Appeals in *Smith v. Au Gres* (6th Circuit) 17 Am. Bankr. R. 745, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876. This case is explained and modified, and the rules applicable to bank deposits formulated, in *Board of Commissioners v. Strawn*, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100.

Applying these rules to this case, the presumption would be that the loans made by the bank on January 6th and 7th, after receiving

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

this trust fund cash, were made out of its own funds, and not out of the trust funds; and the same presumption would arise on January 9th. This presumption could only be met by proving that, at the close of the bank on the day in question, the bank did not have remaining in its vaults money equal to, and out of which it could repay, the trust fund. There is no such proof here, and for all that appears the bank had on hand, after making each of the investments in question, sufficient cash to repay to Spaulding his money.

The referee's order must be affirmed.

In re WESTBROOK.

(District Court, N. D. Alabama, S. D. April 20, 1911.)

No. 10,146.

1. LIMITATION OF ACTIONS (§ 182*)—NATURE OF DEFENSE.

The defense of limitations is personal to the debtor, and, if not specially pleaded when the claim is sued on, is unavailable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 676-682, 695, 705; Dec. Dig. § 182.*]

2. BANKRUPTCY (§ 405*)—DISCHARGE—OBJECTIONS—CAPACITY OF CREDITOR.

That a creditor's claim was barred by limitations at the time he filed objections to the bankrupt's discharge did not deprive him of a subsisting cause of action, so as to bar his right to object.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 405.*]

3. BANKRUPTCY (§ 405*)—DISCHARGE—OBJECTIONS—LIMITATION.

Where limitations had not run against a creditor's claim against the bankrupt when specifications of objections to the bankrupt's discharge were filed by the creditor, the fact that the claim was barred before the hearing of the application was immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 405.*]

4. BANKRUPTCY (§ 404*)—FORMER PROCEEDINGS—DISCHARGE—FAILURE TO APPLY.

Where a bankrupt failed to apply for a discharge on a former petition within the time allowed, the denial of his discharge was res judicata, precluding his discharge from debts then scheduled, and rescheduled in his subsequent petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 404.*]

5. BANKRUPTCY (§ 421*)—DISCHARGE—LIMITATIONS.

Where a bankrupt was not entitled to a discharge as to certain debts scheduled in a former proceeding, the court had power to limit a subsequent discharge, so as to exclude such claims.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 421.*]

In the matter of bankruptcy proceedings of one Westbrook. On objections by a creditor to the bankrupt's discharge. Sustained.

L. J. Cox, for objecting creditor.

Robert J. Wheeler, for bankrupt.

GRUBB, District Judge. [1] This matter comes on to be heard upon the objection of a creditor to the application of the bankrupt for his discharge. The bankrupt denies the right of the objecting creditor

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

to appear and object as a party in interest, because his claim has become barred by the statute of limitations, after the filing of the specifications of objections, but before the hearing of the application. The statute of limitations does not destroy the cause of action, but merely affects the remedy. If not specially pleaded by the debtor, when the claim is sued on, judgment would go against him. The defense is personal, and waived by a failure to plead.

[2] In view of the nature of the defense, there is left in the creditor a subsisting cause of action, in spite of the running of the statute. He is therefore a party in interest, even thereafter, in resisting the discharge.

[3] Again, when the specification of objection was filed by the creditor, the statute had not run. He was then a party in interest, and it seems to me the time as of which this interest is to be determined is the time of the beginning of the opposition to a discharge.

[4] The bankrupt had filed a prior petition, had been adjudicated under it, and had failed within the statutory time to apply for his discharge under the first petition. The objecting creditor was scheduled under the first petition, as well as under the second. The only ground of objection to the discharge is that, as to the objecting creditor, failure to apply for a discharge under the first petition within the time allowed can be offered as res adjudicata to an application to be discharged from the same debt under the second petition, and that the discharge should be restricted, so as to except the debt of the objecting creditor from its operation.

[5] While the right of the bankruptcy court to so limit the discharge admits of doubt, following the authorities cited below, which constitute the great weight of authority, a discharge will be granted the bankrupt, excluding from its operation the debt of Odum & Bowers, the objecting creditor. Collier on Bankruptcy (8th Ed.) p. 259; Remington on Bankruptcy, § 2438, p. 1474; In re Pulliam (D. C.) 22 Am. Bankr. R. 513, 171 Fed. 595; In re Kuffler (D. C.) 19 Am. Bankr. R. 181, 155 Fed. 1018, and same case 22 Am. Bankr. R. 289, 168 Fed. 1021, 93 C. C. A. 671; In re Levenstein (D. C.) 24 Am. Bankr. R. 822, 180 Fed. 957; Pollet v. Cosey, 24 Am. Bankr. R. 678, 179 Fed. 488, 103 C. C. A. 68; In re Schnabel (D. C.) 23 Am. Bankr. R. 22, 166 Fed. 383.

If the bankruptcy court has no authority to limit the discharge, no injury is done, since the court in which the discharge is pleaded will give effect to the discharge, disregarding the limitation. On the other hand, if the court in which the discharge is pleaded can give restricted effect to it, only when the limitation is placed in it by the bankruptcy court, injustice will be done, if it is not inserted, if the bankrupt is rightfully concluded by his failure to seasonably apply for his discharge under the first petition, and authority and reason concur in this last conclusion.

The propriety of resolving the doubt as to the matter of procedure in favor of the objecting creditor is therefore manifest.

CONNILLEAU v. ROGERS et al.

(Circuit Court, E. D. Pennsylvania. February 10, 1911.)

No. 140.

SALES (§ 420*)—ACTION BY BUYER FOR BREACH OF CONTRACT—EVIDENCE OF DAMAGES.

In an action for breach of contract for the sale of phosphate to be delivered to plaintiff in France, evidence of the market price of such phosphate at the time and place of delivery *held* sufficient to warrant the submission of the question of damages to the jury.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 420.*]

At Law. Action by Theophile Connilleau against George H. Rogers, Henry Welsh Rogers, and G. Walter Holloway, composing the firm of Rogers, Holloway & Co. On motion by defendants, for new trial. Motion denied.

See, also, 162 Fed. 998.

Howard H. Yocom and Charles Biddle, for plaintiff.
Francis S. Laws, for defendants.

HOLLAND, District Judge. In this case there are filed a motion and 21 reasons for a new trial, the first two of which are objections to the admission of contracts; the third, fourth, fifth, and sixth to alleged errors in admitting the answers of certain witnesses to interrogatories; the seventh and eighth to the charge of the court; and the remaining 13 are objections taken to the refusal of the court to charge upon requests submitted by the defendant.

We do not think that any of these reasons assigned for a new trial require any discussion, other than what was said in the charge of the court. There was evidence to submit to the jury as to the market value of the Florida land pebble phosphate in Nantes during the time involved in this controversy, from which the jury could ascertain the damages to the plaintiff on the number of tons upon which plaintiff was permitted to recover. It is true the evidence as to the market value was not very voluminous, but in the nature of the case it was sufficient to submit to the jury for them to find the market value. The contracts were properly proven, and their admissibility so obvious that no further comment is necessary.

Motion and reasons for a new trial are overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

RAMJAK v. AUSTRO-AMERICAN S. S. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1911.)

No. 2,106.

1. CARRIERS (§ 280*)—LIABILITY FOR INJURY TO PASSENGERS.

A carrier of passengers for hire is bound to give all reasonable facilities for the reception and comfort of passengers, and to use all precautions as far as care and human foresight can go for their safety, and is answerable for the smallest negligence in himself or his servants.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1085; Dec. Dig. § 280.*]

**2. SHIPPING (§ 166*)—LIABILITY OF VESSEL FOR INJURY TO PASSENGER—NEG-
LIGENCE OF SEAMAN.**

A seaman on respondent's steamship, being required to go aloft, instead of using the standing ladder in the side rigging, which was reasonably safe, and which he had used on previous occasions, unnecessarily climbed the fore-topmast backstay, a wire rope three-fourths of an inch in diameter, and while at work thereon slipped and fell to the deck, killing himself and falling upon and seriously injuring libelant who was a passenger. *Held*, that the injury was the result of the seaman's negligence, and that respondent was liable therefor.

[Ed. Note.—For other cases, see Shipping, Dec. Dig. § 166.*]

3. DAMAGES (§ 132*)—PERSONAL INJURY.

A laboring man, 24 years old, awarded damages in the sum of \$5,100 for an injury which caused him pain and suffering for several weeks and resulted in shortening one of his legs and otherwise impairing his earning capacity.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 132.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Suit in admiralty by Peter Ramjak against the Austro-American Steamship Company, Limited. Decree for respondent, and libelant appeals. Reversed.

The libelant came to this country as an immigrant passenger on the steamship "Eugenia," belonging to the Austro-American Steamship Company, Limited, arriving here on December 16, 1907. Four days before the ship's arrival, the libelant's leg was badly broken in at least two places above the knee by the fall upon him of a sailor from a fore-topmast backstay; the sailor himself being killed in the fall. This sailor, having occasion to go to the extreme top of the foremast to reeve a halyard through a small block near the top, 79 feet high from the deck, in a spirit of ostentation and bravado, took off his shoes, put the end of the halyard in his mouth, climbed with hands, feet, and knees the fore-topmast backstay, a wire rope three-quarters of an inch in diameter which ran from the top of the bulwark about five feet high on the starboard side of the ship to the top of the mast, slanting towards the stern at an angle with the foremast from 20 to 25 degrees. When he reached within a few feet of the top and stretched out his hand to put the rope through the block, he slipped and slid part way down the backstay, and then fell to the deck, killing himself and falling upon Ramjak, who was then coming out of the water-closet.

The weather was calm and sea smooth. The usual way for a sailor to climb to the top of the fore-topmast was to climb the standing ladders in the side rigging to the cross-trees and then go up in the boatswain's chair. This same sailor had used that method several times before on the voyage.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ramjak was treated for his injuries aboard the ship as well as the ship's outfit permitted with somewhat insufficient appliances. On reaching the city of New Orleans, he was refused admission to the country by the immigration authorities, and thereupon was carried by the steamship company to Touro Infirmary, where he was treated with best of surgical skill at the expense of the company. He was discharged from the infirmary about March 5th, and again taken before the immigration authorities, and was again refused admission. Being necessarily in the custody of the steamship company, who was ordered to deport him, he was thereupon transferred to the parish prison of the city of New Orleans, where he was confined at the expense of the company but without further medical treatment until April 6, 1908, when he was again taken before the immigration authorities, examined, and admitted.

On October 10, 1908, Ramjak filed a libel in personam against the steamship company, setting forth the negligence of the company in the treatment he had received, and claimed: First, damages for the breaking of his leg; and, second, damages for false imprisonment.

The respondent excepted to all that portion of the libel which claimed damages for false imprisonment, which exception the court sustained. The libellant amended his libel limiting his damages to the breaking of his leg.

On the hearing on the amended libel the trial court, for reasons orally assigned, dismissed the libel, with costs.

Louis P. Bryant, for appellant.

Edgar H. Farrar, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The trial judge apparently took the view that under the evidence Ramjak's injuries were the result of an accident for which neither the carrier nor his servants were responsible; but we do not so read the evidence. Ramjak was a passenger for hire, and no fault can be imputed to him. The unfortunate sailor involved was presumably in the performance of a duty, and he was or should have been under the eye of the officer of the deck, and when to show his dexterity and skill he undertook the dangerous, and in the absence of an emergency "foolhardy," feat of climbing the fore-topmast backstay, thereby unnecessarily endangering his own life and possibly the lives and limbs of those persons rightfully on and about the deck, he was guilty of negligence, and, as his bravado resulted in injury to Ramjak, the carrier is unquestionably answerable. There is no question of selection between two safe ways. The usual way by the ladder in the side rigging was ordinarily safe; the way by climbing the backstay was res ipsa loquitur not only dangerous for the climber but unsafe with reference to the ship's company and passengers.

[1] The carrier of passengers for hire is bound to give all reasonable facilities for the reception and comfort of passengers and to use all precautions as far as care and human foresight can go for their safety on the road. He is answerable for the smallest negligence in himself or his servants. See Kent's Comm. vol. 2, p. 601; Shearman & Redfield on Neg. (2d Ed.) § 266. And this is the rule in admiralty. See *The New World v. King*, 16 How. 469, 14 L. Ed. 1019; *The Ori- flamme*, Fed. Cas. No. 10,572; *The Anchoria*, 83 Fed. 847, 27 C. C. A. 650.

[2] From this view of the law and the facts it follows that the appellant, libelant below, is entitled to recover compensation for his injuries and resulting damages.

[3] Under the evidence given by himself, appellant should be classed as a laborer dependent for his living upon his physical capacity to perform manual labor; and with his apparent determination, energy, and industry he could well look forward to earning in this country from \$2.50 to \$3 a day for 300 days in the year. Crippled, with one leg an inch and a half shorter than the other and some resulting infirmities (all of which is the direct result of his injuries), his earning capacity has been decidedly impaired, in our judgment to the extent of \$1 per day, and the compensation in this respect can be assimilated to an income of \$300 per year. During his expectancy of life, which, at 24, is 38.59 years, the present value of such an income at 6 per cent., the usual business rate in this country, would be about \$4,500 in round numbers.

He undoubtedly suffered pain and anguish during his cure and convalescence, and in that I think we can safely follow the late Mr. Justice Bradley, who allowed in a very similar case in the matter of injuries the sum of \$500. See Miller v. W. G. Hewes, 1 Woods, 363, Fed. Cas. No. 9,594. Also see William Branfoot (D. C.) 48 Fed. 914.

According to the same cases, appellant is also entitled to compensation for the loss of his labor from the time he arrived in the port until he was discharged from the custody of the steamship company and admitted into the country, for which allowance should be made at \$1 per day, based on the fact that as he was a foreigner just come into the country, and, not versed in our language, he would have had some difficulty in getting employment, and his board was paid, and which period was from the 16th day of December, 1907, to April 4, 1908, in which there was about 100 working days. As appellant was necessarily in the custody of the steamship company during this period, confinement in the infirmary and parish prison may be considered as *damnum absque injuria*. Appellant makes no proof of medical and surgical expenses and attendance.

The decree of the District Court is reversed, and the cause is remanded, with instructions to enter a decree in favor of libelant and against the respondent for \$5,100 damages and all costs.

WILLIAMS et al. v. CITY BANK & TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)

No. 2,173.

1. APPEAL AND ERROR (§ 397*)—APPEAL IN OPEN COURT—PARTIES—CITATION—NECESSITY.

Where an appeal is taken in open court, it is taken against all adverse interests; all parties present in fact or in law being regarded as having notice without citation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2101; Dec. Dig. § 397.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. APPEAL AND ERROR (§ 336*)—APPEAL IN OPEN COURT—SEVERANCE—OBJECTIONS.

Where an appeal was taken in open court from an order granting an interlocutory injunction, appellant's failure to summon and sever and notify parties was not a jurisdictional defect, but one which might be corrected in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 336.*]

When summons and severance of parties on appeal or writ of error is authorized or required, see note to *City of Detroit v. Guaranty Trust Co., 93 C. C. A. 608.*]

3. COURTS (§ 316*)—JURISDICTION—REAL PARTY IN INTEREST—STATUTES.

Act Cong. March 3, 1875, c. 137, § 5, 18 Stat. 472, continued and re-enacted by Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436 (U. S. Comp. St. 1901, p. 511), provides that if it appear to the satisfaction of the Circuit Court, at any time after suit brought therein, that it does not really involve a dispute or controversy properly within the court's jurisdiction, or that the parties have been improperly or collusively made or joined to create a case cognizable under the act, the court shall proceed no further, but shall dismiss the suit or remove it as justice shall require. *Held* that, where a street railway and electric company, prior to default in the payment of principal or interest on bonds secured by mortgage, was entitled to possession of its property, and the only persons objecting to its right to lay double tracks on a certain street were the abutting property owners, a nonresident trustee for the bondholders under such mortgage was not entitled to maintain a suit in the federal court against the railway company, the city, and the objecting property owners, to restrain them from objecting to the laying of such additional track, on the allegation that such improvement was essential to the bondholders' security; that the bondholders were more deeply interested in the property of the railway company than any other corporation or persons; and that a failure of the railway company to lay such track would greatly impair the value of the bonds, etc., it being evident that the suit was instituted by the plaintiff as trustee to relieve the railway company, the real party in interest, from the necessity of resorting to the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 862; Dec. Dig. § 316.*]

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

Suit by the City Bank & Trust Company and others against F. W. Williams and others to restrain defendants from opposing the Meridian Light & Railway Company from carrying out its purpose of double tracking its street railway on Eighth Street in the City of Meridian, Mississippi. From an order granting an injunction pendente lite, defendants Williams and others appeal. Reversed and remanded.

G. Q. Hall, for appellants.

W. E. Baskin and Wm. H. Armbrecht, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. This is an appeal from an interlocutory order granting an injunction pendente lite, and there is a motion to dismiss the same on the ground that all the defendants are not made parties to this appeal.

The record shows that immediately upon granting the injunction pendente lite "the said parties defendant thereupon in open court presented their petition accompanied by bond in the penalty of \$500

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

signed by the United States Fidelity & Guaranty Company as the surety, conditioned as provided by law, which said bond is hereby approved, and, having filed and presented this said petition and assignments of error and done the other things necessary for the perfection of their appeal in the premises, it is ordered, adjudged, and decreed that the said appeal as prayed for be granted and allowed."

[1] When an appeal is taken in open court, it is taken against all adverse interests. All parties are present in fact or in law, and they have notice then and there. No citation is required. *Chicago & Pacific Railroad Co. v. Blair*, 100 U. S. 666, 25 L. Ed. 587; *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251. And see *Taylor v. Leeznitzer et al.* (U. S. Sup. Ct. March 20, 1911) 31 Sup. Ct. 371, 55 L. Ed. —.

[2] It follows that, whatever objection is urged in regard to the failure to summon and sever and notify parties in this case, it is not jurisdictional, and, as in the case above cited, the defect, if any, may be corrected in this court.

The motion to dismiss the appeal is therefore denied.

The bill in this case was filed by the complainant, a citizen of the state of Alabama, the trustee in a trust deed granted by the Meridian Light & Railway Company, a corporation created under the laws of Mississippi, to secure a series of bonds, naming as defendants the Meridian Light & Railway Company, the mayor and boards of councilmen and aldermen of the city of Meridian, and 40 or 50 persons, all citizens of the state of Mississippi, for the purpose of protecting the Meridian Light & Railway Company from all hindrance and opposition in double tracking by laying an additional track for the street railway on Eighth street in the city of Meridian, and, if the court has and should exercise jurisdiction, we find that, although the so-called restraining order issued in the case and from which no appeal was taken is subject to some of the criticisms of appellant, there is no good reason in the record for holding that the order granting an injunction pendente lite, which is the subject of this appeal, was improvidently or erroneously granted.

Our inquiry then is directed to the question whether the Circuit Court has, and should exercise, jurisdiction in the premises.

An examination of the lengthy bill and its exhibits, the charter of the Meridian Light & Railway Company, the deed of trust granted by it to complainant, the ordinances of the city of Meridian granting privileges and franchises to the railway company, the answers of the Meridian Light & Railway Company, and of the mayor and boards of councilmen and aldermen, and the answers of the private parties defendant to the bill, all too lengthy to be copied here, show only one controversy, and that a controversy primarily between the Meridian Light & Railway Company and the abutting property owners on Eighth street of the city of Meridian as to whether the light and railway company should be permitted to exercise its rights under its charter and franchise and double track Eighth street without previous compensation to the abutting property holders.

Aligning the parties to the record and according to interests involved, this controversy is between the trustee, complainant in the bill, the Meridian Light & Railway Company, the mayor and boards of

councilmen and aldermen of the city of Meridian, and, as we gather from the pleadings, the public interests generally, on the one side; while on the other side are the aforesaid protesting property holders.

[3] The question then for us to determine is whether the complainant, as trustee, and without showing any other interest than that it and the bondholders it represents will be benefited through enhancing the security and increasing the revenues of the light and railway company by the extension of its lines, can invoke the interference and protection of the United States Circuit Court in equity to decide the controversy; and this without averring that the failure of the light and railway company to avail itself of the permission and authority granted by the city of Meridian will result in impairing the security that the said complainant may now have to such an extent as to affect adversely the ability of the light and railway company to fully comply with all its obligations as stipulated in the deed of trust.

The bill avers:

"Your orator would further represent and show unto your honors that the said bondholders who are represented by your orator are more deeply interested in the properties of the said street railway company and the protection of it and the successful use of the same than any other corporation, person, or persons, and that, in order to meet the public demands and to properly use said property, it is necessary that the said street railway company should extend its street railway lines and further equip said street railway so as to further facilitate the purposes for which it was organized and incorporated, and to thus enable it to meet the interest accruing on the bonds held by your orator as trustee for the said bondholders, and to eventually liquidate and pay said bonds; that in order to do this it is now necessary for the street railway company to lay down double tracks upon other streets and avenues of the city of Meridian, and over Eighth street in said city of Meridian, which street leads from the business portion of the said city through one of the most thickly settled resident portions of said city, and over which said street there has been for a long time—15 or 20 years—a street car line, which has been constantly operated; that there is now and has been for a long time a single track operated by the present street railway company; and that the said street railway company, in order to meet the public demands, has placed also in said Eighth street, at different places therein, diamond switches or double tracks, which have been used by it for a long space of time in order to enable it to run its cars to meet the demands of the schedules which have been fixed at every 15 minutes during the hours when said cars are in operation."

Also:

"Your orator further charges the fact to be that its mortgage and bonds are and will continue to be greatly impaired if the said street railway, because of the threats of the various suits against it by the abutting property owners on Eighth street, declines or fails to perform its duty to the public and to carry out the charter purposes by laying double tracks along and over the said Eighth street."

Also:

"That a failure on said street railway's part to place the said double tracks on said Eighth street would greatly impair the value of the bonds held by your orator as trustee of the various bondholders, and in a large measure destroy their investments of the property of the said street railway company, thus inflicting irreparable loss upon the bondholders who are represented by your orator and destroy the security of the said bondholders, thus rendering their debt of little value."

These averments of conclusions show plenty of apprehension, but seem to be wanting in facts to show that the bondholders will be so materially damaged by the neglect of the light and railway company to lay the additional track that their trustee can appeal to a court of equity for relief. To increase the security will undoubtedly benefit the bondholders, and to lay more tracks may or may not increase the security; but we find nothing in the bill and exhibits showing any obligation on the part of the light and railway company to increase the security held by the bondholders. The averment in the bill that the "said bondholders who were represented by your orator are more deeply interested in the properties of the said street railway company and the protection of it and the successful use of it more than any other corporation, person, or persons" is a statement of an interesting conclusion that may be read in the light of the general rule that, unless otherwise stipulated, the mortgagor retains possession, operates and controls the mortgaged property, and receives the income thereof, and, until breach, is not liable to the mortgagee except in case of waste or active damage to the security; and, also, in the light of the stipulations contained in this particular deed of trust, the second paragraph of which reads as follows:

"So long as the said company, its successors and assigns, shall not make default in the payment of the interest or principal of said bonds or coupons as the same shall respectively become due and payable, and so long as the said company, its successors and assigns, shall faithfully pay, observe, keep and perform all the other covenants, conditions and agreements in the said bond in this indenture contained, the said company, its successors and assigns, shall be entitled to retain possession of the said railroad, lighting, heating and power lines, gas plant and pipes, rights, franchises and other property hereby mortgaged, and receive and enjoy the income thereof and operate the same as authorized by law"

—the fourth paragraph of which provides that the light and railway company may sell any portion of its rolling stock, horses, mules, implements, equipments, electrical apparatus, or machinery which may become useless, or any of its car sheds, shops, or other structures which may become useless or undesirable or unnecessary, providing that the proceeds of any such sale shall be invested in other needed property, and that the light and railway company may also make any local change in the line or construction of any portion of its lines, and for that purpose may take up portions of its said lines or track, etc., and abandon portion of its line, with the proviso that thereby the present length of the line shall not be diminished; and the fifth paragraph, which provides, in case default shall be made of the payment of interest on any of said bonds or default made in the performance of any of the covenants contained in the deed of trust, and said default shall continue for a period of six months, then, and only then, the trustee on the performance of certain requisites may take possession of the property and enjoy the rents and revenues thereof, etc.

Under these stipulations, notwithstanding all the averments in the bill, it seems perfectly clear that, if this were a real controversy between the bondholders on one side and the light and railway company on the other, no court of equity on the showing herein made could intervene to control the management and operation of the light and street

railway company in the matter of laying or not laying an extra track. And it seems clear to this court that in this aspect of the case, if we concede the jurisdiction of the court by reason of diverse citizenship of the parties, the bill is without equity.

The separate answer of the light and railway company is made up of admissions of matters charged, and not directly charged in the bill, but all showing that the light and railway company has no controversy with the complainant in this case.

The answer of the mayor and boards of councilmen and aldermen of the city of Meridian also admits the matters alleged in the complainant's bill and clearly aligns the municipal authorities of the city of Meridian on complainant's side.

These answers decidedly emphasize the proposition that the only controversy in the case is one primarily, and in fact only, between the light and railway company and the protesting property holders, and we think upon the whole record we may safely say the whole purpose and object of the suit by the City Bank & Trust Company as trustee is for the purpose of investing the Circuit Court with jurisdiction in a case which does not really and substantially involve a dispute or controversy of which it should have cognizance.

And it seems clear from the whole record that the complainant only comes into the case to save the real party in interest, the light and railway company, the necessity of appealing to the courts of the state for its protection.

The fifth section of the act of March 3, 1875, continued and re-enacted August 13, 1888 (U. S. Comp. St. 1901, p. 511), provides:

"That if in any suit commenced in a Circuit Court or removed from a state court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court at any time after such suit shall have been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just."

This statute covers the case in hand, and we are compelled to give it effect in our disposition of the same.

We have examined and given full consideration to the many cases cited wherein a trustee has been permitted to maintain a bill for the protection of the trust estate against third parties and therein assert the rights of the bondholders as well as the rights of the bonded company, of which Mercantile Trust Company v. Texas & Pacific Ry. (C. C.) 51 Fed. 529 (s. c., Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014), is a fair sample. The question in that case involved the power of the Railway Commission of the state of Texas to make railroad rates that the trustee averred and by specific facts and figures showed would, if forced on the Texas & Pacific Railway, be confiscatory of the earning power of the property to the great injury of the trust estate.

In that case Judge McCormick, in passing on the charge that the

suit was collusive and preagreed as to the defendant railway company, correctly said:

"It is apparent from the whole record and the conduct of this hearing that the controversy is not between complainants and the railways, but between the railways and the other defendants. The bills of complainants and the answer and cross-bills of the railways, and the arguments of their counsel, show that there is no such element of collusion in these cases as can prejudice the rights of complainants to sue. The cases cited and pressed by counsel for defendants on this point are plainly different from the cases here. The complainants here show equitable interest in the fair earnings of the roads; they show actual ownership and possession of the mortgage securities of the roads, both of which they allege are being irreparably injured and threatened with destruction by the defendants; they show that the railways are willing and want to meet all their obligations as mortgagors in possession, but that said railways are coerced by the defendants, armed with the railroad commission act, and the directors cannot exercise their judgment and discharge their duty as they should and would but for said coercion.

"It may be the railway companies could, under section 6 of the railroad commission law [Acts 22d Leg. Tex. 1891, c. 51], or without the authority of that section, have brought these suits and obtained all the relief to which the complainants are entitled against the other defendants, or it may be that they could not. If they could not, that would only be one additional reason why the complainants should sue; and, if the railways could have so sued, that would be no reason for denying the complainants any right, even if, as seems to be hinted rather than charged, the railways could only have resorted to the state courts; and that there was a previous understanding between the complainants and the railways that the relief complainants desired and believed themselves entitled to receive would be more likely to be speedily and adequately extended in the national courts. It was to meet such cases that the national courts were established. In them parties 'may hope to escape the local influences which sometimes disturb the even flow of justice.' Davis v. Gray, 16 Wall. 221 [21 L. Ed. 447]."

In all the other controlling cases we have examined in this connection we have found in each case where jurisdiction was maintained that there was a real controversy involved in which the trustee asserted an interest to be protected independent of the attitude taken by the mortgagor. If the present case showed that the light and railway company was being coerced by state or municipal authority, and such coercion would result in actual injury to the trust estate or even showed a real controversy in which the interests of the bondholders of the light and railway company were in danger of impairment and needed the protection of a court of equity to preserve their security, then Mercantile Trust Company v. Texas & Pacific Railway Company, supra, and like cases by the Supreme Court, would be cheerfully followed.

But as we are impressed with the facts in this case those cases are not applicable. And we may well observe that, if on the facts of this case we can maintain jurisdiction, then any state corporation that grants a deed of trust, naming therein a citizen of another state as trustee, can indirectly through the trustee appeal to the courts of the United States in any controversy with any resident citizen involving the minimum jurisdictional amount.

The decree of the Circuit Court appealed from is reversed, and the cause is remanded, with instructions to dismiss the bill, with costs.

HALL et al. v. HOBART.

(Circuit Court of Appeals, Eighth Circuit. April 9, 1911.)

No. 3,325.

1. NAVIGABLE WATERS (§ 36*)—LANDS UNDER WATER—TITLE OF STATE.

Under the law of Minnesota the state has no proprietary title to the bed of the Mississippi river or other navigable stream or lake below low-water mark, but holds the title in its sovereign capacity in trust for the public, to protect the right of free navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 184; Dec. Dig. § 36.*]

2. NAVIGABLE WATERS (§ 36*)—RIPARIAN RIGHTS—LANDS BEYOND LOW-WATER MARK.

Under the law of Minnesota a riparian owner, under a government patent, of land bounding on a stream navigable in fact, as the Mississippi river, takes title to the stream only, at furthest to low-water mark, but has the right of possession and use of the bed of the stream between low-water mark and the navigable channel, including any island or other accretion formed on such bed, subject only to such use, control, or regulation as the state may make of it in the exercise of its sovereign power, for protecting or improving the public right of navigation.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 185; Dec. Dig. § 36.*]

3. ESTOPPEL (§ 93*)—EQUITABLE ESTOPPEL—ACQUIESCEENCE.

An owner of land bounded by the Mississippi river, who served notice on a city of her claim to an island in the river in front of her shore line, was not estopped to maintain an action for its recovery because the city, before suit, but after such notice, had expended a large sum in making improvements thereon.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 93.*]

4. EJECTMENT (§ 11*)—TITLE TO SUPPORT—POSSESSORY RIGHT.

Ejectment will lie by a riparian owner on a navigable stream to recover possession from an adverse claimant of an island formed by accretion in front of his shore line, although the naked title to the bed of the stream where it was formed is in the state, and plaintiff's right of possession is subject to any proper exercise of the sovereign power of the state in aid of navigation.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 42-46; Dec. Dig. § 11.*]

In Error to the Circuit Court of the United States for the District of Minnesota.

Action at law by Corinna L. Hobart against P. M. Hall and the City of Minneapolis. Judgment (174 Fed. 433) for plaintiff, and defendants bring error. Affirmed.

This was an action of ejectment, instituted by the defendant in error, Corinna L. Hobart, to recover possession of a lot of ground fronting on the Mississippi river, commonly known as "Boom Landing," and the accretions and rights appertaining thereto, including part of an island which arose from the bed of the river opposite to it, known as "Hall's Island." Her remote grantor acquired the lot by patent from the United States dated March 24, 1849, in which it was bounded on the southwest by the Mississippi river. The defendant the city of Minneapolis claimed the island through mesne conveyances from the state of Minnesota, which asserted title to it by reason of its ownership of the bed of the river. At the trial a jury was waived,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the cause submitted to the court upon the pleadings and proof, and the following controlling facts were found:

"That the Mississippi is and always has been, at and about the point in controversy, a stream of water navigable in fact; * * * that about the year 1875, or a little prior thereto, there began to appear above the surface of the water in the river opposite plaintiff's premises, at several different points, separated from each other by stretches of water, the island, afterwards known as 'Hall's Island,' the title and right to the possession of a portion of which is here in controversy; that when this island first began to appear it was at these several different points above the surface of the water at ordinary low stages thereof, and at ordinary high stages it was entirely submerged; that by gradual deposits of earth and sand and other material from the water of the river the exposed portions of said island grew gradually in area, extent, and height, so that in a few years the detached portions thereof became connected together in one continuous island, which island showed continuously thereafter above the water at all ordinary stages, except extreme high water during the spring freshets; that the growth of said island continued in like manner until the year 1902 [in which year the patent from the state to defendant Hall, hereinafter referred to, was issued], at which time it was more or less covered with willows, brush, and cottonwood trees, and was about 1½ acres in extent; that this island was formed, by gradual deposits on the bed of the river of earth and sand and other material from the water thereof, at and about the line of boom piers which had been placed in the river at a distance of about 200 feet from plaintiff's shore line, and where the water was about 8 or 10 feet deep, which piers had been put in for the purpose of attaching booms thereto to hold and control logs coming down the river; that said island was formed on the east side of the middle thread of the said Mississippi river, and the main navigable channel of said river has since the formation of said island always been on the west side thereof, said island lying between said main navigable channel and said plaintiff's shore line; that the width of the open navigable channel of said river on the west side of said island is about 600 feet and the depth thereof for a large part of said distance is from 10 to 15 feet; that while said island, at the time of its formation as above set forth, was, and ever since has been, separated from the plaintiff's shore line by the water of the river for a distance of from about 75 to about 200 feet, said water, or channel, if it may be called a channel, varying in width at different points between said limits, the bottom of said channel has been gradually filling up with earth and sand and other material from the water of the river, so that the depth of the water therein was at times of ordinary low water, in the year 1902, and for some years prior thereto, only about 2 feet at any point from the shore of the island to the shore of the main land at the shallowest part thereof, and about from 3 to 5 or 6 feet at the deepest part thereof, and in the year 1908 only from about 1½ to about 2 feet at the shallowest part, and from about 3 to 4 feet at the deepest part, except where the same had been artificially deepened; * * * that the said channel between said island and the plaintiff's said premises on the east shore of said river has, since the formation of said island until the year 1905, been used at all seasons of the year, except when covered with ice, at all ordinary stages of water, for transporting large quantities of pine and other logs to the several saw-mills located upon said channel and upon the east bank of the Mississippi river, it being necessary at times of extremely low water to scrape the channel to permit the free passage of such logs."

There was a further finding to the effect that Hall, the original patentee from the state of Minnesota, and who was at the time of the trial the officer of the city of Minneapolis in actual custody of the island, in the year 1906 executed and delivered to the city of Minneapolis a deed purporting to convey the island to the city in trust for "public municipal purposes only," and also a definite finding "that thereafter the defendant city of Minneapolis took possession of said island, and made and constructed large and valuable improvements thereon, using the same as a public park, and the channel on the east side thereof as a public swimming pool in the summer months, and as a public skating rink in the winter months," and also a finding that

before the city had taken possession of the island, and made the improvements thereon, plaintiff caused a written notice to be duly served on the city advising it of her claim to the island.

The trial court found as a conclusion of law from these facts that plaintiff was the owner and entitled to the immediate possession of the lot bounded on the river, and as such "was the beneficial owner, and entitled to the immediate and exclusive possession and use (subject only to the paramount right and title of the state therein, or of the general government, for the purpose of protecting, preserving, and improving the public right of navigation on said river), of all that part of that certain island, known as 'Hall's Island,' in said river, which lies between the shore line of said above-described premises and the middle thread of said river, and between two lines drawn perpendicularly to said thread, one at the northerly and one at the southerly end of the shore line of said premises, and is therefore, as against the defendants herein, entitled to the immediate possession of said portion of said island."

Judgment was afterwards entered accordingly. From that judgment, defendants prosecute error. There is but one assignment of error, stated, however, in different ways, and that is that the facts found by the court are not sufficient to support the judgment.

A. C. Finney and George W. Armstrong (Frank Healy, on the brief), for plaintiffs in error.

George T. Simpson, Atty. Gen., and C. Louis Weeks, Asst. Atty. Gen., for State of Minnesota.

Fred W. Reed, for defendant in error.

Washburn, Bailey & Mitchell and Crassweller, Crassweller & Blu filed brief in answer to brief of the State of Minnesota.

Before SANBORN and ADAMS, Circuit Judges, and REED, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). This being an action of ejectment, plaintiff must recover, if at all, on the strength of her own title, and not on the weakness of the defendants'. She is conceded to have been the owner in fee simple of a lot of ground fronting on the east bank of the Mississippi river, which was originally acquired by patent from the United States, and was therein described as bounded on the southwest by the Mississippi river. While the object of this suit is to recover possession of the lot, with its accretions generally speaking, the chief controversy is over plaintiff's right to the possession of that part of Hall's Island which lies opposite her lot, and between it and the navigable channel of the river. The river, at the place of present inquiry, is conceded to be navigable in fact, and navigability in fact is conceded to be the test of navigability within the meaning of the law governing the relative rights of riparian owners and the state. It is further conceded that these rights, so far as this case is concerned, are to be determined by the laws of the state of Minnesota as interpreted by its highest judicial tribunal. See Barney v. Keokuk, 94 U. S. 324, 24 L. Ed. 224; Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; Lamprey v. State, 52 Minn. 181, 192, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541.

What, then, are the rights under the law of Minnesota of a riparian owner, in fee, of a lot of land originally acquired by patent from the United States, and bounded by a navigable river to an island which,

after title to the lot emanated from the government, arose from the bed of the river between the shore line and the main navigable channel of the river? As this island, according to the facts found, arose from the bed of the river as an accretion thereto, its ownership most obviously depends upon the ownership of the bed. This much is conceded.

Primarily the riparian owner's title extends at least to highwater mark. As to this there is no dispute. He has, however, a certain qualified or dependent right to that part of the shore between high and low water mark (*In re Minnetonka Lake Improvement Co.*, 56 Minn. 513, 520, 58 N. W. 295, 45 Am. St. Rep. 494), which need not now be discussed. What his rights are between low-water mark and the middle thread or navigable channel of the river is the controlling and important question for decision; and, as this must be answered by the decisions of the Supreme Court of Minnesota, they have received most careful and critical attention. Judge Wilson, speaking for that court in a similar case (*Schurmeier v. St. Paul & Pacific R. R. Co.*, 10 Minn. 82 [Gil. 59, 75] 88 Am. Dec. 59), said:

"It is too clear to admit of a reasonable doubt that the river bounds this lot on one side. But, this being admitted, the further question is presented whether the riparian owner takes to high-water or low-water mark, or to the middle thread of the stream. At common law, grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle thread of the stream, * * * except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. * * * The fact that these rivers are, and must remain, public highways, is not at all inconsistent with the view that riparian owners have the fee of the bed of the stream."

In harmony with the views so expressed, the conclusion was reached that the riparian owner took title in fee to the middle thread of the stream. There was, however, a separate concurring opinion in that case. Berry, Judge, was indisposed to agree to the conclusion of the majority that the riparian lot owner held title to the center of the stream, but said that he "acquired at least an easement in the landing which could not be impaired for public use without compensation." This case went to the Supreme Court (7 Wall. 272, 19 L. Ed. 74), where the conclusion reached by the state court, to the effect that the river itself, and not a meander line, was the west boundary of plaintiff's lot, was concurred in; but the Supreme Court, speaking by Mr. Justice Clifford, said:

"But the better opinion is that proprietors of land bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is that all such rivers shall be deemed to be and remain public highways."

After some further discussion the opinion proceeds:

"Viewed in the light of these considerations, the court does not hesitate to decide that Congress, in making a distinction between streams navigable, and those not navigable, intended to provide that the common-law rules of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways. Although such riparian proprietors are limited to the stream, still they also have the same right to construct suitable landings and wharves,

for the convenience of commerce and navigation, as is accorded riparian proprietors bordering on navigable waters affected by the ebb and flow of the tide."

It was decided that from any point of view the decree of the state court which enjoined a trespass upon Schurmeier's riparian rights was correct.

In *St. Paul, S. & T. F. R. Co. v. First Division, etc., R. Co.*, 26 Minn. 31, 49 N. W. 303, plaintiff claimed that the patentee of land bordering on a stream navigable in fact took title only to the meandered line, or at most to low-water mark. The trial court held that such patentee took title to the middle of the river and directed a verdict for the defendant. The Supreme Court, speaking by Chief Justice Gilfillan, said:

"In the same case [Schurmeier v. St. Paul & Pacific R. Co., 10 Minn. 82 (Gil. 59, 82) 88 Am. Dec. 59] this court held that the common-law rule as to the construction of grants of land bordering on streams is in force in this state, and is applicable to patents or grants of the public lands by the general government. * * * The Supreme Court of the United States (7 Wall. 272, 19 L. Ed. 74) decided that, under the various acts of Congress providing for the survey and sale of the public lands, the title of the patentee of lands bordering on streams navigable in fact stops at the stream, and that the title to the beds of such streams is reserved to the government."

The Supreme Court, therefore, held that the trial court was wrong in directing a verdict for the defendants.

From the foregoing decisions it appears that the Supreme Court of the state of Minnesota held that a riparian owner upon a stream navigable in fact took actual title to the center of the stream. The Supreme Court of the United States, in contravention of the generally accepted doctrine that the rights of riparian owners were determinable exclusively by the law of the state, differed with the Supreme Court of Minnesota with respect to the ownership of the bare legal title to the bed of the stream, but indicated that the riparian owner was entitled to certain beneficial uses of it.

The nature, character, and extent of these beneficial uses afterwards became the subject of much litigation in Minnesota, and many cases are found in which they were ably discussed and finally determined. These cases have all been thoroughly examined, and, while it might be interesting to analyze them separately, we shall content ourselves by stating somewhat comprehensively what we find them to decide.

[1] In our opinion they establish the following certain and definite propositions: That the patentee of land bordering on the Mississippi river takes title only to the stream, at furthest to low-water mark, leaving the naked legal title to the bed of the stream below low-water mark in the state; that the state takes and holds this title, not as a proprietor, but in its sovereign capacity, for the benefit of and in trust for the people; that it thereby acquires for itself no right of property in the bed of the river, but takes upon itself the obligation of a trustee to guard the right of the public to freely navigate the river; that, while the riparian owner acquires the technical fee at furthest to low-water mark, he has certain rights originating, ex necessitate, in the ownership of the bank, among which are the right

to enjoy free communication between his abutting premises and the navigable channel of the river, to build and maintain suitable landings, piers, and wharves on and in front of his land, and to extend the same therefrom into the river to the point of navigability; that his right to the possession and control of the bed of the river in the assertion and enjoyment of these rights is exclusive as to all persons except the state, and as to it for all purposes, except in so far as it may interfere with free navigation, and possibly with free fishing, and that these rights of the riparian owner are subject to alienation by him separate and apart from the shore land to which they were originally incidental. The following cases we think establish the propositions just stated: *Morrill v. St. Anthony Falls Water Power Co.*, 26 Minn. 222, 2 N. W. 842, 37 Am. Rep. 399; *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219; *Hanford v. St. Paul & Duluth R. Co.*, 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722; *Bradshaw v. Duluth Imperial Mill Co.*, 52 Minn. 59, 62, 53 N. W. 1066; *Lamprey v. State*, *sura*.

For instance, in *Miller v. Mendenhall*, 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219, it is said:

"These waters are within the jurisdiction of the state and federal governments, and the state holds the title to low-water mark in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But, though the title is nominally in the state, the common right of the people is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines. * * * The right of access and communication with the navigable waters, which pertain peculiarly to the ownership of the upland, in order to be available and of practicable use, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land, and below low-water mark. * * * While the public right of navigation and fishery may not be extinguished until the waters are excluded, yet after the submerged land is filled or occupied the riparian owner will have the exclusive right of possession, and the entire beneficial interest; and whether his dominion would be absolute, and his title indefeasible as against the state, is not necessary to inquire."

In *Hanford v. St. Paul & Duluth R. Co.*, 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722, the court first held that the riparian owner had the exclusive right to occupy with landings, piers and wharves the bed of the stream in front of his shore line out to the point of navigability, and that this right was so incidental to and connected with his ownership of the shore land that it was incapable of separate existence and could not be alienated to another. On a reargument, however, a most exhaustive consideration was given the subject. The main question related to whether the riparian rights could be alienated or severed from the shore land itself so as to exist as separate property from it. In discussing this question the court considered the doctrine of riparian rights *ab initio* and exhaustively and among other things said:

"In this state the title of the proprietor of lands abutting upon navigable waters extends to low-water mark; the bed of the stream or body of water, below low-water mark, being held by the state, not in the sense of ordinary

absolute proprietorship, but in its sovereign governmental capacity, for common public use. * * * The estate or interest of the riparian owner in the bed of the stream below low-water mark is subject to the right of the public to use the same for the purposes of navigation; but, restricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. * * * Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers, and wharves into the water, and up to the point of navigability, for his own private use and benefit. * * * The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right. * * * The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right. No one but the riparian proprietor has the right to improve and occupy such premises for private purposes. * * * This right of the riparian proprietor, *even before it has been in any manner exercised* by reclaiming or improving the premises—the right itself to reclaim, improve, or occupy—is a *property right, vested in him, recognized and protected in the law as property.* * * * These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. * * * If the right to occupy and use the premises is transferable *after* they have been improved by the exercise of the legal rights of the riparian proprietor, we see no sufficient reason why his legal right to improve and occupy and use the premises should not be transferable. If it be said that in the one case he has the legal title, and in the other he only has the valuable right of occupancy and improvement, with the power thereby to acquire the legal title, it may be answered that such rights are themselves ordinarily a proper subject of transfer. * * * We have thus considered that the riparian proprietor has the exclusive right—absolute as respects every one but the state, and limited only by the public interests of the state for purposes connected with navigation—to improve, reclaim, and occupy the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate; that his *right* even though it may never have been exercised, is recognized and protected by the law as *property*, of which he cannot be deprived even by the state without just compensation. * * * From these considerations, as well as from the authorities cited bearing directly upon the question, we think that the quality of alienability should be deemed to belong to this kind of property, as it does to property in general. * * * The rights of no one are affected by allowing the riparian owner to convey away this part of his property as he may his other property. It is only an abstract question whether the right, originating in custom, and having originally attached as an incident to his riparian lands, may now be sold and conveyed, and be enjoyed by the purchaser. * * * We think that we ought to go further, and hold that the riparian right to improve, reclaim, and occupy such premises is transferable."

The learned court then concludes thus:

"We have been thus led to the conclusion that the proposition that the riparian proprietor's peculiar right of occupancy and use of lands beyond the boundary of his ownership in fee is inalienable and incapable of existence, apart from the right of occupancy and use of the adjacent bank, should not be adhered to."

A frank confession is then made that in their former decisions they had not sufficiently considered the peculiar nature, extent, and relation of the private and public rights, respectively, to lands lying between low-water mark and the point of navigability.

[2] We refrain from making further extracts from the decisions of

the Supreme Court of Minnesota, but confidently assert that nothing can be found departing from the doctrine announced in the Miller and Hanford Cases, from which we have so liberally quoted. Our conclusion is that the law of Minnesota, which is our sole guide in this case, conferred upon the riparian owner the right of possession and use of the bed of the stream between her low-water mark and the navigable channel of the river, including, of course, the island and other accretions formed on the bed, subject only to such use, control, or regulation of the island or bed as the state, in the exercise of its sovereign power over them, may from time to time deem necessary in order to adequately maintain or promote the rights of the public to navigate the river.

The space between plaintiff's lot and Hall's Island appears to be in a formative state. The natural sedimentary deposits from the waters of the river have banished the water therefrom, so that it is only 1½ to 2 feet in the shallowest and 3 to 4 feet deep in the deepest part, excepting, however, at places where a channel is artificially kept open to permit the passage of rafts of logs. The general rules of law governing accretions to riparian holdings will probably soon definitely settle the status of this part of the property. At present the plaintiff is entitled to its possession and use, as well as to the possession and use of the island itself, subject to limitations already pointed out.

The facts found by the learned trial judge disclose that the city of Minneapolis, under the supposed authority and sanction of the state, is withholding the possession of the island and the shoal between it and the east shore from the plaintiff, making use of them, not for the purpose of promoting navigation, but for the purposes of a public park, skating rink, and swimming pool for its citizens. This, in our opinion, is an unwarranted use, and in derogation of plaintiff's rights. As long as it is continued, plaintiff is precluded from the exercise of any of her rights, whether she has a present purpose to exercise them or not. *Hanford v. St. Paul & Duluth R. Co.*, *supra*.

[3] There is no merit in the contention that plaintiff is estopped by her conduct in permitting defendants to expend money in improving the premises in question. She timely warned them, and they proceeded at their peril.

[4] The only question now remaining for consideration is whether the plaintiff in this case is entitled to the remedy in ejectment for the assertion of her rights. Ejectment is a personal action, founded upon a possessory right; and, as we have already decided that plaintiff has the right of possession in question, it necessarily follows that ejectment is her proper remedy for the assertion of that right. It is true the state holds the naked title, but holds it without any proprietary interest, and only in its governmental capacity, as a dry trust for the use of the public in a very limited sphere. As this trust cannot continue beyond the period when the subject of it ceases to be available for the purposes of the trust (*Doe, Lessee of Poor, v. Considine*, 6 Wall. 458, 471, 18 L. Ed. 869), it is not perceived how it can ever be called into exercise so far as Hall's Island itself is concerned. This

probably can no longer be utilized for navigation purposes. If it can be invoked to protect navigation on the shoal between the island and plaintiff's shore, it in effect is only an easement, to which plaintiff's beneficial title and right of exclusive possession is subject. Ejectment lies to recover possession of lands, even if the right of possession is subject to some dominant easement. *Blake v. Ham*, 53 Me. 430; *Thomas v. Hunt*, 134 Mo. 392, 35 S. W. 581, 32 L. R. A. 857; *Taylor v. Armstrong*, 24 Ark. 102, 106; *Adams v. Emerson*, 6 Pick. (Mass.) 57; *Weyl v. Sonoma Valley R. R. Co.*, 69 Cal. 202, 10 Pac. 510. Especially is this true against an intruder who asserts a right outside of the easement. *Westlake v. Koch*, 134 N. Y. 58, 31 N. E. 321; *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 407. Possession, when secured, however, by plaintiff, will necessarily be subject to whatever dominant easement may exist.

The learned trial judge made a most critical and exhaustive examination of the case in the light of the decisions of the Supreme Court of Minnesota, and reached a conclusion that plaintiff, Hobart, was entitled to recover the possession of the premises sued for, subject only to the paramount public right of navigation, and entered a judgment accordingly.

We think this was right, and the judgment is accordingly affirmed.

ETHEREDGE v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)

No. 2,065.

1. INDICTMENT AND INFORMATION (§ 130*)—COUNTS—DIFFERENT OFFENSES—JOINDER.

The statute limiting the number of counts which may be joined in the same indictment for separate offenses committed within the same six calendar months relates merely to the mode of procedure, so that the inclusion of more than three counts in the same indictment does not vitiate it as an entirety; the rights of the defendant ordinarily being amply safeguarded by directing the prosecution before entering on the trial to nolle pros. all the counts in excess of three, or by requiring the prosecutor to elect three of the counts on which he will proceed after his evidence is in, and then compel him to abandon the others.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419-423; Dec. Dig. § 130.*]

2. POST OFFICE (§ 48*)—MISUSE OF MAIls—"SCHEME TO DEFRAUD"—INDICTMENT.

An indictment for violating Rev. St. § 5480, as amended by Act Cong. March 2, 1889, c. 393, § 1, 25 Stat. 873 (U. S. Comp. St. 1901, p. 3696), prohibiting the use of the United States mails in furtherance of a "scheme or artifice to defraud," must allege, not only that the defendant had devised a scheme or artifice to defraud, but must also plead facts showing what the artifice was, wherein the fraud consisted, and how it was to be accomplished, the words "scheme or artifice" not being equivalent to a plan or mode of effecting a fraud, but must be a plan so cunningly devised and presented as to appeal to human passion for gain, by untruthful and seductive embellishment of advantages, begetting confidence where it would not otherwise be bestowed; and hence

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

an indictment merely charging that defendant caused another to order a diamond ring from complainant to be paid for on the installment plan, through the United States mails, with the intent not to pay for the same, did not charge a scheme to defraud, and was therefore insufficient.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 48.*

For other definitions, see Words and Phrases, vol. 7, p. 6342.

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Alabama.

John B. Etheredge was convicted of using the post office establishment in furtherance of a scheme to defraud, and he brings error. Reversed and remanded, with instructions.

This is a writ of error sued out by John B. Etheredge to reverse his conviction under an indictment charging him with the violation of section 5480 of the Revised Statutes, as amended by the act of March 2, 1889 (U. S. Comp. St. 1901, p. 3696). The indictment contains four counts, differing from one another in that three of them aver a scheme to defraud Loftis Bros. & Co., a corporation, and the other, a scheme to defraud Loftis Bros. & Co., a partnership. Each of the counts sets forth a letter averred to have been mailed in execution of the scheme, three of them reciting the same letter, and the fourth a different letter. It is necessary to proper understanding of the case to set forth only one of the counts. The first count of the indictment reads as follows: "The grand jurors of the United States elected, impaneled, sworn, and charged to inquire for the body of the said Northern division of the Northern district of Alabama, upon their oaths present that on, to wit; the 27th day of April, A. D. 1908, at Town Creek, in the county of Lawrence, state of Alabama, and in the division and district aforesaid. John B. Etheredge had then and there devised a scheme and artifice to defraud Loftis Brothers & Company, of Chicago, Illinois, a corporation, to be effected by opening correspondence and communication with the said Loftis Brothers and Company by means of the post office establishment of the United States, which scheme was in substance and effect following, to wit: That one Claude Le May would order of the said Loftis Brothers and Company a diamond ring of great value to be sent to the said Claude Le May, to be paid for in installments, with the intent then and there entertained by the said Claude Le May, and the said John B. Etheredge not to pay for said ring, but to convert the same to the use of the said Claude Le May and John B. Etheredge, without paying for the same, and that the use of the post office establishment was a part of said scheme and artifice to defraud and that the said John B. Etheredge in and for executing said scheme and artifice did on the 27th day of April, A. D. 1908, place and cause to be placed in the post office of the United States at Town Creek, Alabama, a letter with the intent and purpose that said letter should be sent and delivered by the said post office establishment to the said Loftis Brothers and Company, at Chicago, Illinois, which said letter was in substance as follows: 'Town Creek, Ala., 4/27/1908. Loftis Bros. & Co., Chicago, Ill.—Gentlemen: Enclosed find check for \$30.00, for which send me No. 8713 \$200.00 diamond ring, size 7- $\frac{1}{2}$, by mail. I enclose reference from the house I work for. Yours truly, Claude Le May'—contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

The defendant demurred to the indictment and each count thereof on the following grounds: "(1) Said indictment charges the defendant, John B. Etheredge, with more than three separate and distinct offenses committed within the same six months. (2) Said indictment contains four separate counts, each of which charge the defendant with separate and distinct violations of section 5480 by mailing the four separate letters, all within the same six months. (3) Said indictment does not show that the defendant had devised

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a scheme and artifice to defraud Loftis Bros., of Chicago, by opening correspondence with the said Loftis Bros. by means of the post office establishment of the United States. (4) Said indictment does not show that the said defendant made to Loftis Bros. any false representation or pretense for the purpose of procuring said diamond ring. (5) Said indictment does not describe a scheme and artifice to defraud Loftis Bros. by means of opening correspondence and communication with them by means of the post office establishment of the United States, in this: That it does not show that the said John B. Etheredge as a part of said scheme intended to represent any false matters to said Loftis Bros., or that he intended to make them any false pretense, or token, for the purpose of procuring from them said diamond ring. (6) Said indictment does not show that the said John B. Etheredge, defendant, made any false representations to the said Loftis Bros. for the purpose of obtaining said diamond ring, or that he intended, as a part of said scheme, to make any such false pretense for the purpose of obtaining the same. (7) There is no charge in said indictment that the said defendant intended as a part of the scheme and artifice set forth therein to make any false representations to Loftis Bros. or any other person for the purpose of procuring said diamond ring, or that he as a matter of fact did make, either through correspondence or otherwise, any false representation for the purpose aforesaid. (8) Said indictment charges no offense under the laws of the United States."

The demurrer was overruled, whereupon the defendant pleaded not guilty, a trial was had, the jury returning a verdict of guilty as to the first, third, and fourth counts of the indictment, and the defendant was thereupon sentenced to be confined in the penitentiary for 18 months and to pay a fine of \$500.

Shelby S. Pleasants, for plaintiff in error.

O. D. Street, U. S. Atty.

Before PARDEE, Circuit Judge, and TOULMIN and JONES, District Judges.

JONES, District Judge (after stating the facts as above). This case is not controlled in any way by the Penal Code of 1910. The indictment is found on section 5480 of the Revised Statutes, as amended by the act of March 2, 1889, and charges that the offense was committed on the 27th day of April, 1908.

[1] The provision of the statute regarding the number of counts which may be joined in the same indictment for separate offenses committed within the same six calendar months relates merely to the mode of procedure. The inclusion of more than three counts in the same indictment does not vitiate it as an entirety. Neither the reason nor the letter of the statute requires the court to hold that all good counts in such an indictment are rendered bad merely because the indictment contains counts in excess of the number which the statute permits to be joined in the same indictment. The indictment here contains four counts, three averring a scheme to defraud Loftis Bros., a corporation, and the fourth charging a scheme to defraud Loftis Bros. & Co. a partnership. Each of the counts sets out the same "scheme or artifice" to obtain the same ring by the same persons and the posting of letters in execution of the same scheme. It is doubtful, to say the very least of it, whether more than three counts which differ from each other as here only in varying descriptions of the same offense fall within the reason of the rule forbidding the joinder of more than three distinct offenses in the same indictment. It is not perceived how the mere joinder of more than three offenses could so prejudice the de-

fendant that he ought not to be tried on the indictment at all. If, however, that were made to appear, the court could quash the indictment. Ordinarily all the rights of the defendant will be amply safeguarded by directing the prosecution before entering upon the trial to nol. pros. all the counts in excess of three, or, if the court be of opinion that the several counts are merely varied descriptions of the same offense, it can allow the trial to proceed on the indictment until the prosecutor's evidence manifests an election as to the three counts upon which he will proceed, and then compel him to abandon the other counts. *Pointer v. U. S.*, 151 U. S. 396-493, 14 Sup. Ct. 410, 38 L. Ed. 208. The defendant did not ask the court below to take any of these steps. He demanded in effect that the prosecution of all the charges contained in the indictment be discontinued merely because the indictment joined more than three separate offenses within the same six calendar months. The demurrer to the indictment on that ground was properly overruled.

The remaining grounds of demurrer resolve themselves into the objection that the indictment does not disclose any "scheme or artifice to defraud" within the meaning of the postal laws, and, waiving that, that the indictment does not set forth the facts relating to the offense with sufficient definiteness to fairly apprise the defendant of the nature of the offense preferred against him.

[2] It has been settled by repeated decisions that a good indictment under this statute must allege not only that the defendant had devised a "scheme or artifice to defraud," but it must also set out clearly what the artifice was wherein the fraud consisted, and how it was to be accomplished, and that charging the offense in the language of the statute alone is not sufficient. *United States v. Hess*, 124 U. S. 486, 8 Sup. Ct. 571, 31 L. Ed. 516; *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667. Nothing in a criminal case can be charged by implication, but every fact must be clearly alleged. *Carll's Case*, 105 U. S. 611, 26 L. Ed. 1135; *United States v. Post*, 113 Fed. 852. The indictment must show clearly that the person charged has devised or intended to devise a "scheme or artifice to defraud"; that he intended to effect it by opening or intending to open correspondence with some other person through the post office establishment, or by inciting some other person to open communication with him; and that in executing the scheme charged in the indictment the accused has either deposited a letter or packet in the post office or has taken or received one therefrom. As said in *Miller v. United States*, 133 Fed. 341, 66 C. C. A. 403:

"When one is indicted for a serious offense, the presumption is that he is not guilty, and that he is ignorant of the supposed facts upon which the charge against him is founded. He is unable to procure and present the evidence in his defense—indeed, he is deprived of all reasonable opportunity to defend—unless the indictment clearly discloses all the facts upon which the charge of the commission of the offense is based. It must set forth the facts which the pleader claims constitute the alleged transgression so distinctly as to advise the accused of the charge which he has to meet, so fully as to give him a fair opportunity to prepare his defense, so particularly as to enable him to avail himself of a conviction or acquittal in defense of another prosecution for the same crime, and so clearly, that the court upon an examination

of the indictment may be able to determine whether or not under the law the facts there stated are sufficient to support a conviction."

The indictment does not set out whether the scheme was that one Claude Le May was to open correspondence or communication with Loftis Bros. by the use of the post office establishment, or whether the defendant was to open such correspondence. It might well be that Claude Le May "would order a ring," and yet that prior correspondence by other persons was intended to be opened with Loftis Bros., as a part of the scheme to pave the way for favorable reception of the order when actually sent by Le May. It is not alleged that pursuant to the scheme Le May opened correspondence with Loftis Bros. and ordered the ring of them with the promise to pay for it by installments or otherwise. It is not even alleged that the communications deposited in the post office mentioned in the several counts were in any wise false. The letter, which it is alleged Le May wrote, and Etheredge placed in the post office, is contradictory of the scheme alleged in the indictment that Le May would order a diamond ring to be paid for in installments, in that the letter ordered a diamond ring and inclosed a check for \$30, and says nothing about future payments. In its last analysis, the indictment charges nothing more than the mailing of a letter by one person which was written by another person with the understanding that the ring ordered would not be paid for, but converted to their joint use. It is not alleged that it was any part of the understanding between them that the order would be preceded by other letters to influence in any way the judgment of the person to whom the order was addressed, or that it was to be followed by other letters, making any misrepresentation or false statement as to the solvency, character, or occupation of the sender of the order, or otherwise, to get the order filled. It is not alleged that the letter actually sent contained any false statements of any kind, or that it made any promise whatever. The plan described in the indictment really shows nothing more than the mailing of a letter with a fraudulent intent. The averment of such intent, indeed, is essential, but it takes something more than the mailing of a letter with a fraudulent intent to constitute "a scheme or artifice to defraud" within the meaning of the statute. The character of "the scheme or artifice" the law determines on a just consideration of the form in which it is pictured to the person who is expected to act on it, and whether the scheme thus represented is of such a character, if truly presented, as would ordinarily deceive a person capable of attending to his own affairs. If the plan does not have these characteristics, and, in consequence, does not constitute "a scheme or artifice to defraud," it is not converted into such "scheme or artifice" merely because two persons, instead of one, thought out the plan or agreed to execute it. The plan here formed for obtaining the ring is one of the simplest and commonest ways in which professed buyers cheat sellers, and is as old as human nature, and is not likely to deceive any one who is possessed of sufficient mental capacity to attend to the ordinary affairs of life. Sellers of goods to persons at a distance, particularly when engaged in the risky business of selling diamonds on a credit to

strangers, as the courts know from common knowledge, are always on their guard against such methods of swindling. A method so simple unfolded to the intended victim of the fraud merely in the form of an order to ship goods, without more, without any false description of anything, or any promise, and not intended to be preceded or followed by other statement of the schemers, cannot, we think, amount to a "scheme or artifice" within the spirit and the purview of the statute. This conclusion, we think, is inevitable from a just consideration of the words of the statute itself, the character of the evil sought to be suppressed, the history of the enactment designed to remedy the evil, and the objects of the power conferred upon Congress to regulate the mails.

The authority of Congress to enact statutes preventing the abuse of the mail facilities is found in that clause of the Constitution which confers the power to establish post offices and post roads. Congress has no grant of authority to regulate morals or to exercise the police power proper which is retained by the states. The statute does not ascertain or define, otherwise than by the general description "scheme or artifice to defraud," what methods or conduct in effecting a fraud by the use of the mails the statute intends to proscribe and punish. Unless the plan or method in effecting a fraud by the use of the mails is of such a nature as to constitute "a scheme or artifice to defraud" within the meaning of the postal laws, it is not punishable under the statute. Were the words "scheme or artifice" as used in this statute intended as a mere equivalent of plan or mode for effecting a fraud? Every choosing of means or determination of the steps to be taken to effect any given end may, in a general sense, be said to be the devising of a plan or method to accomplish that end, and, if every plan or method for working a fraud be treated as "a scheme or artifice to defraud" within the meaning of the statute, every intentional use of the mails to effect a fraud, whatever its nature or however remotely or indirectly it assisted in the perpetration of the fraud, would fall within the purview of the statute. Such a construction would inevitably result in the federal courts supervising the credit transactions of the country in a large measure, through the administration of the criminal statutes. Every person who filled an order for goods on a credit where the mails were used could, and many would, prosecute the delinquent debtors before the federal courts on the simple, naked charge that they entertained the intent not to pay for the goods but to defraud, when the order was posted, and thus used the mails in effecting "a scheme or artifice to defraud." It would burden their dockets with many unfounded prosecutions, and result in the nature of things in much oppression. If such was the intent, why was it not expressed in a simple and direct provision, to the effect that any person who resorted to the mails to aid him in effecting a fraud of any kind would be punished criminally? The practical difficulties of rightly solving such questions, where, primarily, only the relation of debtor and creditor exists, and the criminality depends on a mental status, which is seldom capable of direct proof, has led to the policy in many of the states not to deal with such forms of fraud by criminal pro-

ceedings, but to leave the wrong and injury to be redressed by civil remedies. The inquiry suggests itself why Congress, which is familiar with the meaning and use of words if it intended to deal with every fraudulent use of the mails, employed such careful phraseology to express that purpose. Although Congress has power to punish any use of the mails for any fraudulent purpose in any manner whatever, a policy so far-reaching in its consequences and so likely to promote abuses ought not to be imputed to its legislation on the subject, in the absence of language manifesting such an intention in the clearest and most unequivocal terms.

"It is a familiar rule that a thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * Frequently words of general meaning are used, words broad enough to include the act in question, and yet a consideration of the whole legislation and the circumstances surrounding its enactments or the absurd results which follow from giving such broad meaning to the words makes it unreasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. "A literal interpretation of words in most common use, and having a well-defined meaning as ordinarily used, would not infrequently defeat, rather than accomplish, the intention of the party using them. The ground and cause of making the statute explains its intent." *Smith v. People*, 47 N. Y. 330. "Nothing is perhaps more frequently misunderstood than language often is which at first blush appears to be plain, if considered by itself. The subject, the occasion, the surroundings, and the end to be accomplished must be steadily kept in view." *Lane v. Kolb*, 92 Ala. 643, 9 South. 875.

The causes which led to the passage of the statute are well known. In a vast and growing country like ours, with its excellent mail facilities, unscrupulous persons were in the habit of utilizing the post office establishment for the purpose of effecting frauds and cheats upon the ignorant or unsuspecting in many seductive ways. The mails were flooded with letters and prospectuses concerning all manner of enterprises and ventures in which individuals were invited to participate. These projects in which persons were thus solicited to become interested seldom had any relation to the ordinary purchase and sale of commodities in the markets, or the customary operations of trade and commerce. They were generally paraded in the garb of proposals or offers of some kind, which, under the circumstances set forth, were asserted to afford rare opportunities of gain, or the betterment in some way of conditions of mind, body, or estate of those who would act on the faith of the representations. While these projects and offers differed widely in scope and nature, the manner of their presentation through the mails was always marked by the same distinguishing characteristics, when they were conceived with a fraudulent intent. The "scheme or artifice" was invariably bolstered by false pretenses, such as that the schemer or his associates were engaged in a particular calling or occupation, when in fact not so engaged; or that he was managing or promoting some existing or contemplated enterprise, when

no such enterprise was in existence or contemplated, or, if actually undertaken, was materially different in conditions from that described; or that money or property intrusted to him in carrying out the scheme would be applied in a particular way, when he had the intent not to apply it at all, but to convert it to his own use; or that he was manufacturing or selling some particular kind of wares or goods when he was not so engaged, or, if he was making or selling them, intended to fill orders with worthless imitations, or not to fill them at all; or where he represented the wares and goods were valuable for particular purposes, when he knew, although he furnished them, they were worthless for such purpose, or that he possessed certain skill or attainments, the exertion of which would accomplish certain results for those employing him, when, in fact, he possessed no such skill or attainments, or, if he did, knew he could not effect what was promised, or did not intend to exert them as he promised; or other like circumstances to induce persons to negotiate with him through the mails that he might defraud them.

The misuse of the mails in these and kindred modes was the evil intended to be suppressed, and the examples we have given clearly point out the nature and scope of the conduct and misbehavior in the use of the mails which Congress had in mind when it spoke of "any scheme or artifice to defraud." The purpose of the statute was to prevent the circulation through the mails of cunning appeals to human passion for gain by untruthful and seductive embellishment of advantages of engaging in ventures, begetting confidence where it would not otherwise be bestowed, and luring persons of ordinary prudence and intelligence into fraudulent transactions and ventures, in which they would not otherwise be persuaded to embark. In short, as said in *Durland v. United States*, 161 U. S. 307, 16 Sup. Ct. 508, 40 L. Ed. 709, the statute meant to put an end to the use of the mails in tempting and cheating the ignorant and unsuspecting by the allurement "of schemes glittering and attractive in form, though unreal and deceptive in fact." *United States v. Clark* (D. C.) 121 Fed. 190; *Post v. United States*, 135 Fed. 1, 67 C. C. A. 679, 70 L. R. A. 989; *United States v. Mitchell*, 36 Fed. 492, 1 L. R. A. 796; *United States v. Owens* (D. C.) 17 Fed. 72. Beyond this, the statute did not intend to go. When it spoke of "scheme or artifice," it did not intend to cover, as we have endeavored to show, every method, however simple and crude, by which one man endeavors to defraud another, by proposal to buy his property, without intention to pay for it in any event. Such conduct, it is true, amounts to a cheat or fraud at the common law, and is immoral, and Congress has the right to punish it when the mails are used to effect such an end; but it has not expressed any intention to do so, except when such deceit and fraud are accomplished by methods which amount to "a scheme or artifice to defraud." The term, as used in the statute, includes much more than the sending of an order for goods with the intent not to pay for them, and thereby to defraud the seller. On the other hand, the fraudulent conduct which will bring the schemer within the statute is not confined to fraudulent misrepresentations as to past or existing facts, and the schemer may be

guilty by the making of a fraudulent promise as to something to be done in the future, if the false promise be interwoven or connected with other intentional misrepresentations so cunningly blended and presented that they would ordinarily mislead a man of common prudence. There must always be a "scheme or artifice" of which the promise forms a part to bring the offender within the statute. A mere fraudulent promise to be performed in the future, whereby one obtains goods from another, without paying for them, disconnected from anything in the transaction which amounts to a "scheme or artifice," will not suffice to uphold a conviction for a violation of section 5480 of the Revised Statutes as amended by the act of March 2, 1889. Whether such conduct would come within the statute, as it appears greatly enlarged in section 215 of the Penal Code (U. S. Comp. St. Supp. 1909, p. 1455), or whether the making of a fraudulent promise as a means of obtaining property, constitutes a "scheme or artifice" within its meaning, is not involved on this writ of error, and no opinion is intended to be expressed as to it. The inclusion in the revision of the statute of the words "for obtaining money or property by means of false or fraudulent pretenses, representations or promises," not found in it before, after frequent amendments to broaden the scope of the legislation, is persuasive at least that Congress in its legislation prior to that amendment has not construed a mere false or fraudulent promise, standing alone, to constitute a "scheme or artifice."

We are aware that general language is used in the opinion in Durand's Case, *supra*, which, considered apart from the case then before the court, would support a contrary conclusion. The scope and meaning of the general language in an opinion must, of course, be confined to the facts of the case before the court. In that case the indictment alleged an elaborate scheme to defraud, of which the promise to be performed in the future was only one of the constituent elements. The Provident Company had fraudulently obtained large investments in its business, and held out fraudulent promises about the maturity and redemption of its investment bonds and the return of investments, with no intention of carrying out the scheme presented, on the faith of which scheme the money was invested. The indictment charged a fraudulent device in the organization and promotion of a business whose advantages were cunningly and seductively held out to the public, in the nature of a lottery, with the fraudulent intention of procuring the money of others on the faith of the scheme thus held out, with no intention of honestly executing it. There was much more than a mere naked promise to pay for goods, fraudulently made, and never intended to be kept. In *Culp v. United States*, 82 Fed. 990, 27 C. C. A. 294, apparently a scheme such as here charged was held to fall within the statute. The indictment itself is not set out in the report of the case. The argument here as to the proper construction of the statute does not seem to have been presented to the court in that case, and the only question actually decided in the opinion, though it contained dicta on the points here presented, was whether the act of March 2, 1889, operated to narrow the scope of, or repeal, section 5480 of the Revised Statutes.

For these reasons, the judgment of the Circuit Court is reversed, the verdict of the jury set aside, and the cause is remanded, with instructions to enter judgment sustaining the demurrer to the indictment on the third, fifth, and eighth grounds.

BARBER ASPHALT PAVING CO. V. AUSTIN.

(Circuit Court of Appeals, Eighth Circuit. March 30, 1911.)

No. 3,450.

1. MASTER AND SERVANT (§ 278*)—INJURY TO SERVANT—NEGLIGENCE.

The location in a brickyard of uncovered and unguarded manholes connecting with underground conduits leading to kilns for burning brick, at places in close proximity to where employés are invited and expected to pass in the discharge of their common duties, is substantial evidence of the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

2. MASTER AND SERVANT (§ 221*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

An employé, who continues in the employment for a reasonable time in reliance on the promise of the employer to repair defects complained of, does not assume the risk of injury resulting from such defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 638-647; Dec. Dig. § 221.*]

3. MASTER AND SERVANT (§ 204*)—ASSUMPTION OF RISK—STATUTES.

Acts 32d Gen. Assem. Iowa, c. 181, relieving an employé from risk incident to remaining in the employment on his giving a written notice of a defect causing injury, does not supersede the common law making a complaint of defect, promise of reparation, and remaining in employment in reliance on the promise, essential to secure immunity from assumption of risk, but confers an additional right.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546; Dec. Dig. § 204.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

4. STATUTES (§ 239*)—CONSTRUCTION—CHANGING COMMON LAW.

A statute will not be construed as altering the common law farther than its words import.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 320; Dec. Dig. § 239,* Common Law, Cent. Dig. § 12.]

5. MASTER AND SERVANT (§ 236*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé, continuing in the employment in reliance on the employer's promise to repair defects complained of, is not relieved from the duty of observing ordinary care for his own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. § 236.*]

6. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Whether an employé, injured by falling into an open manhole on the employer's premises, was guilty of contributory negligence, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

In Error to the Circuit Court of the United States for the Southern District of Iowa.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Charles Austin against the Barber Asphalt Paving Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

This was a suit to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company in maintaining an open manhole on its premises into which plaintiff fell and sustained an injury. The defenses were a denial of defendant's negligence, assumption of risk, and contributory negligence by plaintiff.

There was substantial testimony tending to show that the premises where the injury occurred consisted of a brick-paved yard in which were located 16 kilns for burning brick with an underground conduit extending from each of the kilns to a nearby smokestack. A separate manhole, distant about eight feet from the kiln and close to the smokestack, which was two feet in diameter, extended from surface of the yard to a depth vertically of about seven feet and connected with each conduit leading from the kilns to the stacks. In the process of burning brick these manholes were required to be opened a part of the time, and when open were uncovered and unguarded. The heat in them until they were completely cooled off by opening them up was so intense as to severely burn if not to kill an unfortunate that might fall into them. About this yard workmen, including the plaintiff who had general charge of the brick burning, were required to perform duties which occasionally took them across the yard between the kilns and manholes. In going from the lower end of the yard to the office of the superintendent at the upper end, workmen or others could and naturally would go directly over the pavement between the kilns and stacks, but could go around the yard in a more circuitous way. Plaintiff had large experience in burning brick and had been in the employ of the defendant in general charge of the burning operations for two years before his injury, and during that time at least had been familiar with the location of the manholes and of the requirement for opening them.

The verdict, on the issues joined, conclusively established that a short time before the accident in question plaintiff complained to the general superintendent of the defendant of the danger to himself and other workmen from the unguarded manholes and exacted a promise from him to have them properly guarded or protected. Relying on that promise, he continued to work in the yard, and before a reasonable time had elapsed for the fulfillment of the promise, while passing through the yard between one of the kilns and its smokestack in obedience to a call from the general superintendent to report at the office, and being distracted by a heavy wind which blew off his hat, he fell into a manhole and received serious injuries.

From a judgment in favor of plaintiff, the defendant prosecutes error.

Nathaniel T. Guernsey (Alonzo C. Parker and William E. Miller, on the brief), for plaintiff in error.

Eugene D. Perry (Silas B. Allen, on the brief), for defendant in error.

Before HOOK and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge (after stating the facts as above). The important question in this case is whether the Circuit Court erred in refusing to instruct the jury to return a verdict for the defendant. It is claimed this should have been done because there was no substantial evidence of negligence by the defendant and because the evidence conclusively showed plaintiff to have assumed the risk and to have been guilty of contributory negligence.

[1] We find it unnecessary to detail the evidence with respect to defendant's negligence. The learned trial judge fairly submitted this question to the jury. He told them:

"Now the one question is: Was the company guilty of negligence in not barricading the manhole? Now that question I leave to you. Would an ordinarily prudent man have barricaded that manhole?"

No exception was taken to the charge in this particular, and without doubt the location in the yard at places in close proximity to where the employés were invited and expected to pass in the discharge of their common duties, of dangerous pitfalls like the manholes in question without either guarding them or protecting them, constituted substantial evidence of negligence on the part of the defendant. *Foster v. Portland Gold Min. Co.*, 52 C. C. A. 393, 114 Fed. 613.

We pass, therefore, to a consideration of the questions whether the plaintiff assumed the risk or negligently contributed to the injury which he sustained.

[2] It is first contended that by reason of his long familiarity with and actual knowledge of the exposed condition of the manholes he assumed the risk of continuing to work in the yard in close proximity to them. This would undoubtedly be true except for the complaint, promise to repair, and continuance in the employment in reliance upon that promise. Tested by this rule, there was, in our opinion, no assumption of the risk in this case for a reasonable time within which the promised repair could have been made. *Crookston Lumber Co. v. Boutin*, 79 C. C. A. 368, 149 Fed. 680.

[3] It is urged, however, that the statute of Iowa (Acts 1907, c. 181, p. 182) required the complaint of defect to be in writing, and because no such written complaint was made plaintiff's assumption of risk was not avoided. The statute in question reads as follows:

"In all cases where the property, works, machinery or appliances of an employer are defective or out of repair and the employé has knowledge thereof, and has given *written* notice to the employer * * * of the particular defect or want of repair, * * * no employé after such notice, shall by reason of remaining in the employment with such knowledge, be deemed to have assumed the risk incident to the danger arising from such defect or want of repair."

We do not think this statute supersedes the common law which made a complaint of defect, promise of reparation, and remaining in employment in reliance upon the promise essential to secure immunity from assumption of the risk. The Iowa statute relieves a servant from the risk, incident to remaining in the employment of a master provided only he shall have given a notice in writing of a defect which caused his injury. His immunity is not made dependent upon the proof of a promise by the employer to cure the defect or reliance upon that promise. We think, therefore, the statute was intended to confer a cumulative or additional right rather than to abridge an existing one.

It is not believed the Legislature intended to take away this existing right, but rather to make an alternative or cumulative provision which when available would render the right more secure.

[4] The common-law right is clearly not inconsistent with the statutory right.

"No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Shaw v. Railroad Co.*, 101 U. S. 557, 565, 25 L. Ed. 892.

See, also, to the same effect, *Kinyon v. Chicago, etc., Ry. Co.*, 118 Iowa, 349, 92 N. W. 40, 96 Am. St. Rep. 382; *Rich v. Keyser*, 54 Pa. 86; *Rosin v. Lidgerwood Mfg. Co.*, 89 App. Div. 245, 86 N. Y. Supp. 49; *Colorado Milling Co. v. Mitchell*, 26 Colo. 284, 58 Pac. 28.

[5] Although the complaint and promise of reparation may have relieved the plaintiff from the assumption of the ordinary risk of continuing in defendant's service for a reasonable time thereafter, it did not relieve him from afterwards observing ordinary care for his own safety. *Crookston Lumber Co. v. Boutin*, *supra*.

Does the proof conclusively disclose that he failed in doing so?

[6] Defendant's counsel contend that he might have gone around the yard on either side on his way to the office when summoned there; that a safe way was there provided for him; that his selection of a way through the yard which took him near the dangerous manhole was a choice of a dangerous way when a safe way was provided; and that this constituted contributory negligence on his part. We do not think we can declare as a matter of law that this was so. The way through the yard was not so obviously dangerous as to preclude the possibility of any one in the exercise of reasonable care in safely employing it. The yard was paved with brick, and there was a clear passageway seven or eight feet wide between the kiln and the open manhole. Workmen about the yard had frequent occasion in the discharge of their duties to pass there, and the way through the yard past these manholes was the customary way taken by the employés. Neither was the way around the yard so free from peril as to afford assurance of greater safety if that circuitous route had been selected. On the sides of the yard were railway tracks upon which cars were frequently moved and wagonways over or across which gangs of workmen were frequently wheeling brick and performing duties connected with their employment.

In view of these and other facts, we think the question of contributory negligence was for the jury to decide.

The cases relied on by defendant are unlike this.

In *Crookston Lumber Co. v. Boutin*, *supra*, a servant undertook to clean a pulley over which a dangerous band saw was revolving, heedlessly and recklessly occupying a position of great danger when he could readily have occupied a position of perfect safety.

In *Williams Cooperage Co. v. Headrick*, 86 C. C. A. 548, 159 Fed. 680, the plaintiff took a short cut through a narrow and perilous way 18 inches wide, which brought him into close proximity to a rapidly revolving ripsaw, when a slight detour would have taken him over an unquestionably safe way to his destination.

In *American Linseed Company v. Heins*, 72 C. C. A. 533, 141 Fed. 45, a workman attempted to jump over a revolving drum when he could have readily walked around it in perfect safety.

These cases and others like them plainly disclose that the plaintiff undertook to perform an act carelessly and recklessly when a safe and convenient way for doing it was open before him.

The present case discloses no such obvious recklessness. On the contrary, it discloses a fair controversy of fact whether plaintiff under all the circumstances exercised reasonable or ordinary care for his own safety in going through the yard rather than around it.

There was substantial evidence to warrant a submission of this issue to the jury, and it seems to have been done in an unexceptionable way.

Other assignments of error, in so far as they were based on exceptions properly presented, have been examined and found to be untenable.

The judgment is affirmed.

JACKSON v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. March 24, 1911.)

No. 3,345.

1. APPEAL AND ERROR (§ 259*)—REVIEW—FINDINGS OF FACT.

Where no exceptions have been taken to rulings by the court in the progress of the trial, the court's findings of fact are conclusive on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1498–1502; Dec. Dig. § 259.*]

2. APPEAL AND ERROR (§ 733*)—ASSIGNMENTS OF ERROR—QUESTION OF LAW.

An assignment that the court should have rendered a judgment for plaintiff on the pleadings presents a question of law for review on a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3025–3027; Dec. Dig. § 733.*]

3. PLEADING (§ 349*)—ACTION ON POLICY—CONSTRUCTION.

In an action on a policy providing for quarterly premiums, and giving 30 days, called "grace," within which premiums may be paid after a date specified, plaintiff pleaded that prior to the maturity of the premium on August 8, 1903, an extension of 60 days was granted, and that on October 5th following a tender of the premium was made and refused. Defendant denied an extension to October 8th, and followed with a denial of any extension "for any other period of time except a 60-day extension from July 8, 1903." Held, that such allegation did not constitute an admission as a matter of law that the 60-day extension should be supplemented by the 30 days of grace, so as to entitle plaintiff to judgment on the pleadings.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 349.*]

4. INSURANCE (§ 349*)—POLICY—CONSTRUCTION—FORFEITURE.

Where by a life policy the insurer's obligation to pay was based on the condition that the annual premium should be paid in advance on the delivery of the policy, and thereafter to the insurer on specified dates in every year during the continuance of the contract, the fact that the policy did not contain an express provision for forfeiture did not preclude a defense of forfeiture for nonpayment of premiums within the time specified.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 891; Dec. Dig. § 349.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

5. APPEAL AND ERROR (§§ 959, 969*)—MATTERS OF DISCRETION—REVIEW.

Denial of requests to amend the petition and its amendments, and that the trial court make a special finding of facts, in the exercise of the trial court's discretion, would not be interfered with on a writ of error, unless the discretion was abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3825; Dec. Dig. §§ 959, 969.*]

6. PLEADING (§ 236*)—AMENDMENT—APPLICATION FOR LEAVE—DENIAL—DISCRETION.

Where the trial judge had carefully considered all the questions sought to be presented by proposed amendments to the petition, his refusal to permit the amendment, application for which was not made until 40 days after the entry of final judgment, was not an abuse of discretion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236.*]

7. TRIAL (§ 392*)—SPECIAL FINDINGS—REQUEST—TIME.

A request that the trial judge sign special findings of fact, not made until 40 days after the entry of final judgment, was too late.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 917; Dec. Dig. § 392.*]

In Error to the Circuit Court of the United States for the District of Kansas.

Action by Sarah A. Jackson against the Mutual Life Insurance Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

J. T. Allensworth, for plaintiff in error.

John S. Dean (James McKeen, on the brief), for defendant in error.

Before SANBORN and ADAMS, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

ADAMS, Circuit Judge. This was a suit in five counts on five separate policies of insurance on the life of Don W. Jackson, who died October 13, 1903. The defense was that the policies lapsed by the nonpayment of premiums of \$13.30 on each policy, which fell due July 8, 1903. By way of anticipating this defense the beneficiary, Sarah A. Jackson, plaintiff in error, in her amended and second amended petitions alleged:

"That prior to the date when the July 8, 1903, premium became due and payable by the terms of said policies, the said defendant company granted an extension of 60 days' time to the said Don W. Jackson for the payment of the July 8th extension, by the terms thereof and the conditions of said policies; and on, to wit, the 5th day of October, 1903, one J. D. Hutchings made full and complete tender thereof, together with all subsequent premiums, as above alleged, which said tender was wholly refused by said company as aforesaid; * * * that the 60-day extension for the payment of the July 8, 1903, premium, as therein alleged, was granted both by written and oral communication from said defendant company, and took effect and began on the 8th day of August, 1903, and expired on the 8th day of October, 1903."

The defendant denied:

"That it extended the time for payment of the quarterly premiums due on said policies from the 8th day of August, 1903, to the 8th day of October, 1903, as alleged in said original and amended petition, nor for any other period of time, except a 60-day extension from July 8, 1903."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A jury was duly waived, and the cause submitted to the court on the proof taken. A general judgment, without any finding of facts, was rendered in favor of the defendant. No exception was taken to any ruling of the court in the progress of the trial on the admission or exclusion of evidence or otherwise. Neither was there any request for a ruling upon the legal sufficiency or effect of the evidence.

A certain definite issue of fact was joined in the case, whether the agreement of the parties, taken in connection with the terms and conditions of the policies, extended the time of payment of the July premium to September 8th or October 8th. The trial court heard the proof, both oral and written, and from it all found and decided that the extension was to September 8th only.

[1] No exceptions having been taken to any rulings of the court in the progress of the trial, the finding of this fact is conclusive. No question of law is presented for review. *Hughes County v. Livingston*, 43 C. C. A. 541, 104 Fed. 306; *York v. Washburn*, 64 C. C. A. 132, 129 Fed. 564, and cases cited.

[2] But it is assigned for error that the court should have rendered a judgment for plaintiff on the pleadings. This presents a question of law for our consideration. *Lehnens v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373.

[3] The policies gave 30 days, called "days of grace," within which premiums might be paid after the times specified for their payment. In view of this provision, it is contended that that part of defendants' answer following its denial of the alleged extension to October 8th, wherein it is said, "Nor for any other period of time except a 60-day extension from July 8, 1903," was an averment that the admitted extension of 60 days should be supplemented by the 30 days of grace, and, as so supplemented, would extend to October 8th.

We think this is far-fetched. Pleadings must receive a rational construction. The obvious purpose of the defendant's answer was to deny the allegation of the petition that there had been an extension of time given the insured to pay the July premium until October 8th. This became an issue of fact. It was so treated by the parties. There was no motion for a judgment on the pleadings; but, on the contrary, oral and written evidence was heard and supplemented by some conditions of the policies, and the cause was submitted for the final decision of the court on the issue joined.

[4] The policies sued on were incorporated in the petition, and they disclose that no provision for forfeiture upon nonpayment of premium is found in them. Accordingly the further contention is made that, even if there was a default in the payment of the July premium, the right of recovery exists. This is on the ground that the covenant to pay is independent, and its violation entitled the company to an action to recover the premiums, or, upon the maturity of the policy, to deduct them from the amount to be paid. We cannot give our assent to this contention. By the terms of the policies the obligation of the company to pay is "upon the following condition":

"* * * The annual premium of fifty dollars and eighteen cents [afterwards divided into quarterly premiums of \$13.30 each] shall be paid in advance on the delivery of this policy, and thereafter to the company at its

head office in the city of New York, on the 8th day of October [afterward on the 8th days of October, January, April, and July] in every year during the continuance of this contract."

It is thus seen the promise to pay is conditioned upon the premiums being paid as and when due. The fact that no express provision of forfeiture is made is of no importance. The obvious and necessary interpretation of the contract, if the business of insurance is to be conducted at all, is that the obligation of the company to pay the amount promised depended upon the payment of the premiums reserved. If the premiums were not paid, the obligation, according to the plain import of the contract, ceased.

In Mutual Life Ins. Co. v. Hill, 193 U. S. 551, 559, 24 Sup. Ct. 538, 541, 48 L. Ed. 788, a case was under consideration where the insured failed to pay the premiums, and continued such failure for four years prior to his death. An action was nevertheless brought to compel the same performance by the insurance company which would have been due if the insured had paid his premiums. The court said:

"It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. * * * Courts have always set their faces against an insurance company which, having received premiums, has sought by technical defenses to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid."

[5] On August 25, 1908, 40 days after the entry of final judgments in the case the plaintiff requested leave to amend the "amended petition," and also the "amendments to the amended petition," to conform, as she says, to the facts proven at the trial, and also on the same day requested the court to make a special finding of facts in the case. These requests were denied by the trial court, and that action is assigned for error. The granting of these requests rested in the sound discretion of the trial court. Unless that was abused, we cannot interfere. [6] The delay in making the requests after the conclusion of the trial, as well as the fact, apparent from the opinion of the learned trial judge, that all of the questions sought to be presented in the proposed amendment had been carefully considered by him, make it certain that there was no abuse of discretion in not opening up the case again.

[7] The request for a special finding of facts also came late. It was optional with the trial judge, even at the close of the trial, to make a special or a general finding as to him seemed best. Declining to make a special finding, under the circumstances of this case, was a reasonable exercise of discretion.

Finding no error in the proceedings below, the judgment is affirmed.

STREET GRADING DIST. NO. 60 OF LITTLE ROCK, ARK., v. HAGADORN
et al.[†]

(Circuit Court of Appeals, Eighth Circuit. March 31, 1911.)

No. 2,713.

1. RECEIVERS (§ 6*)—APPOINTMENT—ADEQUATE REMEDY AT LAW.

Kirby's Dig. Ark. § 5664 et seq., provides for the organization of local improvement districts in certain cities and prescribes a complete scheme to pay for such improvements. Section 5720 authorizes the board of improvement to "pledge" uncollected assessments to repay loans obtained to expedite work. Bonds were issued under the latter section, and a holder obtained judgment on interest coupons. The judgment not being paid, he sues in equity for appointment of a receiver to collect the unpaid assessments. *Held*, that the suit does not lie because of existence of an adequate remedy at law by mandamus or enforcement of payment under the statutes cited.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 12; Dec. Dig. § 6.*]

2. PLEDGES (§ 11*)—DELIVERY.

The word "pledge," as used in Kirby's Dig. Ark. § 5720, is used in its colloquial, rather than technical, sense, since there can be no pledge without delivery and there could be no delivery of "uncollected assessments."

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 5, pp. 5412-5417; vol. 8, p. 7756.]

3. JUDGMENT (§ 707*)—CONCLUSIVENESS—PERSONS NOT BOUND.

Judgment that a local improvement district was unlawfully organized does not affect holders of bonds of the district who were not parties to the suit.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 707.*]

4. APPEAL AND ERROR (§ 882*)—DISMISSAL—RIGHT TO—CONSENT DECREES.

Appellees are not entitled to dismissal of the decree appealed from because it was entered by consent.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 882.*]

5. APPEAL AND ERROR (§ 882*)—RIGHT TO COMPLAIN.

Ordinarily a party cannot complain of error procured or acquiesced in by him, but the rule does not apply when the trial court was without jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 882.*]

6. APPEAL AND ERROR (§ 184*)—OBJECTIONS—TIME FOR RAISING.

The rule that the existence of an adequate remedy at law cannot be raised for the first time in an appellate court is always subject to the qualification that jurisdiction over the subject-matter exists, and that the trial court is competent to grant the relief prayed for.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1179-1183; Dec. Dig. § 184.*]

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Bill by William J. Hagadorn and others against Street Grading District No. 60 of Little Rock, Arkansas. From the decree, defendant appeals. Reversed, and bill dismissed.

The statutes of Arkansas (section 5664 et seq., Kirby's Digest 1904) empower any 10 resident owners of real property in any portion of a city of the first

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 13, 1911.

or second class to petition the city council to take steps toward making improvements in streets, alleys, and sewers.

Upon the receipt of such a petition, it becomes the duty of the council to lay off the portion of the city mentioned in the petition into one or more improvement districts. An ordinance of the council establishing the district is thereafter required to be published in some newspaper; and, within three months after that publication, a majority in value of the owners of real property within the district may present to the council a petition designating the nature of the improvements to be undertaken and praying that they may be made and that the cost thereof be assessed as a charge upon the real estate situated within the district. Upon this being done the council is required to appoint three persons, owners of real property in the district, to act as a board of improvement. This board, upon its members qualifying as provided by law, must then form plans for the improvement and secure estimates of its cost and report the same to the council; after which the council is required to appoint three electors of the city to constitute a board of assessment, to assess the benefits to be received by each lot of land in the district as a result of the proposed improvement. Upon such assessment being reported to the city clerk, the council must provide by ordinance for the payment thereof in successive annual installments and fix the day in each year for their payment. The city clerk must then extend the amount of the assessment against each lot, deliver to the city collector a warrant commanding him to make the collections accordingly, and to pay the same over to the treasurer of the local improvement district.

In order to expedite the improvement, the board is authorized to borrow money not exceeding 90 per cent. of the estimated cost of the work and pledge all uncollected assessments for the payment thereof.

Pursuant to the foregoing statutory scheme, Street Grading District No. 60 of Little Rock, defendant below and appellant here, was created. The property within the district was assessed to pay the sum of \$17,032 to meet the cost of the proposed improvement. The board, desiring to expedite the work, concluded to borrow the money and proceed at once with it. Accordingly, it executed a series of 34 bonds each for \$500 bearing interest, represented by coupons, at the rate of 6 per cent. per annum and executed a written contract pledging to the Union Trust Company and to L. A. Coquard, as trustees, all the uncollected assessments as security for their payment. On the strength of this pledge the bonds were sold in open market and fell into the hands of innocent holders for value. Out of the proceeds of this sale the projected improvement was made.

William J. Hagadorn acquired some of these bonds and afterwards, in 1905, the coupons not having been paid, recovered a judgment thereon for \$3,695.84.

This judgment not having been paid, he, together with the trustees, instituted this suit, charging, in addition to the foregoing facts, that the collector had failed and refused to collect the assessments, and that the defendant, the Grading District, had secured a decision of the Supreme Court of Arkansas in a case to which Hagadorn was not a party that the ordinance creating the Grading District was void. Complainants therefore prayed that a receiver be appointed to collect the unpaid assessments and to enforce the pledge for the payment of the bonds. The defendant, the Grading District, answered the bill admitting that the collector had failed to collect, denying that he had refused to collect the assessment levied by the city council, and alleging that he had been wholly unable to do so. All the other allegations of the bill were admitted, and the defendant joined in the prayer thereof and asked the court to grant the complainants the relief prayed for.

Upon this bill and answer the cause came on for a hearing, and the learned trial court appointed Eben W. Kimball receiver and empowered him to collect the unpaid assessments which had been levied by the city council or sufficient at least to pay the judgment theretofore obtained by Hagadorn, together with interest and costs, and also to pay the amount due on all bonds and coupons issued by the Grading District, the payment of which had been secured by the contract executed by it to the Union Trust Company and to Coquard. Provision was made for ascertaining the amount due to any holders

of the bonds and coupons other than the ones represented by the former judgment. From that decree the defendant appealed to this court.

Among the errors assigned are that complainants had a full, complete, and adequate remedy at law, and the Circuit Court had no jurisdiction in equity to hear and determine the action.

T. D. Crawford (Dan W. Jones and John H. Hamiter, on the brief), for appellant.

George B. Rose (U. M. Rose, W. E. Hemingway, D. H. Cantrell, and J. F. Loughborough, on the brief), for appellees.

Before VAN DEVANTER, Circuit Judge, now Circuit Justice, and ADAMS, Circuit Judge.

ADAMS, Circuit Judge (after stating the facts as above). The contention of the appellant on the merits of the case may be briefly stated as follows: That the Grading District was never legally organized because (a) the petition for the formation of the district was not signed by 10 resident owners of real property within the district, as required by section 5665, Kirby's Digest, and (b) because a majority in value of the owners of real property within the district failed to sign the petition for the improvements as required by section 5667, Kirby's Digest. These are interesting questions; but, if jurisdiction to decide them is lacking, it would be idle to discuss them.

[1] The only relief sought by the bill or granted by the decree appealed from was the appointment of a receiver to collect the annual installments of an assessment which had been duly made and pledged by the defendant Grading District as security for the payment of complainants' bonds.

Is jurisdiction for that purpose vested in a court of equity? In other words, was there an adequate remedy at law?

We think this question has been conclusively answered by the Supreme Court of the United States in several cases.

In *Rees v. City of Watertown*, 19 Wall. 107, 22 L. Ed. 72, a court of equity was asked to appoint its marshal to levy and collect a tax to pay judgments recovered against a city. Peremptory writs of mandamus had been issued against the officers of the city to compel the levy and collection of the tax; but, before the writ could be served, a majority of the defendants resigned their offices. In other ways the officers of the city had succeeded in preventing the levy and collection of taxes to pay the judgment. The Supreme Court, speaking by Mr. Justice Hunt, in denying the power of the court to grant relief, said:

"We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only. * * * It is a power that has not been extended to the judiciary. * * * The appropriate remedy of the plaintiff was and is a writ of mandamus. This may be repeated as often as the occasion requires. It is a judicial writ, a part of a recognized course of legal proceedings. * * * The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the Legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of

a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding. * * * The legal remedy is adequate and complete, and time and the law must perfect its execution."

In *Thompson v. Allen County*, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472, a case was under consideration wherein the complainant had obtained two judgments against the county on bonds issued by it to pay a subscription to the stock of a railroad company. After nulla bona returns on execution issued on these judgments, writs of mandamus had issued to the justices of the county court to levy a tax for the purpose of paying the judgments. The collector duly elected to collect the tax so levied refused to accept the office or qualify for its performance. The bill averred that by reason of the hostility of the citizens and taxpayers of the county no one could be found to perform the duty of collector. The prayer of the bill was that the court appoint a receiver to collect the taxes and pay over the money so collected in satisfaction of complainant's judgments. It was stipulated in the cause:

"That the complainant is without remedy for the collection of its debt herein, except through the aid of this court in the appointment of the receiver, as prayed for in the bill, or other appropriate order of the court."

Mr. Justice Miller delivered the opinion of the court, and after reviewing *Walkley v. City of Muscatine*, 6 Wall. 481, 18 L. Ed. 930, *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72, *Heine v. Levee Commissioners*, 19 Wall. 655, 22 L. Ed. 223, and *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197, and other cases, all of which had denied the remedy in equity to enforce the collection of taxes, made these observations:

"We see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes. A court of law possesses no power to levy taxes. Its power to compel officers who are lawfully appointed for that purpose, in a case where the duty to do so is clear and is strictly ministerial, rests upon a ground very different from and much narrower than that under which a court of chancery would act in appointing its own officer either to assess or collect such a tax. * * * The power to enforce collection when the tax is levied, or to cause it to be levied by existing officers, is a common-law power, strictly guarded and limited to cases of mere ministerial duty, and is not one of the powers of a court of chancery. * * * No such power has ever yet been exercised by a court of chancery. The appointment of its own officer to collect taxes levied by order of a common-law court is as much without authority, as to appoint the same officer to levy and collect the tax. * * * Not only are the decisions here reviewed of our own court clearly opposed to the exercise of this power by the court of equity, but the decisions of the highest court of the state of Kentucky are equally emphatic. It is the powers derived from the statute law of that state under which alone this tax can be collected."

See, to the same effect, *Barkley v. Levee Commissioners*, 93 U. S. 258, 265, 23 L. Ed. 893; *Lyon v. Alley*, 130 U. S. 177, 188, 9 Sup. Ct. 480, 32 L. Ed. 899; *South Dakota v. North Carolina*, 192 U. S. 286, 319, 321, 24 Sup. Ct. 269, 48 L. Ed. 448.

To escape the doctrine of the foregoing cases, learned counsel for the appellees contend that, because the "uncollected assessments" in-

volved in this case were pledged to the bondholders, they thereby acquired a lien which confers upon them an equitable standing for its enforcement or foreclosure.

There are several reasons why this contention cannot be sustained.

[2] Section 5720, Kirby's Digest, in authorizing the board of improvement to "pledge uncollected assessments for the payment of the money borrowed," obviously employed the word in its colloquial, rather than in its technical, meaning. The words "uncollected assessments" evidence a chose in action rather than a thing of substance. Not being susceptible of delivery, they could not be the subject-matter of a technical pledge as known to the law. *Casey v. Cavaroc*, 96 U. S. 467, 490, 24 L. Ed. 779.

In *Barkley v. Levee Commissioners*, *supra*, it was said:

"Liens for taxes are very generally created throughout the country; but it is never supposed that the public creditors, to whom the money raised by tax is to be paid, have the benefit of such lien. It is created for the benefit of the public authorities, to enable them with greater certainty and facility to collect the taxes, without the embarrassment of other pretended claims against the property taxed."

In *Brooke v. City of Philadelphia*, 162 Pa. 123, 129, 29 Atl. 387, 389 (24 L. R. A. 781), the Supreme Court of Pennsylvania, construing a constitutional provision that "every city shall create a sinking fund which shall be inviolably pledged for the payment of the public debt," said:

"Every city shall create a sinking fund. That is, there shall be set apart from all other city money, for a specific purpose, the redemption or payment of the funded debt, a portion of the annual revenues of the city. Then, when this portion of the revenues reaches the fund, it is inviolably pledged for the payment of the funded debt. No temptation however great, no necessity however imperious, shall move the city to divert \$1 of the fund to a purpose other than the redemption or payment of the debt. The word 'pledged' is to have, in its connection here, not a technical legal definition, but its obvious meaning, that of a solemn promise, which, under no possible circumstances, shall be violated."

In *Christian v. Atlantic & N. C. Railroad*, 133 U. S. 233, 10 Sup. Ct. 260, 33 L. Ed. 589, it appears that, in the act incorporating the railroad company and authorizing the issue of bonds, it was provided that, as security for their redemption, the public faith of the state "is hereby pledged to the holders, and in addition thereto all the stock held by the state in the railroad company shall be pledged for that purpose." The suit was one by bondholders to foreclose the so-called "pledge." The court said:

"The proposal is to take the property of the state and apply it to the payment of its debts due to the plaintiffs, and to do it through the instrumentality of a court of equity. The ground on which it is contended that this may be done is that the property is affected by a pledge, and may, therefore, be dealt with in rem. But a pledge, in the legal sense, requires to be delivered to the pledgee. He must have the possession of it. * * * In the case of stocks and other choses in action, the pledgee must have possession of the certificate or other documentary title, with a transfer executed to himself, or in blank (unless payable to bearer), so as to give him the control and power of disposal of it. Such things are then called pledges. * * * This was nothing more than a promise that the stock should be held and set apart for the payment of the bonds, and that the dividends should be applied to the interest. There was no actual pledge. It was no more of a pledge than

is made by a farmer when he pledges his growing crop, or his stock of cattle, for the payment of a debt, without any delivery thereof. He does not use the word in its technical, but in its popular sense."

There is another reason also why complainants cannot invoke the equitable remedy sought in this case. The statutes creating improvement districts in Arkansas (section 5664 et seq., Kirby's Digest) disclose that the Legislature provided a complete scheme not only for their creation, but for raising money to defray the cost and expense of the improvements. Property was to be taxed, and a specific provision was made (section 5686) for the collection of the tax by the city collector upon warrants issued to him by the city clerk commanding him to make the collections according to the assessments as made. This mode of collecting the taxes for the payment of complainants' bonds constituted a part of the contract under and subject to which they were purchased. The enforcement of this provision, namely, enforcement of collection in the mode and through the officers named in the law, is all complainants are entitled to under their contract, and, accordingly, is the only remedy known to the law in case of nonpayment of the bonds.

It is said in *Rees v. Watertown*, 19 Wall. 107, 22 L. Ed. 72:

"The remedies for the collection of a debt are essential parts of the contract of indebtedness, and those in existence at the time it is incurred must be substantially preserved to the creditor. * * * Of these the creditor must take notice, and, if all the remedies are preserved to him which were in existence when his debt was contracted, he has no cause of complaint. * * * The plaintiff invokes the aid of the principle that, all legal remedies having failed, the court of chancery must give him a remedy; that there is a wrong which cannot be righted elsewhere, and hence the right must be sustained in chancery. The difficulty arises from too broad an application of a general principle. * * * A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels. * * * The writ of mandamus is, no doubt, the regular remedy in cases like the present, and ordinarily it is adequate and its results are satisfactory. The plaintiff alleges, however, in the present case, that he has issued such a writ on three different occasions; that, by means of the aid afforded by the Legislature and by the devices and contrivances set forth in the bill, the writs have been fruitless; that, in fact, they afford him no remedy. The remedy is, in law and in theory, adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct, and yet they are confounded in the present proceeding."

It was said in *Heine v. Levee Commissioners*, 19 Wall. 655, 22 L. Ed. 223:

"It is very clearly shown that the total failure of ordinary remedies does not confer upon the court of chancery an unlimited power to give relief. Such relief as is consistent with the general law of the land, and authorized by the principles and practices of the courts of equity, will, under such circumstances, be administered. But the hardship of the case, and the failure of the mode of procedure established by law, is not sufficient to justify a court of equity to depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles."

It is clear, we think, in view of these authorities, that complainants have mistaken their remedy. The writ of mandamus theoretically, and

we are unable to see why not practically, affords them an adequate remedy at law.

[3] The fact that the Supreme Court of Arkansas has ruled in another case in which complainants were not parties that the organization of the Grading District was unlawful is not an adjudication affecting complainants' rights. They were not parties to it. They can have their day in whatever court is open to them regardless of that decision except in so far as it is persuasive of the right.

[4] The appellees at the outset of their argument in this case moved to dismiss this appeal because the decree below was entered by consent. This motion must be denied.

[5] Ordinarily no party can complain of an error procured or acquiesced in by him. *N. Y. Elevated Railroad v. Fifth Nat. Bank*, 135 U. S. 432, 10 Sup. Ct. 743, 34 L. Ed. 231. But this rule cannot prevail when the trial court was without jurisdiction to enter the decree consented to. *Thompson v. Railroad Companies*, 6 Wall. 134, 18 L. Ed. 765; *Morgan v. Beloit*, 7 Wall. 613, 618, 19 L. Ed. 203.

[6] It is also contended that, as no objection was made to the jurisdiction in equity on the ground that there was an adequate remedy at law, such objection was waived and cannot be raised for the first time in this court. This, we think, is untenable. The rule frequently announced and fully recognized that the existence of an adequate remedy at law cannot be raised for the first time in an appellate court is always subject to the qualification that jurisdiction over the subject-matter exists, and that the trial court is competent to grant the relief prayed for. *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. 486, 32 L. Ed. 934; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 536, 10 Sup. Ct. 604, 33 L. Ed. 1021; *Allen v. Pullman's Palace Car Co.*, 139 U. S. 658, 662, 11 Sup. Ct. 682, 35 L. Ed. 303; *Southern Pacific v. United States*, 200 U. S. 341, 349, 26 Sup. Ct. 296, 50 L. Ed. 507. The doctrine of these cases is that the court for its own protection, and *sua sponte*, "may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of the parties interested." *Reynes v. Dumont*, *supra*.

It results that the decree of the Circuit Court must be reversed, and the bill dismissed. This will be without prejudice, however, to complainants' right to proceed by mandamus. It is so ordered.

NOTE.—As District Judge Phillips sat as a member of the court at the hearing of this cause, participated in its consideration, and concurred in the conclusion which is announced in the foregoing opinion, we have taken pleasure in submitting the opinion to him for his consideration; and, notwithstanding the fact that by his retirement from office in the meantime he is now unable to speak officially, we feel an additional assurance of its soundness by the fact of his personal approbation which we are authorized to announce.

CONNOR v. KIMBALL.[†]

(Circuit Court of Appeals, Eighth Circuit. March 31, 1911.)

No. 2,757.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

Bill by Eben W. Kimball, receiver, against Charles M. Connor. Judgment for plaintiff, and defendant appeals. Reversed, and bill dismissed.

T. D. Crawford (Dan W. Jones, W. S. McCain, John H. Hamiter, and C. T. Coleman, on the brief), for appellant.

George B. Rose and J. A. Comer (U. M. Rose, W. E. Hemingway, D. H. Cantrell, and J. F. Loughborough, on the brief), for appellee.

Before VAN DEVANTER, Circuit Judge, now Circuit Justice, and ADAMS, Circuit Judge.

ADAMS, Circuit Judge. This suit was brought by Kimball, receiver, appointed in the case of Street Grading District No. 60 of Little Rock, Arkansas, v. William J. Hagadorn et al. (just decided) 186 Fed. 451, to collect from a landowner the assessments made against his land pursuant to the requirement of the decree appointing him such receiver. He recovered in the court below. An appeal followed to this court.

The principles announced in the main case necessitate a reversal of the decree and dismissal of the bill in this subordinate case, and it is so ordered.

KING LUMBER CO. et al. v. BENTON et al.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)

No. 2,196.

1. APPEAL AND ERROR (§ 920*)—RECORD—PRESUMPTIONS—INJUNCTION.

Where the record does not show the contrary, it will be presumed on appeal from an order granting a temporary injunction that the evidence was sufficient to warrant the order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3717; Dec. Dig. § 920.*]

2. APPEAL AND ERROR (§ 954*)—PRELIMINARY INJUNCTION—REVIEW.

An order granting an injunction pendente lite will only be interfered with on appeal when it is apparent that it has been improvidently made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.*]

3. INJUNCTION (§ 136*)—PENDENCY OF ACTION—PRESERVATION OF EXISTING STATUS.

When issues are joined raising grave questions of law which the court must decide before rendering a final decree, the court in its discretion may grant an injunction pendente lite to preserve the existing status until the case is determined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.*]

4. INJUNCTION (§ 157*)—TEMPORARY INJUNCTION—MANDATORY PROVISIONS.

An order granting a temporary injunction pendente lite to maintain the status quo, until the case was determined, was improper in so far as it contained mandatory provisions requiring of defendants affirmative action.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 157.*]

Pardee, Circuit Judge, dissenting.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 13, 1911.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

Bill by C. A. Benton and others against King Lumber Company and others. From an order granting an injunction pendente lite, defendants appeal. Affirmed.

William H. Atwell, for appellants.

Richard Mays and Etheridge & McCormick, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a bill filed by C. A. Benton and S. S. Freedman, and the city of Corsicana, a municipal corporation of the state of Texas, complainants, against the King Lumber Company, a Virginia corporation, and G. W. North, defendants.

There are no other parties to the bill by intervention or otherwise.

The court below made an order granting an injunction pendente lite, and the defendants have appealed.

It appears affirmatively that the affidavits and documentary evidence that was before the lower court are not in the record, but an agreement of counsel is substituted "for the purpose of shortening the record." This agreement was made for the purposes of this appeal after the decree was rendered below, and it does not appear that it was submitted to or recognized by the trial judge as embodying all of the evidence or the ultimate facts of the case.

The suit is one to enjoin the closing of an alley. On the pivotal point in the case, the agreement shows:

"That the testimony of plaintiff's tended to show the existence of the alley as claimed, and the testimony of defendants tended to show there was no such alley."

[1] When the record does not show the contrary, it is presumed that the evidence was sufficient to justify the decree appealed from. [2] This court, as we have repeatedly held, is reluctant to interfere with the discretion of the Circuit Court in granting interlocutory injunctions, and will only do so when it is apparent that the order has been improvidently made. Kerr v. City of New Orleans, 126 Fed. 920, 61 C. C. A. 450. [3] When issues are joined raising grave questions of law which the court must decide before rendering a final decree, it is within sound judicial discretion to preserve the existing status till the case is finally decided. City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161; Massie v. Buck, 128 Fed. 27, 62 C. C. A. 535.

We are of opinion that there is nothing in the record before us to show that the lower court improvidently exercised its discretion in maintaining by injunction the conditions that existed when the bill was filed. If the rules are complied with, the evidence may be soon taken and the case tried, and the court may then determine by final decree the issues made by the bill and the answers.

[4] We are of opinion that the decree appealed from should be amended by striking out the mandatory part of the injunction, and letting it stand as an order maintaining the conditions that existed

when it was granted. The part of the order stricken out by amendment is as follows:

"And commanding and requiring them and each of them forthwith to remove the coping and permanent obstructions which they have placed and constructed across said alley at the point of its intersection with said Sixth avenue, so that there shall remain no obstruction placed by said defendants preventing free egress and ingress out of and into said alley from and to the said Sixth avenue."

As so amended, the order is:

Affirmed.

PARDEE, Circuit Judge (dissenting). The controversy shown by the record is one of an easement vel non over a piece of property admitted to belong to the United States, and the suit is one by appellees against the agents of the United States in possession and custody of the property to declare such easement.

In order to render any valid or effective decree, the United States are a necessary and indispensable party, and they cannot be made a party without their assent.

The particular order appealed from is one which restrains the appellants, the agents of the United States as aforesaid, in the use and occupation of the property; and I doubt the propriety (to say nothing of the authority) of the court, even with proper and indispensable parties before it, to issue preliminarily, and before a final hearing, any injunction restraining the use of the property. United States v. Lee, 106 U. S. 196, 1 Sup. Ct. 240, 27 L. Ed. 171, should not control under the conceded facts in this case, but rather Stanley v. Schwalby, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960, wherein, all the judges concurring, United States v. Lee was distinguished as follows:

"In that case an action of ejectment was brought in the Circuit Court of the United States against officers occupying in behalf of the United States lands used for a military station and for a national cemetery. The Attorney General filed a suggestion of these facts, and insisted that the court had no jurisdiction. The plaintiffs produced sufficient evidence of their title and possession, and the United States proved no valid title. This court held that the officers were trespassers, and liable to the action; and therefore affirmed the judgment below, which, as appears by the record of that case, was simply a judgment that the plaintiffs recover against the individual defendants the possession of the lands described, and costs. And this court distinctly recognized that, if the title of the United States were good, it would be a justification of the defendants."

In the instant case the title and full ownership of the United States is conceded, and the agents of the United States are not trespassers.

I am clear that the injunction pendente lite should be dissolved. In my opinion the proper disposition of the case is to reverse and remand, with instructions to dismiss the case, unless within some reasonable time, to be fixed by the Circuit Court, the United States shall intervene and submit the controversy to the court.

GARRY v. JEFFERSON BANK.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)

No. 2,137.

1. BANKRUPTCY (§ 414*)—APPLICATION FOR DISCHARGE—EVIDENCE.

While the ordinary rules of evidence control in the contest of a bankrupt's discharge, the proof must be strict and convincing to justify a refusal of the bankrupt's application, though not necessarily such as to establish the objections beyond a reasonable doubt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 720-722; Dec. Dig. § 414.*]

2. BANKRUPTCY (§ 414*)—APPLICATION FOR DISCHARGE—OBJECTIONS—EVIDENCE.

On objections to a bankrupt's discharge, evidence *held* insufficient to sustain a finding that the bankrupt failed to keep books of account, or that he concealed or destroyed them so as to prevent his financial condition from being ascertained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 722; Dec. Dig. § 414.*]

Appeal from the District Court of the United States for the Southern Division of the Northern District of Alabama.

In the matter of bankruptcy proceedings of Robert Garry. From a decree denying a petition for discharge in bankruptcy on the objection of the Jefferson Bank, the bankrupt appeals. Reversed.

This is an appeal by Robert Garry from a decree of the District Court denying his discharge in bankruptcy, upon opposition made by the Jefferson Bank, a creditor.

Robert Garry & Co., a partnership composed of Robert Garry and J. Gudel, doing a wholesale notion business in Birmingham, Ala., was adjudged a bankrupt on an involuntary petition in May, 1909. The firm had been engaged in business for several years. In 1905 Garry, who, up to that time, had resided in Birmingham, removed to New York, leaving the Birmingham business in charge of his partner, Gudel. In New York Garry formed a partnership with one Pearlman, and engaged in the wholesale dress goods business under the firm name of Robert Garry & Co.; there being two firms doing business under this name at the same time, the New York firm composed of Garry and Pearlman, and the Birmingham firm composed of Garry and Gudel. The firms had no mutual transactions. The New York firm became indebted to the Jefferson Bank in 1908 in the sum of \$5,000. The firm was dissolved in November, 1908, Pearlman retiring; and Garry proceeded to wind up the business, which he concluded, and moved to Birmingham on February 22, 1909.

Garry applied for his discharge in December, 1909. The Jefferson Bank appeared and opposed the discharge upon many grounds. Reference to a special master was had, and report made sustaining a number of specifications of opposition, to wit, the first, fifth, sixth, and seventh, as follows:

"(1) Upon information and belief, the said Robert Garry wrongfully, fraudulently, willfully, and knowingly concealed, while a bankrupt, from his trustee in bankruptcy, the sum of \$15,000, said moneys belonging to the bankrupt estate, which the said bankrupt had reserved and retained for himself, being moneys withdrawn from the firm of Robert Garry & Co., or the proceeds or avails of the property belonging to the said bankrupt, or that the same is now being held by divers relatives or friends of the said Robert Garry, a member of the firm of Robert Garry & Co., the above-named bankrupt, under cover and for the benefit of the said Robert Garry, a member of the bankrupt firm herein."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"(5) Upon information and belief, that the said Robert Garry wrongfully, fraudulently, willfully, and knowingly, and with fraudulent intent to conceal his financial condition, and in contemplation of bankruptcy, destroyed his books of account from which his financial condition might be ascertained, and which said books of account consisted of the following, to wit, ledger, cash-book, journal, checkbook, returned checks and vouchers and papers kept by the said Robert Garry in the city of New York, during the years 1908 and 1909 and up to the time of the filing of the petition in bankruptcy, said books having been used by the said Robert Garry, and relating particularly to the business conducted by the said Robert Garry in the city of New York during the years 1908 and 1909, and relating to the New York end of the business of the said bankrupt, as well as a large part of the books used at the Birmingham end of said business, consisting of journal, cashbook, checkbook, and returned checks and vouchers from the American Trust & Savings Bank used in and about and in connection with the business at Birmingham, Ala., during the years 1908 and 1909, up to the date of filing of the petition in bankruptcy.

"(6) Upon information and belief, that the said Robert Garry knowingly, wrongfully, willfully, and with fraudulent intent to conceal his financial condition, and in contemplation of bankruptcy, concealed his books of account or records from which his financial condition might be ascertained, said books of account of record consisting of the following, to wit, ledger, cashbook, journal, checkbook, returned checks and vouchers and papers kept by the said Robert Garry in the city of New York during the years 1908 and 1909 and up to the time of the filing of the petition in bankruptcy, said books having been used by the said Robert Garry, and relating particularly to the business conducted by the said Robert Garry in the city of New York during the years 1908 and 1909, and relating to the New York end of the business of the said bankrupt, as well as a large part of the books used at the Birmingham end of the said business, consisting of journal, cashbook, checkbook, returned checks and vouchers from the American Trust & Savings Bank, used in and about and in connection with the business at Birmingham, Ala., during the years 1908 and 1909, up to the date of the filing of the petition in bankruptcy.

"(7) Upon information and belief, that the said Robert Garry, individually, and as a member of the firm of the above-named bankrupt, wrongfully, willfully, and with fraudulent intent to conceal his financial condition, and in contemplation of bankruptcy, failed to keep books of account or records from which his financial condition might be ascertained."

Exceptions were filed, and the matter was submitted to the District Judge, who rendered the following decree:

"In re Robert Garry & Company, Bankrupt. In Bankruptcy.

"This cause coming on to be heard upon the application of the bankrupt for his discharge and upon the amended specifications of objection filed thereto by the Jefferson County Savings Bank, and upon the evidence introduced by the bankrupt and the objecting creditor, respectively, on the hearing before the special master, and the court being of the opinion that the depositions, the report of the receiver, and the testimony of all the witnesses before the referee in bankruptcy, except that of the bankrupt, is incompetent and should be excluded, and being of the further opinion that, excluding all such testimony, the amended specifications of objection relating to the concealment and destruction of the bankrupt's books of account are established by the preponderance of the evidence, it not being necessary to consider or pass upon the issues presented by the other specifications of objection:

"It is therefore ordered and adjudged that the depositions, report of the receiver, and the testimony of all the witnesses, except the bankrupt, in the examination before the referee in bankruptcy, be and they are hereby excluded.

"It is further ordered, adjudged, and decreed that the application of the bankrupt for his discharge be and it is hereby denied, and that the costs of the proceeding for the discharge of the bankrupt be taxed against the bankrupt."

From this decree, the bankrupt prayed an appeal, which was duly allowed.

Geo. Huddleston, for appellant.

R. Dupont Thompson and Leonard Bronner, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). The question presented on this appeal is whether any one of the specifications of objections numbered first, fifth, sixth, and seventh, fully recited in above statement, is sufficiently proved to warrant the refusal to discharge the bankrupt.

The judge a quo was of opinion that the fifth and sixth were established by the preponderance of evidence, and that it was not necessary to pass upon the first and seventh.

[1] Counsel contend that the contest of a bankrupt's discharge is a quasi-criminal proceeding and governed by rules of criminal practice, and therefore that a mere preponderance of evidence is not sufficient. We are of opinion that, as stated in Collier (7th Ed.) 268, while the ordinary rules of evidence control, the proof must be strict and convincing, but not necessarily to the limit required in proving a crime.

The question is fully and ably discussed by Judge Putnam in Troeder v. Lorsch et al., 150 Fed. 710, 711, 80 C. C. A. 376, and we concur with what is there said on the subject.

In support of the first specification, we find much suspicion, some presumption, but no sufficient evidence to prove that the bankrupt concealed \$15,000, or any other sum of money belonging to the bankrupt's estate.

[2] The three other specifications charge the bankrupt with failure to keep books of accounts or records from which his financial condition might be ascertained; the destruction of the books of accounts relating particularly to the business conducted by the bankrupt in the city of New York during the years 1908 and 1909, as well as a large part of the books used at the Birmingham end of said business during the years 1908 and 1909; and, lastly, concealing the books of accounts or records relating to the business in New York, as well as a large part of the books used at Birmingham. And these specifications can be considered together.

There is no evidence to substantiate the charge that the bankrupt failed to keep books of accounts and records from which his financial condition might be ascertained.

There is no evidence supporting the finding that books of accounts showing the financial condition of Robert Garry & Co., kept at Birmingham, were destroyed or concealed.

All the evidence there is in the case bears on the proposition that the books of accounts kept in New York or relating to the business of Robert Garry & Co. in New York were concealed or destroyed.

Keeping in mind the undisputed fact that the firm of Robert Garry & Co. in New York was dissolved and the business wound up in November of 1908, the inquiry seems to be restricted to the proposition that the bankrupt concealed or destroyed books showing the financial condition of the firm in New York, and the evidence in support

of this is that when Robert Garry went to Birmingham to go on with the business of Robert Garry & Co., in that city, he left the New York books in New York, and thereafter in May, 1909, when examined before the referee, he was verbally ordered by the referee to produce the said books and turn them over to the trustee, which order he failed to comply with, and that in testifying how and when and with whom he left the books there is some discrepancy between the answers he gave on his examination before the referee and those given a year later when examined before the special master. Besides this, the special master considered, as tending to show that the bankrupt had concealed and destroyed his books, that on his examination before the referee he had given evasive and untruthful answers to questions relating to the matters contained in the books.

It is not pretended that any written order to produce the New York books at any time or place was ever served upon the bankrupt. Nor is it claimed that at any time the bankrupt was provided with means to go to New York, find his books, and bring them to the referee or trustee. It cannot be inferred that when the firm of Robert Garry & Co., in New York, was dissolved and liquidated in November, 1908, there was any misconduct in leaving the books relating to the business of that firm in New York, in the absence of all proof to the effect that there and then Robert Garry contemplated that the firm of Robert Garry & Co., in Birmingham, would thereafter be forced into bankruptcy.

On the examination before the referee the bankrupt testified that the New York firm kept a full set of books and he left them in New York with a former bookkeeper named Henry Kaplan and asked him to store them. Cross-examined as to details, the following appears:

"Q. At that time did you keep a full set of books?

"A. Yes, sir.

"Q. You are sure?

"A. Yes sir.

"Q. Keeping a cashbook and ledger, etc.?

"A. I don't know about that.

"Q. You said a full set of books, didn't you?

"A. Well, I guess they did then.

"Q. Do you wish me to understand, and the court to understand, that you were keeping a business like that going, and still don't know whether they kept a cashbook and a ledger and other books that are kept in such a business?

"A. I couldn't say, Mr. Brunner, because I don't know, you know."

On the bankrupt's examination by his own counsel before the special master a year later, he testified as follows:

"Q. What books did the New York firm keep?

"A. We kept a ledger, an expense book, and we kept a charge book. Our charge book was made with copies of the bill. We sent one to customer, and copy we kept and put in a binder, a cashbook.

"Q. Did you keep an invoice book?

"A. Yes, sir.

"Q. And checkbook?

"A. Yes, sir.

"Q. Any other books?

"A. Do not know. We kept a regular and usual set of books used in that business.

"Q. What become of those books?

"A. Well, I wound up all the business of Robert Garry & Co. and paid everybody merchandise with the exception of this \$5,000 of the bank, and I got through with it, and some one else moved in, and we sold the furniture, and I got through with the books, and I left them there. They were useless to me, and I left them there, and I had my bookkeeper—he quit me a long time before, some time about January. And he would come around there and help me, and I left them there, and I do not know whether those people moved them out or left them in the same place.

"Q. Who was the firm?

"A. The manager was named Mulligan.

"Q. Where were the books when you last saw them?

"A. 465-7 Broome street.

"Q. What part of the house?

"A. Second floor; we call it here the second floor, but they call it the ground floor.

"Q. Were they on the floor?

"A. We had a big desk, and I sold the furniture and fixtures, and I moved it in the back part of the store. He moved in on us unexpected.

"Q. When you closed there you had quit the business?

"A. Yes, sir; entirely.

"Q. And had paid everybody all the bills you owed—you only owed this bill to the bank?

"A. Yes, sir.

"Q. And nobody owed you anything that was in business?

"A. No, sir.

"Q. Who owed you anything at that time?

"A. Nobody. I wound up with notes with some concerns and discounted them in the bank, so that closed up all the books.

"Q. What date was that?

"A. In February, 1909. I left on the 20th, was the last time I saw them.

"Q. Have you made any inquiry for those books since?

"A. I did. I asked my brother about it, and they were still there in August, and I went up there in January of this year and saw Mr. Mulligan, and he said somebody moved out with the load of furniture.

"Q. Did you destroy any of those books?

"A. No, sir.

"Q. Did you conceal them?

"A. No, sir.

"Q. What is the name of your bookkeeper?

"A. Kaplain.

"Q. What request did you make of him about those books?

"A. I asked him to find them, and I asked Sam Garry, not knowing his address, and I saw Mr. Kaplain personally in January. He came to see me, and I asked him about them, and he said he did not know. He said they were all there."

The discrepancy between the bankrupt's evidence before the referee and that before the special master and the reticence in the former compared with the fullness in the latter gives rise to a suspicion as to his credibility, but no strong inference that the bankrupt had either concealed or destroyed his books. There is little doubt that in the lengthy and to some extent badgering examination before the referee the bankrupt was evasive to the verge of untruth; but for that we do not put all the blame on the bankrupt. The special master says:

"Robert Garry, in testifying before the master, appeared unmistakably a man of much intelligence, of quick, ready, and accurate apprehension, and of keen business sagacity. He was 39 years old and in the maturity of sound mental and physical vigor. His business experience on his own ac-

count rose from peddler to dominant partner in two large mercantile houses — the one in New York, the other in Birmingham."

He might have added that Garry came to Birmingham at the age of 16, when his education was necessarily incomplete; that he was ignorant of commercial bookkeeping and, so far as the case shows, had always relied on his bookkeeper to keep his books. These facts, taken in connection with the character of the examination, which evidently soon impressed Garry that he was in the "house of his enemies," who were seeking to lead him into pitfalls and traps through attempted explanations of book entries that he himself had not made, and mainly at Birmingham when he was not there (for it was in relation to items in the Birmingham books that the most evasive answers were given), tend somewhat to soften the otherwise natural conclusion that he was willfully evading explanation and was withholding information with a bad intent.

But if we concede that the bankrupt's conduct in this respect was all that the appellee claims, and, further, that he was in fault for not producing before the trustee his New York books, and that his conduct pending the bankruptcy has been recalcitrant, we are still unable to find in all the evidence of the case strict and convincing proof that the bankrupt either concealed or destroyed his books, which is the crux of the specifications of opposition to the bankrupt's discharge under consideration on this appeal.

We do not agree with the special master that the evidence is perfectly clear and convincing that the bankrupt failed to keep books of account and that he concealed them or destroyed them; nor with the judge a quo, who held that the preponderance of evidence showed the bankrupt concealed and destroyed his books of account, and, as on this appeal we must follow our own convictions as to the sufficiency of the evidence to establish the specified objections of opposition herein involved, we are constrained to reverse the decree of the District Court and remand the cause, with instructions to grant the appellant his discharge in bankruptcy.

And it is so ordered and decreed.

FLEITMANN et al. v. JOHN M. STONE COTTON MILLS.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1911.)

No. 2,088.

1. CORPORATIONS (§ 447*)—CAPACITY TO MAKE CONTRACTS.

In the absence of any provision in the statute or its charter prohibiting it, a contract by a manufacturing corporation to give its exclusive selling agency to a commission firm in consideration of its buying stock of the corporation, and to repurchase the stock on the termination of the agency, is not ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1786, 1788, 1807; Dec. Dig. § 447.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CORPORATIONS (§ 406*)—REPRESENTATION BY OFFICERS—AUTHORITY TO MAKE CONTRACTS.

A contract signed by a corporation by its president was binding on the corporation, where its by-laws provided that the president should "make all contracts for the company."

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.*]

3. CORPORATIONS (§ 82*)—CONTRACTS—VALIDITY.

A manager of one of the departments of plaintiffs, who were commission merchants in New York, while on a trip South, had a talk with the directors of defendant corporation which was about to build a cotton mill, and made them a written proposition in his own name to take a certain amount of stock of the corporation, to be paid for when the mill was completed and in operation, conditioned that he should be the sole selling agent for the product. It was understood that he made the proposal in behalf of plaintiffs, but that he had no authority to conclude a contract. On his return he induced plaintiffs to write a letter to defendant making a similar proposition. No answer was made to the letter, but several months later plaintiffs wrote again, inclosing a contract for execution embodying the same proposition, and containing a provision that defendant should have the right to terminate the agency on notice and by repurchasing plaintiffs' stock. The contract was seen and discussed by at least three of defendant's directors and officers, and was afterward signed and returned by the president with the request that plaintiffs remit for the stock, which they did. The agency agreement was carried out satisfactorily for two or three years, when it was repudiated by defendant, which refused to make further consignments to plaintiffs. Held, that the contract was valid and bound defendant to repurchase plaintiffs' stock as a condition to a termination of the contract; the prior proposal, which omitted such provision, not having been accepted.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.*]

Shelby, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Northern District of Mississippi.

Bill by F. T. Fleitmann and others composing the firm of Fleitmann & Co. against the John M. Stone Cotton Mills. Decree for defendant, and plaintiffs appeal. Reversed.

Marcellus Green and Garner W. Green (Rounds, Schurman & Dwight, Arthur C. Rounds, and Charles W. Atwater, of counsel), for appellants.

C. H. Alexander, Chalmers Alexander, Charlton A. Alexander (Carroll & Magruder, of counsel), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. This is an appeal from a decree of the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi, entered the 7th day of April, 1910, dismissing the original bill of appellants (complainants below), and granting the relief sought in the cross-bill of the appellee (respondent below), and adjudging that the respondent recover of the complainants \$2,531.05, with interest from April 1, 1905.

The appellants compose the firm of Fleitmann & Co., commission merchants, citizens of the state of New York, residing and doing busi-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date. & Rep'r Indexes

ness in New York City. The appellee is a corporation of the state of Mississippi, which hereafter in this opinion we will designate as the "Cotton Mills," a citizen and resident thereof, operating a mill for the manufacture of cotton cloth at Starkville, Miss. The bill alleges, in substance: That for the purpose of enlarging its commission business the complainants (appellants) on April 28, 1902, made a proposition in the form of a letter to the respondent (appellee), whereby the complainants were to take stock in respondents' corporation, and become its exclusive selling agents. That the proposition was understood to contemplate a more precise definition. This proposition was not then accepted. Thereafter, on September 18, 1902, the complainants submitted to the respondent a proposed agreement in more detail, set out at length. This agreement was duly executed by both parties, and in reliance upon it the complainants paid \$15,000 for 150 shares of capital stock of the respondent. Under this contract, the selling agency continued down to about April, 1905. At that time the respondent purported to repudiate the agreement, and refused to make further consignments of its goods to complainants, thus terminating the agency, but refusing to repay the \$15,000 and receive a surrender of the shares of stock, as required by the contract. That the complainants fully performed all conditions of the contract on their part, except that after and because of the breach by the respondents they retained \$2,531.05, which, otherwise, would have been remitted in April, 1905. The complainants further allege that they held the certificate for said stock and the money retained subject to the decree of the court; that, whether said contract be valid or invalid, it would be grossly inequitable to allow the respondents to retain the \$15,000 paid thereunder, and they prayed that it be decreed that said sum be repaid with interest, less the \$2,531.05, with interest from April 8, 1905, the date of its receipt. The answer to the bill sets forth that the letter of April 28th was a confirmation of a definite agreement previously made by an authorized agent of the complainants, and that thereafter the complainants acted as and were treated as stockholders; that the contract of September 18th was entered into by Arthur Whittam, president of the respondent, without authority, through fraud and collusion with the complainants; that Whittam withheld all knowledge of the contract from the directors for over a year; that it was accidentally discovered; and was repudiated on March 30, 1905, as ultra vires, without consideration, unauthorized, and void. The answer admits the refusal to consign goods to the complainants, and alleges the refusal to pay for goods consigned constituted a breach of the terms of agency on the complainants' part; that it was on the faith of the unconditional subscription of the complainants that the mill was built; that the \$15,000 was paid under negotiations, partly verbal, culminating in the letter of April 28, 1902; that bondholders have protested against payment of \$15,000 to the complainants; that at the time repayment was demanded the respondent was in danger of insolvency, and that complainants have no right to retain the \$2,531.05, and prays that bill be dismissed. The replication to the answer alleges the answer to be insufficient, and denies all material allegations therein. The cross-

bill prays for payment of the \$2,531.05 by Fleitmann & Co. to the Mills. The answer to the cross-bill denies all the allegations of improper conduct on the part of Fleitmann & Co. as agents, and other material allegations in the cross-bill, and alleges that the said \$2,531.05 is claimed on account of the greater indebtedness claimed in the bill to be due from the Mills to Fleitmann & Co. All the testimony was taken by deposition de bene esse. In the case of the witnesses called by the respondent, counsel agreed that all objections to competency and relevancy of evidence were considered as reserved and properly taken.

One of the branches of the business of Fleitmann & Co. was to act as selling agents of cotton mills. This they did through various "departments," one of which in 1902 was the firm of Dickson & Hanna, who had their own salesrooms apart from the place of business of Fleitmann & Co. Mr. Hanna in the spring of 1902, before the respondent had commenced building its mill, was traveling in the South, apparently on his own affairs, and the testimony does not show that he was sent by or corresponding with Fleitmann & Co., but tends to show the contrary. He arranged with Mr. Whittam, who was then acting president of the respondent, for a meeting of the board of directors of the Mills, which took place on April 16, 1902. At this meeting Mr. Hanna proposed that his "house" should become stockholders and selling agents of the Mills. After the meeting, on request of some of the directors, he reduced his proposition to letter form, and signed it "Dickson & Hanna." Mr. Whittam, the president of respondent, was with Mr. Hanna when this letter was written, and asked that the letter provide for his presidency of the mill. Mr. Whittam also at the same time said that a letter from Fleitmann & Co. would be preferable. A minute of the action of the board of directors was made by the secretary in these words:

"At a meeting of the board to-day only two members were absent, Scales and Ervin. According to agreement Mr. Hanna was present and made an interesting talk and answered verbal questions. Mr. Hanna stated that his house would take fifteen thousand dollars in stock, provided they were made selling agents, and subscriptions to be paid when mill was completed. He also stated that the mill would not be bound in any way to them, but that they were to have a preference as long as they gave satisfaction."

The letter form into which Mr. Hanna reduced his interesting talk, was in these words:

"People's Savings Bank.

"W. W. Scales, President.

"M. F. Ames, Vice President.

"A. C. Ervin, Cashier.

"C. E. Gay, Asst. Cashier.

"Starkville, Miss.

"Starkville, Miss., April 16, 1902.

"Mr. Arthur Whittam, Prest. Pro Tem. The John M. Stone Cotton Mills,
Starkville, Mississippi.

"Dear Sir: We hereby agree to take up to fifteen thousand dollars stock
in your proposed mill, with the understanding that you are to place as much
of this stock with your own people as you possibly can, thus relieving us
from taking the full amount unless necessary.

"It is also understood that you are to be president of this enterprise and that we are to act as your selling agents, disposing of your product. This proposition is submitted with the understanding that you now have, as stated, eighty-five thousand dollars already subscribed, and that we are not to make any payments on subscriptions until the mill is built, equipped and in operation.

"Yours very truly, Dickson & Hanna. Dept. Fleitmann & Co."

In reference to this letter, the witness Walter W. Scales, Jr., testified: That the meeting which Mr. Hanna addressed was held in the directors' room of the People's Savings Bank, and the witness remembers distinctly that Mr. Hanna, Mr. Whittam, and himself went into the office of the bank for the purpose of writing up this contract of agreement, and "it was suggested that I do the writing, as I had at one time used that particular typewriter, but owing to the fact that I was at that time using a different typewriter—a different keyboard—and Mr. Hanna seemed to be rushed for time to make connections with the I. C. train, they urged me at too great a speed, and I was unable to write the document to their satisfaction, having made two distinct attempts."

On this point the witness John M. Hanna testifies as follows:

"XQ. After you had the conversation spoken of in your direct examination, with the board of directors of the John M. Stone Cotton Mills, you wrote a letter dated April 16th, 1902, a copy of which is marked 'Whittam Exhibit No. 1,' did you not? A. Yes, sir; I did not write the letter. It was written at my dictation.

"XQ. How long after the conversation between you and the board of directors was it that this letter, 'Whittam Exhibit No. 1,' was written by your dictation and signed by you? A. Three or four, four or five hours, something like that.

"XQ. State whether this letter, 'Whittam Exhibit No. 1,' signed 'Dickson & Hanna,' was the letter you wrote to Mr. Arthur Whittam at his request? A. Yes, sir; at the request of Mr. Scales, Jr. The directors also asked me to confirm the proposition which was made to them.

"XQ. I understood you on your direct examination to say that you made an effort to write a letter, but that the machine would not work and that it was abandoned. Was that correct? A. Well, we made an effort to write two different letters and the letter was so blurred that I think I could identify it, though I do not know. After two ineffectual attempts to get a clean copy of the letter, I got a facsimile of them. I wished to take one to New York to Fleitmann & Co.

"XQ. Did you not on that occasion tell the directors that any proposition that was suggested by you would have to be confirmed by Fleitmann & Co.? A. I do not remember telling the directors that, but I think I made such a statement to Mr. Scales and to Mr. Whittam.

"XQ. That was after the meeting was it? A. Yes.

"XQ. You had no authority then in your conversation to do more than make suggestions as to what you would recommend to Fleitmann & Co. to be done by them? A. I had the authority to come here to make a proposition to the John M. Stone Cotton Mills, but I had no authority to sign their names for confirmation.

"XQ. You had no authority to sign a subscription to the capital stock for Fleitmann & Co., did you? A. No, sir.

"XQ. Was not your relations to Fleitmann & Co. evidenced by a written contract between you and Fleitmann & Co.? A. It was."

The board of directors met again April 24th, and took action in the matter, as shown in the following excerpt from the deposition of Mr. W. W. Magruder:

"Q. I notice in the minute book of the John M. Stone Cotton Mills, page 13, dated April 24, 1902, the following language is used in these minutes: 'Then the proposition from Mr. Hanna was read and discussed, and objection was raised to one clause of the proposition, and Mr. Whittam stated he would have said clause erased.' Please examine that statement in the minutes, and explain it as best you can. A. The section to which you refer reads as follows: 'Then the proposition from Mr. Hanna was read and discussed and objection was raised to one clause of the proposition and Mr. Whittam stated he would have said clause erased.' I was the director who made the objection mentioned, and the objection was to that clause in the Dickson & Hanna letter, dated April 16, 1902, which provided that Mr. Arthur Whittam should be president of the mill. This letter in question appears as Exhibit No. 1 to Mr. Whittam's deposition."

Bearing on the same point is the testimony of Mr. A. C. Ervin:

"XQ. You were asked as to the meeting of the directors on April 24, 1902. Will you kindly turn to the meeting of that date and read into the record what is said there in regard to the employment of Mr. Christopher? A. Moved by Mr. Page that Mr. Christopher be employed at nine hundred dollars to superintend the building of the mill. Seconded by Mr. Montgomery. Mr. Magruder moved that the motion be amended. That the contract be signed as soon as a satisfactory reply was received from Fleitmann & Co. Amendment lost and original motion carried."

"XQ. What did this resolution mean by satisfactory reply from Fleitmann & Co? A. I judge it was in regard to the \$15,000 as to whether or not they would take that stock.

"XQ. Then according to your recollection of April 24th, when this meeting of directors was had, the question of Fleitmann's taking the stock was a question as to whether the board got a satisfactory reply from Fleitmann & Co.? A. Well, I do not know what letter that refers to. What was the date of the letter we had? And that was April 24th. I suppose that was the letter we were waiting for. We felt that we could not commence building and equipping the mill, unless we got the amount of \$15,000 in addition to what we had at home.

"XQ. Then on April 24, 1902, the board of directors did not think that the subscription of Fleitmann to the stock was closed, but waited further communication from Fleitmann, did they? A. That is my understanding."

After Hanna's visit to Starkville on April 16, 1902, the whole business between Fleitmann & Co. and John M. Stone Cotton Mills was conducted by correspondence, and Fleitmann & Co. were no parties to any of the subsequent proceedings by the mill.

Mr. Hanna was in Starkville only a few hours on April 16, 1902, during which time he had his talk to the board of directors and with different members of the board after the meeting was closed, and then, in company with Mr. Whittam, Mr. Page, and Mr. Scales, was driven out to the piece of property on the edge of town, which they informed him they were going to select for the site of the mill, and he was so rushed to make the Illinois Central train that he had difficulty in getting written the letter that was requested of him. He returned to New York, and 12 days after the day at Starkville he persuaded Fleitmann & Co. to send a letter which he dictated to the president of the Mills, as follows:

"New York, April 28th, 1902.

"Mr. Arthur Whittam, Pres't., Starkville, Miss.

"Dear Sir: We agree to take up to fifteen thousand dollars stock in your proposed mill, with the understanding that you are to place as much of this stock with your own people as you possibly can, thus relieving us of taking the full amount unless necessary.

"It is understood that we are to act as selling agents for your entire product.

"This proposition is submitted with the understanding that you now have, as stated, eighty-five thousand dollars already subscribed and that we are not to make any payments on our subscription until the mill is built, equipped and in operation.

"Yours very truly,

[Signed] Fleitmann & Co."

This letter was never answered. On June 30, 1902, Fleitmann & Co. signed a paper appointing Mr. Whittam proxy to act for Fleitmann & Co. at stockholders' meetings. This proxy had been sent by Mr. Whittam to Dickson & Hanna. By means of the proxy Mr. Whittam voted 150 shares at the annual stockholders' meeting in July. The next communication between the parties was a letter sent by Fleitmann & Co. on September 16, 1902, inclosing a formal contract of subscription and agency, dated September 18, 1902. This contract was returned signed in the name of the corporation by its president on February 17, 1903. After some correspondence and investigation in relation to the condition of the Mills, Fleitmann & Co. paid \$15,000 for 150 shares of stock on April 17, 1903. The contract provided that the Mills might terminate the agency on notice and paying par value for any stock held by Fleitmann & Co. Meanwhile the mill had been completed and the selling agency went into effect. The agency continued with mutual satisfaction until about the 1st of April, 1905. On March 31, 1905, the Mills wrote to Fleitmann repudiating the contract of September 18, 1902. Fleitmann & Co. then had some goods on hand, which were sold early in April at a price agreeable to the Mills. On April 1st the Mills wrote that they would not ship goods until they were sold. The appellants considered that this was contrary to the established custom and the best interests of selling. On April 5th a telegram came to the appellants signed "W. W. Scales & Company," asking Fleitmann to discount a draft attached to a bill of lading. A letter came from the Mills dated April 8th, demanding discount. On the 10th of April, 1905, the directors of the Mills declared the agency unsatisfactory, and on the 15th this was communicated to Fleitmann & Co. The appellants objected to the form of signature, "W. W. Scales & Company," and to the new method of selling and to the newly discovered practice of the Mills in pledging the finished product to the local bank, of which Mr. Scales was president. Efforts were made by the appellants for a friendly settlement, but proved unavailable. No more goods were consigned.

Defendants pleaded in answer to the original bill that Mr. Whittam concealed the contract of September 18, 1902, and signed it without authority, and that it was not discovered until 1905. It is shown by the proof that W. O. Page, who was a director and active vice president, and W. W. Scales, Jr., who was a director and secretary and treasurer of the Mills, knew of the contract when it was first received. And it appears that it must have been discussed at a meeting of the board of directors in 1903 when section 10 of the by-laws, relating to the power of the president, was amended by striking out the words, "And make all contracts for the company," and inserting the words, "Sign all contracts necessary for the operation of the plant." Mr.

Whittam gave up his presidency of the Mills early in 1905, and Mr. Scales, Sr., became head of the corporation.

The decree below was rendered without opinion. It dismisses the original bill, and grants the relief demanded in the cross-bill. In both these respects appellants allege the decree to be erroneous.

When Mr. Hanna met the board of directors of the Cotton Mills on April 16th, he did not hold himself out as the authorized representative of the complainants, and he was not in fact authorized, and the directors of the Cotton Mills did not, at the time, treat him as authorized. He did not sign the name of Fleitmann & Co. Just before going to Starkville to attend the meeting, he used the name of his own firm, Dickson & Hanna, in his correspondence with Mr. Whittam, the president pro tem. of the Cotton Mills. Mr. Whittam had had no correspondence with Fleitmann & Co. up to that time. The appellants had no correspondence with Mr. Hanna while he was on this trip south. He was not sent to Starkville by them. The most that the board of directors did or could have done by adopting a motion to approve of Mr. Hanna's "interesting talk" was to express their willingness to give the appellants the contract to handle the whole output of their mill on such terms as the appellants and the Cotton Mills could agree upon. When Mr. Hanna reduced his talk to a letter form, it was not received then or afterwards as a proposition which they were willing to accept. Therefore, in any view we can take of the proof, there was no binding subscription made or accepted on the 16th of April, 1902.

We have seen that 12 days after his day at Starkville Mr. Hanna persuaded Fleitmann & Co. to send a letter, which he dictated, to the president of the Mills. Counsel for appellee in propounding leading questions to their witnesses have referred to this letter as a contract and as a confirmatory letter, and have got to their questions the suggested answer to the propositions they have embodied in their questions, and then, in their argument, they have assumed that their questions and these answers established their contention that the letter was a contract and a confirmatory letter. To correctly find its true meaning, we must consider the intent of the party in sending it as expressed in the letter itself. It is the first track of Fleitmann & Co. towards establishing any relations with the appellee contemplating a definite contract. It was not sent as an acceptance or confirmation or ratification of any proposition, for there is no testimony that any proposition had been made from the Mills to Fleitmann & Co., nor is there any testimony that Fleitmann & Co. had any knowledge or belief that Hanna had assumed on their behalf to subscribe for or to take any stock in the Cotton Mills. He had, in fact, not done so. And there was no call on them for a confirmatory letter further than to have them do what Hanna was requested to do in their name, but declined to do for want of authority, namely, to make a proposition to the Mills. This it seems that Hanna succeeded in inducing them to do in substantially the exact terms of Hanna's letter of April 16th, omitting the provision as to the presidency of the enterprise. This letter of April 28th not only uses the language, "This proposition is submitted," etc., but the whole of the letter shows on its face that it was not sent as

an acceptance of or confirmation or ratification of any past proposition, but was merely to indicate a disposition on their part to take stock, and that it contemplated an agreement to be consummated later. It is obvious to any one on reading the letter that their main object was to acquire the agency, and, if there is any doubt as to this appearing on the face of the letter, the extraneous evidence, which the record offers on this point, fully removes that doubt. The letter does not specify definitely the amount of stock it was proposed to take. It is as clear from the letter as it is from all the proof in the case that Fleitmann & Co. did not desire to take or hold stock in the Cotton Mills as an investment, or for any other purpose than, in an emergency, to enable the Mills to produce output to be sent to Fleitmann & Co. for sale. That is, their evident object all along was to get the handling of the goods. And it was equally evident all along that the Cotton Mills preferred to have its stock taken at home. The contemplated transaction was serious enough to call for definite terms as to the mutual obligations of the parties to the sales agency contract. This letter was received by the president of the appellee in the due course of mail. Its receipt was well known at the time to the managing officers and directors of the corporation. No reply to it was sent to Fleitmann & Co., and the record not only does not show that there was any action of the board on it, but, to the contrary, does show that there was none.

On April 24th the board provided for the employment of a superintendent to take charge of the building of the mill, and made other provisions for the installation of the plant. At that time over \$23,000 on the stock had been paid in. Active work on the plant then began and continued to completion. Fleitmann & Co. were not to make any payments "until the mill is built, equipped, and in operation." They had nothing to do as sales agents until the mill was ready to consign product. At the expiration of about five months Fleitmann & Co. sent to the Mills the following letter:

"Fleitmann & Co., 484-494 Broome Street, New York.

"Sept. 16, 1902.

"The John M. Stone Cotton Mills, Starkville, Miss.

"Gentlemen: Having looked over our different Cotton Mill contracts we find that we are not in possession of one with yourselves and we therefore ask you to kindly sign the enclosed, for our mutual guidance, at your earliest convenience.

"Yours very truly,

[Signed] Fleitmann & Co.

"H. C. Fleitmann.

"P. S. Kindly sign the carbon copy; the original is for yourselves."

The contract referred to in this letter is as follows:

"The following agreement made this day Sept. 18, 1902, between Messrs. Fleitmann & Company, New York City, and the John M. Stone Cotton Mills, Starkville, Miss., as follows:

"In consideration of the fact of Messrs. Fleitmann & Co., having agreed to purchase 150 shares of the common stock of the John M. Stone Cotton Mill, the said John M. Stone Cotton Mill agrees to make Messrs. Fleitmann & Co., Department Dickson & Hanna, its sole and exclusive selling agents.

"Messrs. Fleitmann & Co., on their part agree to guarantee all sales and insure goods of said John M. Stone Cotton Mill held by them in New York.

"The John M. Stone Cotton Mill agrees on its part to consign to Messrs. Fleitmann & Co., its entire product to be sold for its account, less commis-

sion of four per cent. (4%), and agrees to guarantee Messrs. Fleitmann & Co. against any loss arising from any claims that may be made on account of the goods produced by it—by reason of imperfections in said goods, late delivery of same or that goods delivered are not up to standard, etc.; and further, also, that cloth held at the John M. Stone Cotton Mill awaiting sales or shipping instructions, and also cloth that may have been advanced on, shall be covered by insurance; the policies to be made in the name of Messrs. Fleitmann & Co., and said John M. Stone Mill paying the premium.

"It is further mutually understood and agreed that should the said John M. Stone Cotton Mill decide to discontinue this contract, it may do so upon sixty days' notice to Messrs. Fleitmann & Co., and upon paying the par value for any shares of stock in the said John M. Stone Cotton Mill held by Messrs. Fleitmann & Co.

John M. Stone Cotton Mills,

"By Arthur Whittam, President."

The letter in which this contract was inclosed, addressed to the corporation and dated September 16th, arrived in the due course of mail, and was received at the office of the Mills by the president, in the presence of the vice president and of the secretary and treasurer. Their attention was called to the contract and the secretary and treasurer read it, and a conversation between the president and these other officers, both of whom were directors, was then and there had, during which conversation the contract or the opened envelope containing it was lying on the table between the president's desk and the secretary's desk, in the presence of the vice president. At the close of this conversation, while the vice president was still present, the contract was placed in a pigeon-hole in a desk belonging to the Mills and used by the president, where it seems to have remained until the change in the presidency of the corporation.

On February 17, 1903, this letter was sent to:

"Messrs. Fleitmann & Co., 484-494 Broome St., New York, N. Y.

"Dear Sirs: Enclosed herewith we hand you signed contract as requested in your letter of September 16th, '02. (Carbon Copy.)

"We regret the delay in returning same but the matter has been unintentionally overlooked by us.

"Our mill is now in operation and we shall be glad to have you favor us with a remittance as per contract at your earliest convenience.

"Trusting you will find it convenient to do so and awaiting your further favors, we are,

"Yours very truly,

John M. Stone Cotton Mills,

"By Arthur Whittam, President."

The appellee refused to recognize this contract, chiefly on three grounds: First, that it is ultra vires; second, that it was fraudulent as to creditors; and, third, that it was signed by the president without authority. In the pleadings there are also direct charges of fraud.

From a business standpoint, this contract is a very natural one for the parties to have made. Fleitmann & Co. wished the agency of the Mills, and the Mills needed the use of Fleitmann & Co.'s money. The terms of the agency offered are advantageous to the Mills. The sales are guaranteed by a factor of unquestioned standing, and the Mills need fear no losses. It is said the Mills are paying lower commissions now than 4 per cent., but it is not shown who takes the risk of the sales or what standing the sales agent has. It is shown that the commission named in the contract was the usual one. Fleitmann & Co.'s interest in the Mills does not extend beyond the agency, hence

the provision for repurchase in case the agency is terminated. Had this provision been omitted, the Mills, perhaps, could not have terminated the agency without being liable for damages for the breach, which might well have been serious. By exercising the option the Mills would not lose \$15,000. They would regain the stock as treasury stock and might gain by it, if the stock were above par. There is no arbitrary favor to Fleitmann & Co. The option is in the Mills. It is as if the provision had been that the Mills might terminate the contract on 60 days' notice and on payment of \$5,000 or other sum as liquidated damages.

[1] From the view of the testimony we have taken it seems clear that the first of the grounds which the appellee chiefly urges is not applicable to this case. We find nothing in the Constitution of the state of Mississippi or in the statute provisions of that state relating to corporations or in the charter of the appellee which forbids or limits the power of the appellee to contract as it did with the appellants. As to the second ground upon which the appellee relies, that it was fraudulent as to creditors, there is no evidence that there were any creditors at the time this contract was made, and there is certainly no appearance for creditors in this case. [2, 3] As to the third ground, that it was signed by the president without authority, that is expressly answered by the provisions of the by-laws in force at the time the contract was made. The charges of fraud which are made by the appellee in its pleadings are not sustained by any evidence as we view the testimony and the written evidence embraced in the record. The witnesses who testified for the appellee did include in their answers the arguments and inferences and conclusions of fact and conclusions of law embraced in the direct interrogatories and questions of the distinguished and able counsel who appeared for the appellee, but there is we think substantially no dispute as to the actual facts which existed in the negotiations of the parties which led up to the concurrence of minds expressed in the contract bearing date September 18, 1902. We have examined the references to text-books and to the very numerous decisions of other courts made by industrious and able counsel as far as these authorities have been accessible to us, and without the profitless labor of giving a specific review of the same in this opinion we have endeavored to apply the sound doctrine which they illustrate to the facts of the case before us for decision.

Judge Thompson in the preface to his Commentaries on the Law of Corporations, dated January 1, 1895, says:

"The author finds his justification for the publication of so large a work upon a single title of the law * * * in the fact that upon no subject in that law has this growth been as rapid and as rank as upon the subject here under consideration. The statement of a single fact made by Mr. Justice Field in his oration delivered at the Centennial Celebration of the Supreme Court of the United States in the city of New York in 1890 that four-fifths of the wealth of the country is held by corporations will give emphasis to what is here said. * * * This work was commenced more than 16 years ago. * * * Since its commencement great changes have taken place in the American law of private corporations. The American doctrine that the capital stock of a corporation, including its unpaid share subscriptions, is a trust fund for its creditors has during that period been greatly

modified—so much so that it may now be doubted whether the capital of a corporation is a trust fund for its creditors in any different sense than the sense in which the property of a private person is a trust fund for his creditors. The doctrine formerly held by many of the state courts and emphasized by a decision of the Supreme Court of the United States and still firmly insisted upon in England that the shares of a corporation can be sold and distributed only at full value either in money or in property has been greatly shaken, if not overthrown, by recent decisions of the Supreme Court of the United States."

We cite in the margin only a few of the comparatively recent cases which appear to us most nearly analogous to the case at bar: Walter L. Chapman v. Ironclad Rheostat Co., 62 N. J. Law, 497, 41 Atl. 690; Egbert v. Sun Co. (C. C.) 126 Fed. 568; Edgar Leonard v. Edward F. Draper et al., 187 Mass. 536, 73 N. E. 644; Watts Mercantile Co. v. Buchanan et al., 92 Miss. 540, 46 South. 66; Paul Steam System Co. v. Paul (C. C.) 129 Fed. 757; Daponte v. Breton et al., 121 La. 454, 46 South. 571. Further, if, as appellee contends, the contract was invalid, either for want of power in the corporation to so contract, or for want of authority in the president to make the contract for the corporation, the appellee would not be allowed after all that took place from the making of the contract to the repudiation of it to refuse to refund the appellant's money with proper interest.

We conclude that the decree of the Circuit Court must be reversed, and this court must now decree that the appellee is required to purchase and receive delivery and surrender of the certificates of stock held by the appellants and tendered in their bill, and pay to the appellants the sum of \$12,468.95, with interest thereon at the rate of 6 per cent. per annum from April 8, 1905, the sum of \$2,531.05, which the appellee by its cross-bill seeks to recover, being deducted as of the date of its receipt by the appellants from the \$15,000 which the appellants were entitled to receive for the stock surrendered, and that the cross-bill be dismissed, the appellee to pay all the cost incurred in the Circuit Court and in this court.

It is so decreed.

SHELBY, Circuit Judge, dissents.

UNITED STATES, to Use of KINNEY, v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Third Circuit. April 12, 1911.)

No. 27.

1. CLERKS OF COURTS (§ 74*)—ACTION ON BOND—CAUSE OF ACTION—DAMAGES.

In an action on the bond of a Circuit Court clerk for refusing to enter a default judgment in favor of the use plaintiff in a garnishment proceeding, he was not entitled to recover, in the absence of proof that there were funds of the defendant in the hands of the garnishee subject to garnishment.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 127; Dec. Dig. § 74.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. COURTS (§ 344*)—STATE PRACTICE—RETURN DAY—FEDERAL COURTS.

Rev. St. § 914 (U. S. Comp. St. 1901, p. 684), requiring Circuit Courts to conform to the state practice as near as may be, etc., does not require conformity with reference to return days for summons; such courts, as to that, being governed by their own rules.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. § 344.*

Conformity of practice in common-law actions to that of state court, see notes to O'Connell v. Reed, 5 C. C. A. 594; Nederland Life Ins. Co. v. Hall, 27 C. C. A. 392.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by the United States, for the use of Robert D. Kinney, against the United States Fidelity & Guaranty Company. Judgment (182 Fed. 1005) for defendant, and the use plaintiff brings error. Affirmed.

Robert D. Kinney, for plaintiff in error.

Thomas S. Stokes and Bayard Henry, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

BUFFINGTON, Circuit Judge. In the court below Robert D. Kinney, a citizen of Pennsylvania, brought suit against the United States Fidelity & Guaranty Company, a citizen of Maryland, surety upon a bond given to the United States by Charles K. Darling, clerk of the United States Circuit Court for the District of Massachusetts. After the proofs by both parties were submitted on the trial of the cause, the court below instructed the jury to find for the defendant. From such proofs it appears that Mr. Kinney, acting as his own counsel, brought suit in the Circuit Court for the District of Massachusetts against the Plymouth Rock Squab Company, as defendant, and the International Trust Company, as trustee or garnishee. After service of process Mr. Kinney sought to have a default judgment entered in accordance with the return days fixed by the Massachusetts state statutes for the courts of that state, while Mr. Darling, the clerk, contended the return days fixed by the rules of the Circuit Court governed, and refused to enter judgment as directed by Mr. Kinney. In an opinion refusing a new trial, reported at 182 Fed. 1005, the court below justified its action in directing a verdict for the defendant on two grounds: First, because there was no proof Mr. Kinney was damaged; and, secondly, that Mr. Darling was justified in following the rules of the Circuit Court as to return days.

[1] We have, as we have said, carefully examined the testimony, and are of opinion the court rightly held that Mr. Kinney's proofs did not show he had suffered damage by the clerk's action. There was no proof that there were any funds of the Plymouth Rock Squab Company in the possession of the International Trust Company, the garnishee, and unless such was the case the act of the clerk did the plaintiff no damage. On this ground alone the court below was clearly justified in its action.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[2] And the same may be said in reference to the return days. In that respect the court below well summed up the situation and authorities in these words:

"The plaintiff's principal contention is that section 914 of the Revised Statutes (U. S. Comp. St. 1901, p. 684) compelled the Circuit Court to follow closely the state practice in the matter of return days for the writ of summons. The federal practice differed, and it is clear that the clerk was obeying the rules of the Circuit Court upon this subject. If, therefore, these rules were valid, he was justified in refusing to enter judgment and to issue execution. Many statutes of Massachusetts were offered in evidence at the trial, and the defendant's counsel contended then, and contends now, that the state practice concerning return days for the writ of summons substantially coincided with the federal practice about 30 years ago, that such conformity fully satisfied section 914, and that, although the state practice may have since been changed, the federal court was not obliged to follow, citing in support of this position *Shepard v. Adams*, 168 U. S. 618 [18 Sup. Ct. 214, 42 L. Ed. 602], and *Railroad Co. v. Gokey*, 210 U. S. 155 [28 Sup. Ct. 657, 52 L. Ed. 1002]. In my opinion these decisions sustain the defendant's contention, and require me to hold that the plaintiff's suit in the Circuit Court for the District of Massachusetts was properly subject to the rules of that court, and that the clerk was right in refusing to comply with the several motions referred to in the statement of claim."

We may add that in *Railroad Co. v. Gokey*, *supra*, it appears that in the state courts of Vermont there were but two terms in the year affecting such actions as were involved in that case, and it was thought best to have more frequent return days. They were provided for by state legislation; but, as stated by Judge Wheeler, the federal "court has three regular terms in each year and it has not been considered that to have writs returnable oftener would be advantageous for the advancement of justice or the prevention of delays." Of this action the Supreme Court say:

"In accordance with the views expressed in the above extract from Judge Wheeler's opinion, he, as District Judge, had not altered the rule which had been first adopted in 1885 in conformity with the practice of the state court, existing at the time of its adoption. *Shepard v. Adams*, *supra*, seems to be a sufficient authority for the refusal of the judge to alter the rule of the Circuit Court, so as to be in conformity with the alteration made by the state statute in 1893."

It will thus be seen that the Supreme Court of the United States has laid down the law applicable to the present case; for the general situation as to variance between the state and federal courts in rules, procedure, and return days is substantially the same in Massachusetts and Vermont.

The judgment of the court below is therefore affirmed.

WILLIAMS, Immigration Com'r, v. UNITED STATES ex rel. BOUGADIS.

(Circuit Court of Appeals, Second Circuit. March 13, 1911.)

No. 156.

**1. ALIENS (§ 53*)—DEPORTATION FOR “ENTERING IN VIOLATION OF LAW”—
FALSE REPRESENTATION AS TO CITIZENSHIP.**

An alien, who falsely represents himself to be a citizen, and by such artifice and fraud secures admission to the United States, is guilty of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"entering in violation of law," within the meaning of Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 459), and is subject to deportation thereunder.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2400-2408.]

2. ALIENS (§ 54*)—DEPORTATION—ENTERING IN VIOLATION OF LAW—ACQUITTAL IN CRIMINAL CASE.

A judgment of acquittal in a criminal prosecution of an alien for falsely claiming citizenship, entered on a directed verdict, is not a bar to proceedings for his deportation, under Immigration Act Feb. 20, 1907, c. 1134, § 20, 34 Stat. 904 (U. S. Comp. St. Supp. 1909, p. 459), for having obtained admission to the United States in violation of law by falsely representing himself to be a citizen.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Habeas corpus proceeding, on the relation of Antonios Bougadis, against William Williams, Commissioner of Immigration. From an order discharging relator, the Commissioner appeals. Reversed.

On appeal by the Commissioner of Immigration from an order of the Circuit Court for the Southern District of New York, made in habeas corpus proceedings, discharging the appellee, Antonios Bougadis, who was held by virtue of a warrant issued by the Department of Commerce and Labor directing his deportation on the ground that he was an alien who had secured admission to the United States by falsely representing himself to be an American citizen. The appellee was discharged upon the sole ground that a verdict of acquittal had been directed by the Circuit Court for the Eastern District of New York, after trial upon an indictment charging that he had obtained admission to the United States by falsely representing himself to be an American citizen.

Henry A. Wise, U. S. Atty., and Isaac H. Levy, Asst. U. S. Atty., for appellant.

Elias Rosenthal, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. The appellee, Antonios Bougadis, an alien, arrived here March 28, 1910, on the steamship Martha Washington, where he had taken a second cabin passage from Greece under the name of Dimitrios Papos. He was admitted as a citizen upon the production of citizenship papers issued to said Papos by the County Court of Westchester county, N. Y. He was arrested upon a warrant issued by the Department of Commerce and Labor, and the facts were fully investigated before a board of special inquiry, which found that he had secured admission to this country by false representations as stated. On these facts the board recommended his deportation.

[1] There can be no doubt whatever that the appellee came here under the name of Dimitrios Papos, and secured admission as a citizen by falsely representing himself to be Dimitrios Papos, and presenting naturalization papers issued to said Papos. In other words, he secured

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

his admission to this country by fraud. The immigration act of 1907 provides that any alien who shall enter this country in violation of law shall be deported to the country from whence he came. We are of the opinion that an alien who falsely represents himself to be a citizen, and by such artifice and fraud secures admission to this country, has entered contrary to and in violation of law. Any other construction would render the act abortive, if the alien succeeds in consummating his fraud. The most undesirable immigrant may in this way secure admission to the country. He may be diseased, a criminal and a pauper, and yet evade the law intended to discover his physical, moral and financial status. One who by fraud succeeds in circumventing the law, and who thus secures advantages to which he is not entitled, violates the law.

[2] In our judgment, the direction of the verdict upon the trial of the indictment is not res judicata of the present proceeding. That was a criminal trial, under section 79 of the Criminal Code (U. S. Comp. St. Supp. 1909, p. 1414), in which the government was required to establish the defendant's guilt beyond a reasonable doubt. This is a proceeding under an entirely different law, instituted by executive officers of the government to ascertain whether an alien should be deported. It is not a criminal trial. No punishment has been or can be inflicted. The department charged with the administration of the law has decided, on ample evidence, that the appellee was improperly admitted to this country. As was said by the Supreme Court in *Turner v. Williams*, 194 U. S. 279, at page 289, 24 Sup. Ct. 719, at page 722, 48 L. Ed. 979:

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application."

The order discharging the appellee is reversed.

FRANCIS v. McNEAL.

(Circuit Court of Appeals, Third Circuit. March 7, 1911.)

No. 6 (1,363).

1. BANKRUPTCY (§ 149*)—PARTNERSHIP—ADJUDICATION AGAINST PARTNER.

Bankr. Act July 1, 1898, c. 541, § 5h, 30 Stat. 548 (U. S. Comp. St. 1901, p. 3424), which provides that, "in the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners * * * shall settle the partnership business as expeditiously as its nature will permit and account for the interest of the partner or partners adjudged bankrupt," applies only to a case where less than all of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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the members of a partnership, but not the partnership, have been adjudged bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. § 149.*]

2. BANKRUPTCY (§§ 54, 69, 149*)—PARTNERSHIP—EFFECT OF ADJUDICATION—ESTATES OF MEMBERS.

Under Bankr. Act July 1, 1898, c. 541, § 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424), a partnership is a legal entity, which may be adjudged a bankrupt irrespective of an adjudication against any of its members; but in an involuntary proceeding, where the act of bankruptcy charged is one that involves insolvency of the partnership, there can be no adjudication against it, unless it and all its members are insolvent, and in such a case, though the adjudication be against the partnership only, or against the partnership and some, but not all, of its members, the estates of all the members are drawn into the proceeding for administration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. §§ 54, 69, 149.*]

Petition for Review of Order of the District Court of the United States for the Eastern District of Pennsylvania.

In the matter of the Provident Investment Bureau, a partnership, bankrupt. On petition of Stanley Francis to revise an order of the District Court. Affirmed.

Henry J. Scott, for petitioner.

George Wharton Pepper, Robert M. Anderson, and Edgar J. Pershing, for respondent.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. The partnership, trading under the name of Provident Investment Bureau, and two of its three members, have been adjudged bankrupts. The third member, Stanley Francis, who has not been adjudged bankrupt, brings this petition to revise in matter of law, under section 24b of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) an order of the District Court adjudging that his separate estate is subject to administration by the trustee of the bankrupt partnership, and directing him to deliver his property to the trustee for the purpose of such administration. The record of the proceedings in the District Court, brought up to this court, consist only of the petition of the trustee in bankruptcy for an order directing Francis to deliver his property to the trustee, the answer of Francis to that petition, the testimony taken, the opinion of the District Court, and the order now under review. (The appraisement of the individual property of Francis, made after the date of the order, and therefore not properly constituting a part of the record, we disregard.)

The trustee's petition avers that on March 31, 1905, a creditors' petition was filed against the partnership and all its members, alleging "that the individual respondents were partners in the said Provident Investment Bureau, that they were bankrupt individually and as a firm, and praying that they be adjudged to be bankrupts under the act of Congress." That such a creditors' petition was filed is admitted in the answer of Francis. Consequently, we must assume that the act of bankruptcy upon which the adjudication against the partnership

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

was made was one involving insolvency of the partnership. This assumption is supported, moreover, by the fact that it conclusively appears by the testimony of the trustee, which is not contradicted, that the partnership debts exceed \$174,000, and are more than three times as great as all of the assets of the partnership and its three members.

Notwithstanding the insolvency of the partnership and all its members, Francis contends that, as he has not individually been adjudged a bankrupt, his estate cannot be administered in bankruptcy. The trustee, on the other hand, insists that, as the partnership and all its members are insolvent, the adjudication against the partnership draws into the proceeding the individual estate of each of its members.

The contested question is to be determined by a construction of section 5 of the bankruptcy act. That section has not been uniformly construed. It is settled, however, that a partnership is an entity which may be adjudged a bankrupt, irrespective of an adjudication of bankruptcy against any of its members. *In re Meyer*, 98 Fed. 976, 39 C. C. A. 368; *In re Bertenshaw*, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886; *Mills v. J. H. Fisher & Co.*, 159 Fed. 897, 87 C. C. A. 77, 16 L. R. A. (N. S.) 656. Section 5 clearly authorizes such an adjudication. It also clearly provides for the administration of partnership and individual property by the trustee of a bankrupt partnership. Undoubtedly, in a case where a partnership and all its members have been adjudged bankrupts, the trustee of the partnership may administer the estates of the partnership and its members. And, as we read section 5, the trustee of a partnership which has been adjudged a bankrupt may, in certain cases to be hereafter mentioned, administer the estates of its unadjudicated members.

[1] We do not think subdivision "h" of the section applies to a case where a partnership has been adjudged a bankrupt. It applies only to a case where less than all of the members of a partnership, but not the partnership, have been so adjudged. It reads as follows:

"In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

It has often been pointed out that section 5 differs materially from the provisions concerning partnership bankruptcies in the bankruptcy act of 1867. Under that act, the partnership was not an entity that could be separately adjudged a bankrupt. The assets of a partnership could be reached only through adjudications against all of its members as copartners. Where less than all of its members were adjudged bankrupts, the adjudication dissolved the partnership, and it became the duty of the unadjudicated members to settle the partnership business as expeditiously as possible, and to account for the bankrupt partners' shares. *Amsinck v. Bean*, 22 Wall. 395, 403, 22 L. Ed. 801. This equitable right of unadjudicated partners, in a case where the partnership is not adjudged a bankrupt, is preserved by subdivision "h" of section 5 of the present act. But the preceding subdivisions of the section deal with cases in which partnership entities, either with

or without their members, are adjudged bankrupts. If a partnership and all its members be adjudged bankrupts, the creditors of the partnership appoint the trustee, and he administers both the partnership and the individual properties. But how shall the subdivisions of section 5 preceding subdivision "h" be construed where a partnership and some, but not all, of its members are adjudged bankrupts? We think the entity doctrine of these subdivisions does not establish a rule of practice which, in cases of partnership insolvency, ignores the liability of each partner for all partnership debts. Their reasonable construction, as we view the matter, is that, if a partnership commits an act of bankruptcy involving insolvency, the assets of the partnership and of its members are brought into the bankruptcy administration, unless, possibly, in some exceptional cases, like *In re L. Stein & Co.*, 127 Fed. 548, 62 C. C. A. 272, where one of the members was insane. A partnership cannot be adjudged a bankrupt, in an involuntary proceeding, unless it has committed an act of bankruptcy. If the act charged be one involving insolvency, since every partner is liable in solido for all the partnership debts, the adjudication against the partnership must be based on allegations and proof that the assets of its members, in excess of their individual debts, plus the assets of the partnership, are insufficient to pay the partnership debts. Otherwise there is no partnership insolvency, notwithstanding the entity doctrine. *In re Blair* (D. C.) 99 Fed. 76; *Vaccaro v. Security Bank*, 103 Fed. 436, 43 C. C. A. 279; *Davis v. Stevens* (D. C.) 104 Fed. 235; *In re Forbes* (D. C.) 128 Fed. 137; *In re Perley & Hays* (D. C.) 138 Fed. 927; *Dickas v. Barnes*, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654; *Tumlin v. Bryan*, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960; *Worrell v. Whitney* (D. C.) 179 Fed. 1014. That doctrine furnishes a direct proceeding against the partnership as a legal entity, but it does not authorize an adjudication of bankruptcy against a partnership, where the act of bankruptcy charged is one involving insolvency, unless, as above stated, it is shown that there is an insufficiency of partnership and individual assets to pay the partnership debts. If a partnership is insolvent, in the sense above explained, all the assets of the partnership and its members are needed for the proper winding up of the partnership affairs.

We find nothing in the present bankruptcy act indicating a purpose on the part of Congress to make it less efficacious in winding up the affairs of a bankrupt partnership than was the act of 1867. All the provisions of section 36 of that act, except the one concerning the discharge of partners, are, in substance, reproduced in section 5 of the present act. Section 5 adds to those provisions subdivision "a," which is the foundation of the entity doctrine, and subdivision "h," above quoted. In *Chemical Nat. Bank v. Meyer* (D. C.) 92 Fed. 896, Judge Thomas said:

"It is considered that subdivision 'h' means that in case all the members of a partnership are not adjudged bankrupt, and the partnership itself has not committed an act of bankruptcy, and thereby becomes exposed to adjudication, the partnership property shall, at the option of the other partner or partners, be administered by them or in bankruptcy."

On appeal, the Circuit Court of Appeals of the Second Circuit (*In re Meyer*, 98 Fed. 978, 39 C. C. A. 370) adopted the same view, saying:

"The last provision [that is, subdivision "h"] applies to a proceeding by or against one partner, or any number less than all, and means that the bankruptcy of one partner shall not preclude the other from settling the partnership business, and, like those immediately preceding it, is merely declaratory of a recognized equitable principle of administration in bankruptcy."

The Circuit Court of Appeals of the Eighth Circuit, in the Bertenshaw Case, *supra*, refused to adopt this view, and held that:

"Where a partnership has committed an act of bankruptcy, and where it has been adjudged bankrupt, as well as where it has not, and one or more, but not all, of its members have been adjudged bankrupts, the partnership may not be administered in bankruptcy without the consent of the partner or partners who are not adjudged bankrupt."

The Bertenshaw Case was not founded on insolvency of the partnership or of its members. The act of bankruptcy there charged was an assignment by the partnership of its assets for the benefit of its creditors—an act of bankruptcy that does not necessarily involve insolvency. The adjudication expressly stated that it bound only the partnership assets. Whether, where the act of bankruptcy charged against a partnership is one that does not involve insolvency, an adjudication against the partnership only draws into the proceeding the individual assets of the unadjudicated members, may well be doubted. That question, however, is not now before us. But to hold that, because a partnership is an entity, it may be adjudged a bankrupt upon an act of bankruptcy involving insolvency, without regard to the solvency or insolvency of its individual members, and its assets taken in *invitum* out of the possession of its members, who may be perfectly solvent, and administered in bankruptcy, is giving to the entity doctrine a meaning which we think neither the language of section 5 nor the history of the legislation on this subject shows Congress intended.

[2] In our opinion, the subdivisions of section 5 preceding subdivision "h" mean that a partnership is a legal entity that may be adjudged a bankrupt, irrespective of an adjudication against any of its members; that it may be so adjudged either in a voluntary or an involuntary proceeding; that in an involuntary proceeding, where the act of bankruptcy charged does not involve insolvency of the partnership, and where there is an adjudication against the partnership only, probably nothing is involved but partnership assets; that in an involuntary proceeding, where the act of bankruptcy charged is one that does involve insolvency of the partnership, there can be no adjudication against the partnership, unless it and all its members are insolvent; and that in such a case, though the adjudication be against the partnership only, or against the partnership and some, but not all, of its members, the estates of all the members are drawn into the proceeding for administration. If section 5 be thus construed, a partnership, which has been adjudged a bankrupt on the ground that it has committed an act of bankruptcy involving insolvency, will be wound up in accordance with the equitable principles adopted by that section and by section 36 of the act of 1867. Under the act of 1867, every member of a bankrupt partnership was compelled to deliver his individual

property to the trustee of the partnership for administration. We find nothing in the present act that confers upon an unadjudicated member of a partnership, which has been adjudged a bankrupt on a ground involving insolvency, the right to withhold his individual property from such a trustee. Where a partner and his partnership have not been adjudged bankrupts, but his copartners have, subdivision "h" reserves to him, as already stated, the right to close up the partnership business. Ordinarily, there is no reason why a man whose copartners have been individually adjudged bankrupts, but whose partnership has not been so adjudged, should have the assets of the partnership taken out of his hands against his consent. If he fails to perform his duty in winding up the partnership business, and to account for the shares of his bankrupt copartners, or if he be insolvent, a court of equity may take hold of the business and administer it. Parker v. Muggridge, 2 Story, 334, Fed. Cas. No. 10,743; Amsinck v. Bean, *supra*; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60.

The decision of this court in the Mercur Case, 122 Fed. 384, 58 C. C. A. 472, is not inconsistent with our present opinion. In that case the adjudications were against the members of the partnership as individuals. There was no adjudication against the partnership. We held, adopting the doctrine of Amsinck v. Bean, that the trustee of the estates of the individual members of the partnership did not represent the partnership. Here, holding, as we do, that where the act of bankruptcy charged against a partnership is one involving insolvency, there must be insolvency of the partnership and its members, the trustee of the partnership necessarily represents its members.

We accordingly conclude that, in the case in hand, it is the duty of Francis to deliver to the trustee of the bankrupt partnership his individual property. The order of the District Court, requiring such delivery, will therefore be affirmed, with costs.

MENKE et al. v. SUNDERMAN et al.

(Circuit Court of Appeals, Third Circuit. March 7, 1911.)

No. 59 (1,422).

BANKRUPTCY (§ 149*)—PARTNERS—SALE OF INDIVIDUAL PROPERTY.

Where an act of bankruptcy charged against a firm involved insolvency of the firm and of both of its members, the individual property of the partners was drawn into the bankruptcy proceedings for administration, as provided by Bankr. Act July 1, 1898, c. 541, § 5, 30 Stat. 547 (U. S. Comp. St. 1901, p. 3424); and hence such individual property was subject to sale and used to satisfy firm creditors, subject to the rights of individual creditors.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 229; Dec. Dig. § 149.*]

Petition for Review of Order of the District Court of the United States for the Western District of Pennsylvania.

In the matter of bankruptcy proceedings against Henry C. Menke & Co. On petition of William Sunderman, as trustee, etc., for an order directing the sale of the interest of Henry C. Menke in certain real

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

estate owned by him individually and as a tenant in common. An order was entered granting the petition, and Henry C. Menke and others were granted a petition to review. Affirmed.

McKee, Mitchell & Alter, for petitioners.

E. G. Hartje, W. K. Shiras, and C. C. Dickey, for respondents.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. Henry C. Menke and Anna M. Menke were partners, trading under the firm name of H. C. Menke & Co. The partnership was adjudged a bankrupt on a creditor's petition alleging, as the act of bankruptcy, that it had, while insolvent, permitted Marie M. Menke to obtain a preference through executions issued on confessed judgments and levies on the partnership property. There was no adjudication against either of the partners individually.

The referee, upon the petition of the trustees of the bankrupt partnership, made an order directing the trustee to sell, at public sale, the interest of Henry C. Menke in certain real estate which he and one Anna L. Roeder owned as tenants in common. The District Court affirmed the order of the referee, and the case now comes to us on a petition to revise, in matter of law, the order of the District Court.

The act of bankruptcy charged against the partnership involved insolvency of the partnership and both of its members. Consequently, under section 5 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]), as it is construed by this court in the opinion of Francis v. McNeal, Trustee, 186 Fed. 481, just filed, the individual properties of the partners are drawn into the bankruptcy proceeding for the purposes of administration. Of course, the rights of the creditors of the individual members of the partnership must be preserved. The order here complained of simply directs the trustee to make public sale of Henry C. Menke's individual half interest in the real estate referred to.

It appears that one of Marie M. Menke's judgments is against Henry C. Menke, Anna M. Menke, and Anna L. Roeder, and the other against the partnership and Henry C. Menke. The order affirmed by the District Court does not direct a sale free from either of the judgment liens. As the order stands, the sale must be subject to the liens. We make this statement to guard against any misunderstanding of the effect of our decision.

The order of the District Court will be affirmed, with costs.

COLUMBUS COMPRESS CO. V. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court of Appeals, Fifth Circuit. March 7, 1911. On Application for Rehearing, April 4, 1911.)

No. 2,121.

1. JURY (§ 28*)—WAIVER—RECORD—SUFFICIENCY.

A recital in a judgment that both parties, announcing "Ready for trial" formally waived a jury in open court, is insufficient to show waiver

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of jury by written stipulation, as required by Rev. St. § 649 (U. S. Comp. St. 1901, p. 525).

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 28.*]

2. APPEAL AND ERROR (§ 553*)—RECORD—SUFFICIENCY.

A substitute for a formal bill of exceptions, indorsed by the trial judge, "The foregoing contains the agreed record," held not to constitute a finding of facts, or agreed statement of facts.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 553.*]

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

Action between the Columbus Compress Company and the United States Fidelity & Guaranty Company. From the judgment, the Compress Company brings error. Affirmed.

William Baldwin, for plaintiff in error.

William M. Hall, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. [1] This case was tried and decided in the Circuit Court without the intervention of a jury, and the record shows no written stipulation waiving a jury. It follows that on this writ there is nothing for us to review, save as to the sufficiency of the declaration, as to which no question was made. *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Dundee Mortgage & Trust Investment Co. v. Hughes*, 124 U. S. 157, 160, 8 Sup. Ct. 377, 31 L. Ed. 357.

[2] We notice, further, that the substitute for a formal bill of exceptions, found in the record and indorsed by the judge as follows: "The foregoing contains the agreed record"—is neither a finding of facts nor an agreed statement of facts, such as the court could consider, were the findings of the trial judge open for review. See *Raimond v. Parish of Terrebonne*, 132 U. S. 192, 10 Sup. Ct. 57, 33 L. Ed. 309; *Glenn v. Fant*, 134 U. S. 398, 10 Sup. Ct. 583, 33 L. Ed. 969.

Under these circumstances, we are constrained to affirm the judgment of the Circuit Court; and it is so ordered.

On Application for Rehearing.

The record before us is not sufficient to show a waiver of jury by a stipulation in writing filed with the clerk, as required by Rev. St. U. S. § 649 (U. S. Comp. St. 1901, p. 525). A recital in the judgment, "that both plaintiff and defendant announcing 'Ready for trial' and formally waiving a jury in open court," is not such a recital as this court can assume therefrom that a jury was waived by a stipulation in writing. See *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395; *Hodges v. Easton*, 106 U. S. 408-412, 1 Sup. Ct. 307, 27 L. Ed. 169; *Bond v. Dustin*, 112 U. S. 607, 5 Sup. Ct. 296, 28 L. Ed. 835. Cases that control the appellate court when the jury is waived without written stipulation will be found cited in 4 Fed. St. Ann. 451. See, also, *Bond v. Dustin*, *supra*, 112 U. S. 604, 5 Sup. Ct. 296, 28 L. Ed. 835; *Dundee v. Mortgage & Trust Investment Co. v. Hughes*, 124 U. S. 157-160, 8 Sup. Ct. 377, 31 L. Ed. 357.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The agreed record approved by the judge is a recital of the evidence, written and oral, containing an agreement that counsel should have the advantage of objection and exception to any of the foregoing matters and testimony put in evidence, as if formally heard and reserved, and is not a finding or agreed statement of the ultimate facts in the case, as required in Raimond v. Parish of Terrebonne, 132 U. S. 192, 10 Sup. Ct. 57, 33 L. Ed. 309, and like cases.

The petition for rehearing is denied.

NASH et al. v. UNITED STATES.[†]

(Circuit Court of Appeals, Fifth Circuit. November 29, 1910.)

No. 1,951.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

Criminal prosecution by the United States against the American Naval Stores Company, Edmund S. Nash, and others. From a judgment of conviction, defendants bring error. Affirmed.

See, also, 172 Fed. 455; 186 Fed. 592.

Samuel B. Adams and Peter W. Meldrim, for plaintiffs in error.

Alexander Akerman, Asst. U. S. Atty., and W. M. Toomer, Special Asst. U. S. Atty.

Before PARDEE and SHELBY, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. A majority of the court is of opinion that there is no error in the record. The judgment of the Circuit Court is therefore affirmed.

NELSON v. AMERICUS MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. November 5, 1910.)

No. 2,128.

1. LOGS AND LOGGING (§ 3*)—CONTRACT FOR SALE AND REMOVAL OF STANDING TIMBER—CONSTRUCTION.

A lease of land, giving the lessee the right to cut all the timber on the land suitable for sawmill purposes during the term of 20 years, entitles him to cut, not only the timber suitable at the date of the lease, but all that becomes suitable during the term.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

2. INJUNCTION (§ 52*)—CUTTING OF TIMBER BY TENANT—INSOLVENCY OF DEFENDANT.

A bill alleging that complainant leased land to defendant, with the right to cut the timber thereon suitable for sawmill purposes, but that defendant is cutting practically all the timber standing on said lands suitable for any purpose and is insolvent, states a cause of action for equitable relief by injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

*For other cases see same topic & § number in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

† Rehearing denied December 20, 1910.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

Suit in equity by Rollin J. Nelson against the Americus Manufacturing Company. Decree for defendant, and complainant appeals. Reversed.

M. P. Callaway and Geo. S. Jones, for appellant.

Du Pont Guerry, E. A. Hawkins, and Alex. Akerman, for appellee.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. We are of opinion that by the lease the lessees acquired the right to cut all the timber on the lands suitable for saw-mill purposes during the 20 years covered by the lease. The lessees are entitled to cut, not only the timber suitable at the date of the lease, but all that becomes suitable during the life of the lease.

If the equity of the bill depended alone upon a different construction of the lease, the ruling of the Circuit Court in sustaining the demurrer would be upheld; but the bill avers the insolvency of the lessees, and alleges that the defendant "is cutting practically all the growth standing on said lands, and actually denuding said lands of all its timber suitable for any purpose." The averments of section 11 of the bill, from which the excerpt quoted is taken, in connection with the averments of insolvency, are sufficient to sustain the equity of the bill, as against the demurrs in the record. *Graves v. Ashburn*, 215 U. S. 331, 30 Sup. Ct. 108, 54 L. Ed. 217.

The decree sustaining the demurrer and dismissing the bill is reversed, and the cause remanded for further proceedings.

NATIONAL METAL WEATHER STRIP CO. v. BREDIN et al.

(Circuit Court of Appeals, Third Circuit. April 26, 1911.)

No. 1,471 (26).

1. PATENTS (§ 318*)—INFRINGEMENT—PROFITS RECOVERABLE.

Where a defendant made and sold weather strips for the equipment of windows, consisting of a frame strip, a sash strip, and a meeting rail strip, the frame strip only being an infringement of complainant's patent, the profits made on such frame strip are alone recoverable in a suit for the infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

2. PATENTS (§ 318*)—INFRINGEMENT—COMPUTATION OF PROFITS.

In computing the entire profits made by a corporation engaged in the manufacture and sale of weather strip as a basis for ascertaining the profit made on certain of its product which infringed a patent, it is a proper method to take its dividends paid during the time covered by the accounting, and to add thereto the amounts it had paid out other than in the conduct of its business, where it is not shown that it paid exorbitant salaries or otherwise unfairly disposed of its earnings.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566-576; Dec. Dig. § 318.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 318*)—SUIT FOR INFRINGEMENT—PROFITS RECOVERABLE—PLEADING.

In a suit for infringement by the joint owners of a patent, profits and damages which inure to the benefit of one of the complainants only as a licensee are not recoverable where no foundation for such recovery is laid by the pleadings, but complainants sue as joint owners only.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 318.*]

4. PATENTS (§ 319*)—SUIT FOR INFRINGEMENT—DAMAGES RECOVERABLE.

Where complainants, who were owners of a patent and manufacturers of the patented article, granted exclusive licenses for certain territory to use the patented article, the licensees binding themselves to buy from them only, and defendant solicited and obtained orders from such licensees for an infringing article, complainants are entitled to recover as damages for the infringement, in addition to the profits made by defendant on such sales, the difference between such profits and the profits complainants would have made if the licensees had purchased from them.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 577-586; Dec. Dig. § 319.*]

Accounting by infringer for profits, see notes to *Brickill v. Mayor, etc., of City of New York*, 50 C. C. A. 8.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

Suit in equity by James Bredin, Charles H. Bredin, and Hugh E. Kenny against the National Metal Weather Strip Company. Defendant appeals from a final decree (182 Fed. 654) awarding profits and damages. Decree modified.

Charles M. Clarke (W. A. Griffith, of counsel), for appellant.

L. S. Bacon (Bacon & Milans, of counsel), for appellees.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

LANNING, Circuit Judge. By their bill of complaint filed in this case James Bredin, Charles H. Bredin, and Hugh E. Kenny alleged that they were the joint owners of patent No. 424,905 for a new and useful improvement in weather strips for windows, etc., and that the defendant, the National Metal Weather Strip Company, was an infringer of the patent. In the course of the proceedings James Bredin, one of the complainants, died, and his personal representatives were substituted on the record in his place. The Circuit Court adjudged the patent to be valid and infringed, and ordered an injunction and an accounting. See Opinion in *Bredin v. National Metal Weather Strip Company* (C. C.) 147 Fed. 741. The decree of that court was affirmed by this court. See 157 Fed. 1003, 85 C. C. A. 281. The case then went to a master for an accounting for profits and damages. The master, having taken the proofs offered, filed his report denying to the complainants any profits and awarding only nominal damages. Exceptions were filed to the report, and the Circuit Court sustained several of the exceptions, and by its decree awarded to the complainants for profits and damages the sum of \$15,554.11. See 182 Fed. 654. From that decree the defendant has again appealed to this court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the amount awarded to the complainants is the sum of \$9,082.58, being for manufacturer's profits on 908,258 feet of weather strip at a cent per foot. We are clear that the complainants are entitled to recover from the defendant what are termed "manufacturer's profits"; that is, profits which the defendant company made in the manufacture and sale of weather strips embodying the complainants' patent. It is conclusively proven, however, that the strips manufactured by the defendant included something more than what was covered by the complainants' patent. In *Crosby Valve Co. v. Safty Valve Co.*, 141 U. S. 452, 12 Sup. Ct. 53 (35 L. Ed. 809), the complainant was allowed the whole of defendant's profits. The court said:

"The entire commercial value of the valves made and sold by the defendant was due to the improvement covered by the patent of 1866, and that the complainant's valves of commerce, all of them, contain the improvements covered by the patent of 1866."

In *Wales v. Waterbury Mfg. Co.*, 101 Fed. 126, 41 C. C. A. 250, it was also held that, where the article sold by the defendant would have been unsalable except for the fact that it embodied the complainant's patent, the complainant was entitled to all the defendant's profits. The same rule was applied in *Orr & Lockett Hardware Co. v. Murray*, 163 Fed. 54, 89 C. C. A. 492. These cases follow the rule stated by Justice Bradley in *Elizabeth v. Pavement Company*, 97 U. S. 126, 139, 24 L. Ed. 1000, that, when the entire profit of a business results from the use of the patented invention, the patentee will be entitled to recover the entire profits if he elects that remedy.

[1] In the present case, however, there is no difficulty in distinguishing, with reasonable certainty, between the proportion of the defendant's profits derived from the use of the complainants' patent and the proportion not so derived. The weather strips manufactured by the defendant consisted of three members—the frame strip, the sash strip, and the meeting rail strip. The complainants' patent covered only the frame strip. The defendant's profit on these strips was found by the master, and assumed by the court, to have been one cent per foot for 908,258 feet, or \$9,082.58. That amount is excessive. According to the uncontradicted evidence, the defendant's total profit on the three kinds of strips for the whole of the accounting period was \$4,580.23. The master criticised the method by which that sum was ascertained, but it was unobjectionable.

[2] The portion of the profit paid out in dividends during the accounting period and the sums paid for legal and expert services in the litigation over the patent were added together, and from the sum was deducted the deficit existing at the end of the accounting period. Assuming that the defendant company paid no exorbitant salaries, and that it did not in any other manner unfairly dispose of its earnings, and there is no suggestion that it did, we think the method was as fair a one as could have been adopted. Taking, then, \$4,580.23 to be the profit made by the defendant in the manufacture and sale of the three kinds of weather strips, it is necessary, in the next place, to ascertain what proportion of that sum should be paid to the complainants. The proof is that the profit on the sash strip is slightly more than on

the frame strip. The evidence is silent as to the profit on the meeting rail strip, but the amount manufactured of that strip was comparatively small. Of the total profit of \$4,580.23, the sum of \$2,250 will be a liberal allowance to the complainants for the profit on the frame strip, which was the only element covered by their patent.

[3] Another item entering into the total amount of the decree now objected to is the defendant's profit on installations of weather strips in what is called the Pittsburgh district. This profit was \$1,213.91. That this part of the defendant's profits does not belong to the complainants as joint owners of the patent is conceded. The argument is that it belongs to the executors of James Bredin, who was the complainants' licensee for the Pittsburgh district. The claim for profits and damages made by the bill of complaint was solely that of the three complainants as joint owners of the patent in suit. James Bredin was one of those owners, but no claim by him as a licensee was made in the bill, and there was no prayer for relief in his behalf as licensee. No ground was laid in the bill for such a recovery, and we agree with the master that upon elementary principles of pleading the executors cannot recover as representatives of the licensee in this suit. We think the principle applied by this court in *Brookfield v. Novelty Glass Manufacturing Company*, 170 Fed. 960, 96 C. C. A. 652, should be applied here. In that case it was said:

"So far as appears, the bill proceeds in the interest and for the benefit of the owner of the patent alone, and it is not at this stage to be transformed into something else. It is only where the licensee, exclusive or nonexclusive, is in fact, in whole or in part, the beneficial party, that anything can be claimed by way of damages on his account. And it should be made clear in some way that recovery is sought on the strength of it, if that is to be the case."

Even if James Bredin's claim as licensee could have been properly joined with the claim of the owners of the patent, it was not so joined, and the award to the complainants jointly of profits arising, not from the manufacture and sale of the strips, which did belong to the complainants, but from the installation of the strips, which belonged exclusively to the licensee, was to extend the decree quite beyond the scope of the pleadings. The item of \$1,213.91 should therefore be rejected.

The third, fourth, and fifth items entering into the total sum awarded by the final decree are as follows:

3. Damages in excess of profits on sales to complainants' agents, 71,634 feet, at half a cent a foot, \$358.17, trebled on account of the aggravated character of the infringement.....	\$ 1,074 51
4. Damages in excess of profits in the Pittsburgh district, on 295-065 feet, at half a cent a foot, which the complainants would otherwise have sold.....	1,475 32
5. Damages in excess of profits at the same rate on the rest of the weather strips sold by the respondent through the entire field	2,707 79

[4] The master thought the evidence on the subject of damages was so uncertain that nominal damages only could be awarded. The Circuit Court thought otherwise. We agree with the court as to the

third item. That item of 71,634 feet of strip was sold by defendant to one of the complainants' agents who was under contract to purchase from the complainants. The proofs show that the complainants' profit on the strips manufactured and sold by them was 1½ cents per foot. It is fair to assume that this agent would have purchased the 71,634 feet from the complainants if the defendant's infringing strip had not been offered to him. The damage sustained by the complainants as to this transaction was therefore the difference between 1½ cents per foot, or \$1,074.51, and a proportionate part of the above mentioned sum of \$2,250, or \$143.27, being \$931.24. We find no evidence of such a wanton violation of the complainants' rights as justifies a trebling of these damages.

We think the fourth and fifth items should be rejected. Their allowance is based on the assumption that, except for the defendant's competition, the complainants would have done the business represented by those items. The evidence is too uncertain and speculative to be the basis of such awards. Other competitors were in the field, notably the Golden Metal Weather Strip Company, which during the defendant's accounting period sold five times as many feet of metal weather strips as did the defendant, besides others who were dealing in felt and rubber strips. How much of the business acquired by the defendant would have gone to the complainants if the defendant had kept out of the field is a matter of conjecture only. For aught we know, it would have gone to the Golden Company or to some other party or parties.

Our conclusion is that the decree should be reduced to the sum of \$2,250 and \$931.24, or \$3,181.24. The record will be remanded to the Circuit Court with instructions to modify the decree by striking out the clause reading as follows: "And whereas on the 9th day of November, 1910, this court, upon due consideration of all the facts in the case, awarded the complainants as damages and profits ascertained and found the sum of \$15,554.11"; and by changing the second paragraph thereof which now reads as follows: "The defendant herein, the National Metal Weather Strip Company, do pay to the complainants the sum of \$15,554.11 with interest at 6 per cent. from March 3, 1910, and that said complainants have forthwith execution therefor," to read as follows: "The defendant herein, the National Metal Weather Strip Company, do pay to the complainants the sum of \$3,181.24, with interest at 6 per centum per annum from March 3, 1910, and that said complainants have forthwith execution therefor," and that the decree as thus modified be affirmed. No costs will be allowed to either party in this court.

VROOMAN et al. v. PENHOLLOW et al.

(Circuit Court of Appeals, Sixth Circuit. April 25, 1911.)

No. 2,013.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—VEGETABLE TOPPING MACHINE.

The Vrooman patent, No. 676,549, for a vegetable topping machine, claims 1, 3, 4, 6, and 7 held valid and infringed.

2. PATENTS (§ 325*)—COSTS—PERSONS LIABLE—JOINT DEFENDANTS—DISCRETION OF COURT.

In a suit against joint wrongdoers as infringers of a patent, it is only in rare and exceptional cases, where one defendant has participated only in a trivial or almost wholly unrelated manner, that the court will exercise its discretion in his favor by relieving him from full liability for costs.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 325.*]

Petition for rehearing. Denied.

For former opinion, see 179 Fed. 296, 102 C. C. A. 484.

Before SEVERENS and KNAPPEN, Circuit Judges, and SANFORD, District Judge.

SEVERENS, Circuit Judge. From the opinion of the court below, which was filed and sent up with the transcript, we learn that the subjects of this litigation, as there presented, were claim 5 of patent No. 580,742, and claims 1, 3, 4, 6, and 7 of patent No. 676,549. Claim 5 of the first patent was considered in our original opinion, and the questions of its validity and the infringement thereof were there disposed of.

From the course of the argument in this court concerning the second patent, we inferred that only claim 3 of the second patent was relied upon. But in the petition for rehearing we were informed that it was not intended that the consideration of the second patent should be thus restricted; and we were requested to take into account the other claims of the patent. In these circumstances we have thought it right to extend our review of the case to those claims of the second patent, other than claim 3, which were made the subject of controversy in the court below.

In the argument on this petition for rehearing, the discussion proceeded mainly upon the lines adopted at the first hearing, and the general subject of the validity and the infringement of the second patent, and scarcely any attention was paid to any possible distinction between claim 3 and the other claims which we were requested to further consider. We are content to abide by our former opinion to the extent to which it goes. And we are unable to perceive any valid reason for thinking that such other claims are not subject to the same reasons and results as we attributed to the third claim. The substance of the invention is present in all of them, and the infringement is by the use of the identical machinery.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

We are therefore of the opinion that the decree of this court should include with claim 3, claims 1, 4, 6, and 7 of patent No. 676,549—and it should be modified accordingly.

A motion has been made in behalf of the defendant Baker that the costs adjudged against the defendants may be distributed among them in proportion to the extent of their participation in the infringement complained of. It is apparently true that in some rare cases where there were several wrongdoers, some of whom had participated in doing the wrong only in a trivial or almost wholly unrelated manner, the court has exercised its discretion in their favor and cast the heavier burden of the costs to which all are liable upon the more guilty parties. But such cases are exceptions to the general rule upon very special circumstances. We think the position which Baker has taken and held in this matter has not been such as ought to induce the court to exercise its discretion in his favor. We have the conviction that he was the most potent factor in the infringement and that it was mainly because of his countenance and encouragement that the other defendants persevered in it.

We think the motion should be denied.

PALMER et al. v. JORDAN MACH. CO.

(Circuit Court, N. D. New York. January 31, 1911.)

No. 7,230.

1. PATENTS (§ 328*)—INFRINGEMENT—APPARATUS FOR INVERTING TUBULAR FABRICS.

The Palmer patent, No. 878,995, for an apparatus for inverting tubular fabrics, covers a combination consisting of a horizontal tube or cylinder upon which the fabric is to be drawn, to be inverted or turned the other side out when it is removed. At one end of the tube are two vertical bearing frames, one on each side, hinged at the bottom, each with an upright shaft carrying a feed roll, the rolls being adapted to engage opposite sides of the tube, and, when rotated, to take hold of the end of the fabric, and draw and press it onto the tube. To prevent tearing or injury to the fabric and to provide for inequalities in thickness, one element of the combination as shown by the specification and drawings and enumerated in most of the claims is a coil spring making a resilient connection between the tops of the two frames, which normally holds the rolls against the sides of the tube, but with a yielding pressure. Held that, in view of the prior art and the proceedings in the Patent Office, such spring must be considered an essential feature of the invention, and that the use of an iron rod, threaded at both ends, making a rigid connection between the frames which can be lengthened or shortened by turning the rod by means of a lever, as in the machine of the Jordan patent, No. 960,227, was not the substitution of an equivalent for the spring, and that the Jordan machine which secures the yielding pressure of the rolls by means of internal springs does not infringe the Palmer patent.

2. PATENTS (§ 22*)—INFRINGEMENT—SUBSTITUTION OF EQUIVALENTS.

The test of equivalency with respect to a substituted element in a patented combination is whether it operates in substantially the same way to produce substantially the same result in the combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. § 22.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

3. PATENTS (§ 287*)—SUIT FOR INFRINGEMENT—LIABILITY OF CORPORATION.

A manufacturer made and sold certain machines which infringed complainant's patent. Before the machines had been accepted and paid for, he transferred his business to defendant corporation of which he became president, and also transferred his accounts receivable, among which was that for the infringing machines, and bills therefor were rendered and collected by defendant. *Held* that, as defendant never became owner of the machines, it was not chargeable as an infringer for having used or sold the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 457, 458; Dec. Dig. § 287.*]

4. PATENTS (§ 283*)—SUIT FOR INFRINGEMENT—DEFENSES—ESTOPPEL.

The president of defendant corporation, who had prior to its organization built and sold machines infringing complainant's patent, which had not been paid for, the accounts for which had been transferred to defendant, on behalf of defendant wrote a letter to the purchaser, in which he acknowledged the sale of the machines by defendant, and guaranteed in its behalf that they were not infringements. *Held* that, while such letter was an admission of liability to the purchaser, it did not estop defendant as against complainant from showing in defense to a suit for the infringement that it did not in fact build or sell the machines.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 283.*]

5. WORDS AND PHRASES—"YIELDING MEANS"—"YIELDING MECHANISM."

The underlying idea of "yielding means" or "yielding mechanism" is something that will give way under pressure.

6. WORDS AND PHRASES—"NORMALLY."

The word "normally" is defined "as a rule; regularly; according to a rule, general custom," etc.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4829.]

7. SALES (§ 1*)—"SALE BY AGREEMENT."

To constitute a "sale by agreement," there must be an intent to sell and an intent to purchase, a purpose to pass title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.*]

In Equity. Suit by William B. Palmer and Jesse V. Palmer against the Jordan Machine Company for infringement of letters patent No. 878,995 for apparatus for inverting tubular fabrics, granted to William B. Palmer February 11, 1908. On final hearing. Decree for defendant.

Herbert Van Kirk and Daniel A. Rollins, for complainants.
Walter E. Ward, for defendant.

RAY, District Judge. The patent in suit, No. 878,995, was granted to William B. Palmer February 11, 1908, on application filed December 5, 1905, after having been amended and rejected as to some of the claims in the Patent Office. Claims 1, 2, 3, 5, 6, 7, and 8 are in issue. The patent relates to "apparatus for inverting tubular fabrics"; that is, turning them inside out. The open end of the tubular fabric is placed upon a cylinder or roller of suitable size and properly supported, but at or near one end only, usually in a horizontal position, and the purpose of the mechanism, quite simple and old in every detail, except in the combination and this particular art, is to push

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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a great or considerable length of tubular fabric onto this cylinder, or roller, to the end that when on, as we would put a stocking on a suitable roller, a person may take hold of one end of the fabric, that first placed on the roller, and by pulling backward finally strip it therefrom, and in the process, of course, "inverting" it or turning it "inside out." Once on the roller, the "inversion" may be done in more ways than one, but the patent does not relate particularly to that part of the process. This patent has nothing to do with the means for supporting the cylinder or roller. We have two upright frames opposite to and at a little distance from each other, and each frame is hinged to a stationary bed piece, so they will swing or move both towards and away from each other freely. Each frame carries or supports an upright shaft rotatively mounted in suitable bearings attached to or supported by its frame. Each shaft carries at or near its upper end a feed roll, which revolves with its shaft. It is not necessary to particularly describe the feed rolls, as they were old in this and other arts. Each shaft might carry two or more feed rolls. It is necessary to have the shafts of the same length and the feed roll of each at the same distance from the upper end, so that, when the frames are swung together, the two feed rolls will meet, and hence, before meeting, grasp, so to speak, the interposed end of the above-mentioned cylinder or roller having thereon at the commencement of the operation of "inverting" one end of the fabric. It is seen, at once, that if these two frames carrying the shafts, and hence the feed rolls, are swung towards each other until the feed rolls grasp or come in contact with the fabric on the interposed cylinder, roller, or tube (tube in the patent), and then, revolved in the proper direction, they will, acting in unison, pull and gather and push the fabric along on the said cylinder, roller, or tube, hundreds of yards if necessary. There are, of course, means for revolving the shafts and attached feed rolls. It is apparent that the frames and feed rolls must be moved away from each other to place in position the tube used to carry or take up the fabric and also when removing it after having been loaded; also, that the said frames, and hence the feed rolls, must be moved towards each other until they grasp the tube and end of the fabric thereon when the operation of loading the tube begins; also, that the said feed rolls carried by the shafts, and, in turn, by the frames, must be kept in contact with said tube or roller taking up and carrying the fabric so long as the operation of taking up and gathering thereon continues. To bring these frames towards each other and hold them in position as stated, the patent in suit, in the specifications, and also in the drawings forming a part thereof, describes and shows "a coil spring," the one end attached to the one frame and the other end to the other frame. With nothing further the feed rolls would be constantly drawn together or in contact with the tube when there. To keep them apart the said patent (and drawings) shows "a brace in the form of a toggle"; that is, a brace with a toggle joint, one end of the brace being attached to one frame and the other end to the other frame.

It is here, in connection with this means of bringing the two frames (and consequently the feed rolls) towards each other and holding them

together and also apart, that this controversy arises. The defendant uses no brace or toggle joint, nor does it use a coil spring or any spring for this purpose, or to perform the function mentioned, in whole or in part. The defendant uses a solid straight bar of iron screw threaded at each end and one end enters a correspondingly screw threaded aperture in one frame and the other end a correspondingly screw threaded aperture in the other frame and this bar is turned with a crank or lever by hand, so that by turning this rigid bar, screw threaded as described in one direction, the frames are made to approach each other, while by turning it in the other direction such frames are made to recede from each other. The "coil spring" shown and described in the patent is self-operating, automatic, so to speak, in bringing and holding the frames towards each other and in bringing and holding the feed rolls in contact with the fabric on the tube or roller. The brace with toggle joint is used to hold them apart and in pushing them apart.

I will insert the claims in issue before referring to the details of the specification and drawings. They read as follows:

"1. In an apparatus of the class described, the combination with the fabric-supporting tube; of a pair of feed rolls adapted to engage the opposite sides of said tube; and yielding means for forcing said feed rolls against said tube.

"2. In an apparatus of the class described, the combination with a fabric-supporting tube; of a pair of feed rolls disposed on opposite sides of said tube; yielding means for forcing said feed rolls toward each other; and locking mechanism for maintaining said rolls withdrawn from said tube at certain times.

"3. In an apparatus of the class described, the combination with a fabric-supporting tube; of a pair of bearing frames pivotally mounted at one side of said tube; yielding mechanism for drawing said frames toward each other; a pair of shafts rotatively mounted in bearings in the respective bearing frames; feed rolls fixed upon said shafts respectively adapted to engage opposite sides of said tube; and means for transmitting power to said shafts. * * *

"5. In a machine of the character described, the combination with a fabric-supporting tube, of a pair of bearing frames, one mounted at each side of the tube, a resilient connection between the two frames whereby the frames are drawn towards each other, and a rotatable feed roll carried by each of said frames, said feed rolls adapted to engage opposite sides of the tube.

"6. In a machine of the character described, the combination with a fabric-supporting tube, of a pair of bearing frames, one mounted at each side of the tube, a resilient connection between the two frames whereby the frames are drawn towards each other, a rotatable feed roll carried by each of said frames, said feed rolls adapted to engage opposite sides of the tube, and means for maintaining said rolls out of engagement with said tube.

"7. An apparatus of the class described comprising a fabric-supporting tube, a pair of swinging frames, means for normally drawing said frames towards each other, an upright shaft carried by each of the frames, a feed roll connected with each of the shafts, said feed rolls positioned one at each side of the tube, and means for operating the shafts.

"8. An apparatus of the class described comprising a fabric-supporting tube, a pair of swinging frames, means for normally drawing said frames towards each other, an upright shaft carried by each of the frames, a feed roll connected with each of the shafts, said feed rolls positioned one at each side of the tube, means for operating the shafts, and means for maintaining said rolls out of engagement with said tube."

It is noticed that claim 1 is a combination claim calling for (1) the fabric-supporting tube which I have referred to also as a roller or cylinder; (2) a pair of feed rolls adapted to engage the opposite sides of said tube; and (3) yielding means for forcing said feed rolls against said tube. We have no reference to any means for forcing the feed rolls away from the tube, and, when we turn to Fig. 2 of the drawings and look at the coil spring, 7, and then read the following in the specification, "A coil spring, 7, connects together the upper vibratory ends of said bearing frames tending to draw the same together so as to force the feed rolls, 3, against opposite sides of the supporting tube, 1, as indicated by dotted lines in Fig. 2," we can have no doubt as to what is intended by "yielding means." This claim certainly refers to a coil spring or its well-known equivalent, something that is in and of itself yielding as it calls for "yielding means for forcing said feed rolls against said tube." I am of the opinion that a solid bar of iron or steel, screw threaded at each end, and having each end, respectively, inserted in screw threaded apertures in the two frames and operated by hand in the manner described to force the feed rolls against the tube, is not "yielding means for forcing said feed rolls against said tube" within the meaning of this claim or patent or a well-known equivalent therefor. I hold that this claim is not infringed by the defendant, for the reason that the defendant does not use a combination having as one of its elements yielding means for forcing feed rolls against the tube or a combination containing a well-known equivalent therefor.

Claim 2 also calls for yielding means for forcing said feed rolls toward each other, and also calls for locking mechanism for maintaining said rolls withdrawn from said tube at certain times. The locking mechanism referred to in this claim is evidently the brace with toggle joint. I do not think that the threaded iron or steel bar referred to is locking mechanism. However, it may be regarded as an equivalent for the locking mechanism of the patent in suit. It is not necessary to discuss that proposition, inasmuch as the defendant's machine or apparatus does not have yielding means for forcing said feed rolls toward each other, and hence defendant does not infringe claim 2.

Claim 3 of the patent in suit substitutes "yielding mechanism for drawing said frames toward each other" for the "yielding means for forcing said feed rolls toward each other" or "against said tube," as claimed in claims 1 and 2. I do not regard this substitution as of importance. Evidently the patentee referred to and intended to claim a coil spring or its well-known mechanical equivalent, and had reference to mechanism of that character. I hold that the solid bar of iron or steel and operating as described and used by the defendant is not yielding mechanism within the meaning of claim 3 or its well-known mechanical equivalent.

Coming to claims 5 and 6, in place of "yielding means" and "yielding mechanism" for drawing the frames toward each other or against the tube, we have as an element of said claims 5 and 6 "a resilient

connection between two frames whereby the frames are drawn towards each other." I am of the opinion, and hold, that the steel or iron bar described and used in the manner described to connect the two frames and draw them towards each other and force them away from each other is not "a resilient connection between the two frames," nor a well-known mechanical equivalent for a resilient connection, and I therefore hold that the defendant does not infringe either claim 5 or claim 6, as it does not use or have any resilient connection between the two frames for the purpose mentioned or for any other purpose.

[5] The underlying idea of "yielding means" or "yielding mechanism" is something that will give way under pressure. The body of a carriage, road or railroad carriage, is connected to the axles by "yielding means" or "yielding mechanism," such as the ordinary carriage springs or strong coil springs. The connecting means or mechanism yield under pressure, under the load, and allow or compel the body and axle to approach each other. Remove the load or pressure, and the carriage body springs back into position. So coil springs may be used which hold the two bodies together or near together and pressure is used to separate them; that is, on pressure the one moves away from the other, but remove the pressure tending to separate them, and they come together again by force of the yielding means or mechanism connecting them. The two bodies might be separated by means of four levers, one at each corner, and by pressing on the outer end of such levers. Remove the pressure or weight on the levers, and the two bodies would come together, the top one dropping by force of gravity or weight to the lower one. Would this be yielding means or yielding mechanism for either bringing them together or forcing them apart? So the body of a car may be raised from the tracks by means of jackscrews as a building may be raised from its foundation thereby; that is, we turn the lever of the jackscrew and by the operation of the screw the one is raised from the other, and by reversing the motion of the jackscrew lever it is lowered. Are jackscrews operated in this manner "yielding means" or "yielding mechanism" within the meaning of these claims?

Webster defines "yielding" as "inclined to give way or comply; flexible; compliant." Century dictionary defines "yield," verb, intrans., "1. To produce; bear; give a return for labor; as the tree yields abundantly; the mines yielded better last year. 2. To give way, as to superior physical force, to a conqueror," etc. And "yielding" as follows: "(3) A giving away under physical pressure; a settling." And "yielding" p. a., "Inclined or fit to yield in any sense of the word; especially, soft; compliant; unresisting."

When we operate the screw threaded bar of defendant's apparatus by means of a lever or wheel, we either draw or push the hinged frames carrying the shafts and attached feed rolls by the force applied to the lever and communicated to the bar, and thence to the screw threads. No part of this bar yields or gives way to the physical pressure. It is of the same length, size, and shape, and maintains its position. It yields to nothing except as turned on its axes by the

lever. Not so with a coiled spring or a yielding spring of any description. An open coil may be pressed together by force, and it yields, contracts, and carries whatever is attached thereto with it. Remove the force and it springs apart, resumes its normal position, and carries with it whatever is attached. A closed coil spring may be drawn apart, partially uncoiled, so to speak, by force, and, when the force is removed, the spring will again coil; that is, draw together, carrying with it whatever is attached. Not interfered with, it draws from both ends with equal force, and if, as here, the frames and feed rolls, the things attached, are movable, they will be drawn together and kept in self-contact or in contact or engagement with whatever is placed between them, but in a yielding manner or yielding grasp, so as to allow for the passage of unequal or uneven surfaces without crushing or cutting; that is, without injury to the fabric. The recoil of the spring does this—without the application of outside force—and such a spring is self-acting and continuous in its action. This mode of operation is very different from that of a rigid steel or iron bar, turned with a lever and where at every turn of the lever the position of the frames and feed rolls becomes fixed and unyielding. We do not by substituting the bar have substituted means operating in substantially the same way to produce substantially the same results. The screw threaded bar does not yield to force, except as it is turned on its axis, but the hinged frames and the attached feed rolls do in a way as they are forcibly drawn together by means of the screw threads when the bar is turned. However, otherwise they remain rigidly in position, and are unyielding to uneven surfaces passing between the feed rolls. Unless a jackscrew is the mechanical equivalent of a coil spring, when yielding means or yielding mechanism are called for, a rigid iron or steel bar, screw threaded at each end and turned with a lever, is not. I cannot assent to any such proposition. In the patent in suit Fig. 2 shows a close coil spring extended, uncoiled by force, and held in that position by means of the brace toggle joint. Unlock this toggle, and the coil spring would resume its normal position, and draw the feed rolls against, and engage the fabric on the tube or roller in a yielding manner.

Claims 5 and 6, which have, as the principal element of operativeness, "a resilient connection between the two frames whereby the two frames are drawn towards each other," are much further away from defendant's machine. That a rigid steel or iron bar screw threaded at each end and inserted in corresponding screw threaded apertures in the hinged frames, respectively, is a "resilient connection between the two frames," is repugnant to my ideas of resiliency. Webster says of "resilient," as follows:

"Leaping back, rebounding, recoiling, returning to or resuming the original position or shape. Specif. Mech., of a body capable of withstanding sudden shock without permanent deformation or rupture. (2) Fig. Possessing power of recovery, elastic; buoyant."

And of "resilience" he says:

"The energy given out by a body which is released after being strained up to its elastic limit, or the energy to deform a bar to its elastic limit."

The Century dictionary defines "resilience" thus: "The act of **re-siling** (that is, starting back, recoiling) leaping or springing back; the act of rebounding"—and defines "resilient" as "having resilience; inclined to leap or spring back; leaping or springing back; rebounding." It is plain that a "coil spring connection" answers to a "resilient connection," but I have never discovered, and there is no credible evidence in this case to show, that a jackscrew or a rigid iron bar screw threaded at each end and turned by a lever forms a "resilient connection" between two objects which it is designed to move and allowed to move. The brace with toggle joint forms no part of these "yielding means for forcing said feed rolls against said tube" or "towards each other," or of the "yielding mechanism for drawing said frames towards each other," or of the "resilient connection between the two frames whereby the two frames are drawn towards each other." That toggle jointed brace is made a distinct element of claims 6 and 8.

The patentee, Palmer, has defined the use of this toggle brace as follows:

"To facilitate the application of the fabric to the supporting tube and its removal therefrom, I provide a brace, 12, in the form of a toggle, the outer ends of which are hinged to the respective bearing frames, 5, said toggle when fully opened serving to brace and hold said frames apart with the rolls, 3, withdrawn from the supporting tube, 1, in which position said toggle is adapted to be automatically locked by a spring-catch, 13, which may be of any known form adapted to be released by the hand of the operator when it is desired to close the toggle to permit the spring, 7, to draw the bearing frames together."

This further emphasizes the kind of connection and nature thereof he intends as part of his invention for bringing the two frames and feed rolls together or in engagement with the tube and fabric carried thereby. We find no suggestion in the drawings or specification of any means for drawing these frames, and the shafts and feed rolls carried thereby, towards each other aside from the coil spring, which, of course, includes any well-known mechanical equivalent for such a spring, but no suggestion of the use of any or all means that would bring them together or move them towards each other. The patentee is not entitled to any such broad construction or interpretation of his patent as that. He was not a pioneer in this art or this branch of the art, as we shall see, and he met with limitations in the Patent Office.

Claims 7 and 8.

When we come to claims 7 and 8, we have a somewhat different proposition. Claim 7 calls for an apparatus of the "class described," comprising (1) a fabric-supporting tube; (2) a pair of swinging frames; (3) means for normally drawing said frames towards each other; (4) an upright shaft carried by each of the frames; (5) a feed roll connected with each of the shafts, said feed rolls positioned one at each side of the tube; and (6) means for operating the shafts.

[6] Broadly and liberally construed, this claim, as well as claim 8, covers the defendant's apparatus or machine. The defendant has in its combination a tube, a pair of swinging frames, an upright shaft car-

ried by or connected with each of said frames, and a feed roll on each shaft positioned one at each side of the tube, and means for operating, revolving the shafts, and feed rolls thereon. The defendant also has means, the means described, for "normally" drawing said frames towards each other. The iron or steel bar described, screw threaded at each end, and connected with the movable frames in the manner described, when turned by crank or lever, operates to "normally" draw said frames towards each other, and consequently to bring the feed rolls carried by the shafts into engagement with the fabric on the tube, and hold them there rigidly and unyieldingly. This seems to be contrary to the spirit and purpose of the patent in suit. When the shafts are revolved, the feed rolls pull, gather "full," and push the fabric on and onto the tube or roller. The word "normally" is thus defined: "As a rule; regularly; according to a rule, general custom," etc. It is evident, I think, that the word "normally" was used to indicate that the frames are to be drawn towards each other regularly and uniformly or with equal force, so the feed rolls will grasp or engage the fabric with equal force on each side of the tube; that is, with uniform action in both feed rolls. The rigid screw threaded bar of defendant's machine does this with precision and certainty, assuming the feed rolls to be the same, but, as stated, they so hold the feed rolls in engagement with the fabric on the tube in a very different manner from that of the yielding coil spring of the drawings and specification of this patent. If the complainants are entitled to this broad construction of claims 7 and 8, the defendant infringes. But, in view of the specification and drawings and the prior art and the limitations of the Patent Office, are complainants entitled to such construction? Was Palmer entitled to such a broad claim as is now asserted? That is, to any and all means for drawing the frames and feed rolls towards each other, provided it is done regularly and according to a rule, or is the patent limited to resilient or yielding means in this regard? To determine this we must consult the prior art, the action of the Patent Office, and the patent itself.

The patentee says:

"My invention relates more particularly to an improved means for depositing the web of fabric upon the tube preparatory to inversion of the web. The principal objects of the invention are to facilitate the depositing of the tube of fabric upon the supporting tube preparatory to inversion, and to prevent injury to the fabric while thus being placed upon the supporting tube."

This idea of preventing injury to the fabric by cutting, tearing, wearing, etc., is made one of the two principal objects of the invention. It is readily seen that the fabric rigidly pressed against and pushed along on the tube by unyielding means might be cut or torn or worn through as was sometimes done in the prior art. Hence the leading and controlling idea of this improved machine to provide "yielding means" and "yielding mechanism" and "resilient connection between the two frames" and the "coil spring" connecting the frames carrying the shafts and feed rolls (which grasp the fabric), all for the purpose of providing means for yieldingly forcing the feed rolls against the fabric supporting tube, or fabric on the said tube, and not for

the purpose of providing "yieldingly supported" feed rolls, or feed rolls with "yielding supports," or rigid "feed rolls," or feed rolls having an "interrupted yielding surface," or feed rolls with "peripherally grooved body and straps of flexible material secured transversely of said grooves," etc., claims for all of which were rejected in the Patent Office.

Mr. Gooding, complainants' expert, admits, in answer to cross-interrogatory 45, that the coil spring 7 of the Palmer patent, or its mechanical equivalent, in combination with the feed rolls and tube, is essential and material to the successful operation of a machine constructed under and in accordance with the Palmer patent in suit; that is, the feed rolls must be able to move both towards and away from the tube carrying the fabric during the feeding operation. We have seen that in the Palmer patent this movement of the feed rolls is made possible and certain by the introduction into the drawings of the coil spring, into the specification of the description of that spring as already quoted, and into the claims of the patent the distinct element variously described as "yielding means for forcing said feed rolls against said tube," and "yielding means for forcing said feed rolls toward each other," and "yielding mechanism for drawing said frames toward each other," and "a resilient connection between the two frames whereby the two frames are drawn towards each other." Mr. Gooding then states, in order to sustain his contention, that defendant's machine has the mechanical equivalent of this essential coil spring; that (answer to cross-interrogatory 46):

"The mechanical equivalent of said yielding means (coil spring, etc.) would be any construction whereby the peripheries of said feed rolls move inwardly toward the tube or outwardly away from the tube during the feeding operation so as to feed the fabric onto the tube by the rotation of the rolls without spoiling the fabric."

If this be true, it is not necessary to have any coil spring or any other connection whatever between the two frames and the shafts carried thereby. Make the frames and shafts rigidly upright, and attach to each of the shafts a feed roll of entirely new design and construction with inside springs or mechanism which will enlarge the same, so that the "peripheries of said feed rolls will move inwardly toward the tube or outwardly away from the tube during the feeding operation," and we have an infringing machine if the theory of Mr. Gooding is accepted. If two elements of a valid patent are combined in one element by an alleged infringer so that the combination element performs the functions of the two operating in substantially the same way to produce the same result, infringement is not avoided. That is not this case. If an essential element of a device or apparatus is left out, and there is no substitution, then infringement is avoided. That is not this case. If an essential element of a patented device is left out, and there is a substitution, the question at once arises whether or not the substituted element is the well-known mechanical equivalent of the one omitted. If it is such equivalent, infringement is not avoided. If not, then we have a new device or apparatus, and there is no infringement even if the result obtained is precisely the same.

[2] The test is, Does the substituted element operate in substantial-

ly the same way to produce substantially the same result in the combination? Does it perform the same function? *Cautrill v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. This Palmer patent was granted when, and only when, an element was introduced which carried the two feed rolls towards each other by yielding or resilient means. The patent as finally allowed and issued did not relate in any way to the size, form, or composition or flexibility or yielding qualities of the feed rolls themselves. The claims call for a pair of feed rolls or a feed roll on each of the shafts. True, the specification gives a preferred form, but a person who should duplicate the machine described in the patent with the substitution of a pair of solid wooden or metal feed rolls would infringe. Leave out the "yielding means for forcing said feed rolls against said tube" or "toward each other," or "yielding mechanism for drawing said frames toward each other," or "a resilient connection between the two frames whereby the frames are drawn towards each other"—that is, use neither the one nor the other, nor a mechanical equivalent—and there can be no infringement. Feed rolls, the peripheries of which enlarge and contract, are not "yielding means for forcing said feed rolls against said tube" or "toward each other" or "yielding mechanism for drawing said frames towards each other," or "a resilient connection between the two frames whereby the frames are drawn towards each other." Enlarging the peripheries of the rolls does not force the feed rolls against the tube. It simply brings the peripheries in contact therewith. That is not the spirit or idea of the patent. That is not the improvement patented or described or claimed, nor is such a mechanism the mechanical equivalent of the one described and patented. "Where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention; but nothing can be held to be an infringement of a patent which does not fall within the terms the patentee has himself chosen to express his invention." *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. "To constitute identity of invention and therefore infringement, not only must the result obtained be the same, but, in case of a combination of known elements, the elements combined must be the same and combined in the same way, so that each element shall perform the same function, and differences alleged which are merely colorable, according to the rule forbidding the use of known equivalents, will not destroy the identity." *Electric Ry. Sig. Co. v. Hall Ry. Sig. Co.*, 114 U. S. 87, 5 Sup. Ct. 1069, 29 L. Ed. 96.

The Jordan Machine.

In defendant's machine, the Jordan machine, covered by United States letters patent No. 960, 227 of May 31, 1910, we have no yielding connection whatever between the two upright frames carrying the shafts, which, in turn, carry the feed rolls or the shafts themselves, unless it be the above-mentioned rigid bar screw threaded as mentioned, and which is the only means for moving the two upright frames and consequently the two feed rolls either toward or away from the tube or roller. These frames and shafts are not constructed of flexible

or resilient materials (in the sense of the patent, all steel being somewhat resilient) which bend or move back and forth.

Feed Rolls.

The feed rolls themselves differ in construction from those shown in the Palmer patent. While they are mounted on their respective shafts, each has within it a spring which allows a giving or yielding of the strips of leather or other flexible material which cover or reach from side to side of the open interior of such feed rolls, when brought in contact with and pressed against the tube and fabric thereon. That is, this spring in the interior of the feed roll allows the said strips on the feed roll to yield and give when pressed against the fabric on the tube. There is, as stated, no yielding of the frames or of the shafts.

The feed rolls of the patent in suit are thus described:

"The feed rolls, 3, are preferably formed with a concaved periphery, 14, across the hollow or groove formed by which are secured strips, 15, of leather or other flexible material adapted to bear upon the engaged fabric with sufficient friction to properly feed the same but without injury thereto."

The purpose of the flexible strips placed a short distance apart is evident enough. Spaced apart, the strips form a sort of corrugated surface to the periphery of the feed roll, so it will the more readily grasp and push along the fabric. Flexible, they yield to extra pressure, and, being elastic in a degree, they regain their normal position when the extra pressure is removed. To my mind the insertion of the spring into the feed roller in no way answers to the spirit or real purpose of the Palmer patent. It is simply an extension of the principle of the feed rolls of the prior art and an improvement on the feed rolls of the Palmer patent. These springs in no way tend to move the frames or shafts carried thereby, and on which the feed rolls are mounted, either toward or away from each other so as to force the feed rolls against opposite sides of the tube supporting and carrying the fabric. They do not move the feed rolls, or tend to do so, toward the tube carrying fabric. They do allow a contraction of the peripheries of the feed rolls.

Palmer's Idea.

Palmer's idea and invention was to provide two swinging frames, each carrying a rigid shaft, which, in turn, carried a feed roll of the kind described, or any feed roll of the then existing art, and to connect these frames by a coil spring or its equivalent, normally drawing the frames toward each other, something that would yield to pressure, so that, when the feed rolls were in contact with the fabric on the tube and held there by the yielding means the feed rolls, shafts and frames would all yield to pressure in unison and move away from the fabric so as not to press the feed rolls too hard against it and wear or tear—that is, injure it—and then come back automatically into position by means of the contraction of the spring or its equivalent when the extra pressure caused by an uneven fabric should be removed. As stated, Palmer nowhere suggests that this yielding of the feed

rolls may be done otherwise than by the yielding connection of the frames themselves. Therefore he provides the coil spring shown in his drawings, described in his specification, and claimed as we have seen.

Jordan's Idea.

Jordan's idea was to provide two rigid swinging frames—swinging because hinged to the bed pieces—two rigid shafts carried thereby, one by each, two improved feed rolls carried by the said shafts, and a rigid and unyielding connection between the two frames, but screw threaded as described, so that by turning same by hand or otherwise the frames, shafts, and feed rolls, as one whole, would be moved toward or away from the tube carrying the fabric. Whenever this connecting bar ceases to turn, the frames and all carried thereby stand rigidly and unyieldingly in position. This enables Jordan to move the rolls into engagement with the fabric on the tube at a certain fixed point and hold them there, or out of engagement and to a distance, any fixed distance, so as not to interfere with the removal of the loaded tube, by turning this connecting bar the one way or the other way. This Palmer is unable to do. His yielding connection or means brings the two feed rolls as forcibly against the fabric as the spring has power to do, and, when released, the rolls go as far apart as the force applied takes them, and they are held by a brace of predetermined length. To prevent injury to the fabric, Jordan resorts to quite a different device and construction. He goes to the feed rolls themselves, and makes the interior thereof hollow. There is a plate at each end of the roll, and these are connected by a spring of somewhat peculiar construction and attachment. It is unnecessary to describe it fully. Palmer has nothing of the kind and no equivalent. These plates are connected by strips of leather or one strip interlacing or other elastic material somewhat yielding to pressure but not sufficiently so and hence the spring. Brought into contact with the fabric on the tube, when the uneven surfaces are great, too great for the strips, the extra pressure operates the springs on the interiors of the feed rolls, so there is a yielding of the leather strip or strips of each of such feed rolls and a shortening of its diameter where in contact with the enlarged part of the fabric and necessarily a reduction of pressure on the fabric at the time from what otherwise it would be. But there is no yielding of the shafts or of the frames, no movement of either away from the tube, and no movement of the feed rolls themselves away from the tube when the machine is in operation. This is an operation quite different in principle from that of the Palmer patent.

Patent Office Action.

Neither Palmer nor Jordan was a pioneer in this art. Each was an improver on Gove, a reference in the Patent Office when the Palmer application was pending, and when all the Palmer claims which referred to "feed rolls so constructed that the peripheries will yield" were rejected and canceled. Palmer having claimed such feed rolls as the defendant now uses under the Jordan patent, and all claims therefor

having been rejected on Gove, a prior patent, No. 769,648, issued September 6, 1904, and Palmer having acquiesced in such rejection, I am unable to see how he can now contend successfully that the defendant infringes his patent by using that kind of a feed roll (improved though it may be). Gove had a patent for it. It was old in the art when Palmer applied for his patent and claimed it. Palmer's claim for it was rejected, and he acquiesced in such rejection. The examiner said in rejecting Palmer's first claims and his amended claims after inserting "yieldingly supported" before the words "feed rolls":

"Yieldingly supported feed rolls, d2, d3, are shown in the patent to Gove and there would be no invention in making said rolls like those disclosed in the patent to Brenon (evidently referring to Dreman, No. 682,245 of September 10, 1901); new claim 6 is rejected as showing no invention over the patent to Gove. The patent to Gove discloses yieldingly supported feed rolls, the duplication of which does not amount to invention."

Claim 1 of the Dreman patent of 1901 says and claims:

"A set of rollers to feed a strip of fabric, having a circumferential groove in the peripheral face of each, and an elastic covering bridging said groove, substantially as described."

This patent does not show the bridging elastic covering in strips, but otherwise the feed rolls are substantially like those shown by Palmer. Dreman also says:

"The face of rollers, 5, have an elastic covering, 13, preferably of rubber, which bridges grooves, 12, and provides an accommodating or yielding gripping surface by means of which strip 7 is twisted and also fed downward in its twisted form. The twisting of the strip is accomplished by rotating the support of rollers, 5," etc.

It is seen that "accommodating or yielding" gripping peripheries in feed rolls were old. Dreman fed in strips of fabric (and twisted them by other means), and then fed them along with these feed rolls having the yielding peripheries of elastic material which bridged the groove or hollow space in the roller itself. Mr. Gooding, complainant's expert, contends that the iron bearing frames of defendant are light in construction and below the feed rolls, and spring and yield so as to form an equivalent for the spring. This is not supported by the evidence or by the machine itself. The frames and construction are made more rigid than those of Palmer. An inspection of the screw threaded shaft of Jordan shows it to be rigid and unyielding. Mr. Cooper, defendant's expert, differs from Mr. Gooding widely, but it is not necessary to quote his evidence. I think the evidence establishes that Gove made operative machines, and had them in operation more than two years prior to the time Palmer applied for his patent, December 5, 1905.

The Utica Knitting Company Machines.

[3] There are four machines in evidence before the court purchased by complainant of the Utica Knitting Company. The defendant concedes that these machines infringe the Palmer patent. They bear no resemblance to the defendant's machines we have been discussing. A glance shows that these so-called Utica machines infringe the Palmer

patent. Defendant claims it neither made, nor sold, nor used same. That is the question so far as these machines are concerned.

The defendant's first certificate of incorporation was filed December 21, 1908, and January 12, 1909, about, the certificate of subscription to stock was filed, and soon thereafter defendant commenced business. In November, 1908, prior to the incorporation of this defendant, Mr. Jordan, later president of the company, made an agreement with Mr. Gridley, acting for the Utica Knitting Company, whereby these infringing machines were, in effect, sold to the Utica Company if they proved satisfactory, and one was put in or delivered on trial at about that time, and subsequently the others were shipped and delivered. It, of course, rested with the Utica Company to determine whether or not they were satisfactory. A bill for the first machine was rendered February 13, 1909, by the defendant company as successor to C. Jordan, who made the agreement, and paid by check March 2, 1909, drawn to order of said Jordan Company and indorsed by it. Early in December, 1908, and before defendant's incorporation, there was trouble with one of the machines and some changes were made by C. Jordan. There was no later or different agreement as to a sale and purchase of these machines than that of November, 1908. In short, the company made no sale or delivery of the machines, but it did after incorporation render bills and collect the pay therefor. If these machines belonged to Jordan (they could not have belonged to the company) when the contract was made in November, 1908, and he remained the owner until finally accepted and paid for by the Utica company, the Jordan Machine Company did not become an infringer by merely taking over the account, rendering bills, and collecting the pay. If, however, the Jordan Company became the owner of the machines and was the owner when actually purchased by the Utica Company, then the Jordan Company became an infringer in selling them. It must be true that, if A. makes and agrees to sell an infringing machine to B., and later sells his business, property and contracts to C., and C. assumes and performs them and consummates the sale of the infringing machine, he becomes an infringer even if he knew nothing of the infringing character of the machine.

The machines, it is claimed, never came into the possession or under the control of the Jordan Company. There was no agreement or conversation or correspondence on the subject of sale or acceptance between the two companies. The bills were rendered by the Jordan Company and paid by the Utica Company, but Jordan was doing business as the Jordan Machine Company before the corporation was organized and got the check himself in payment at the Utica mills. How did this come about, and what was the transaction or what were the transactions? Jordan says:

"Mr. Gridley said that if I was willing to put in a machine on trial, and prove the machine to be a success on their goods, that I could do so, and that they would buy it if it made good and they would also buy three machines for their mill No. 2. * * * I shipped and installed the machine about some time around November 20, 1908, or something like that, and I called at the mill again early in December, 1908, but I did not see Mr. Gridley at that time. I went into the mill, and looked to see if the machine was

working all right, and asked the superintendent of the No. 1 mill if the machine was giving satisfaction. He said the machine was satisfactory. * * * He said I would have to remedy this before he would O. K. the machine, so I decided to improve the arrangement on the countershaft for automatically stopping and starting the machine. Making this improvement in the countershaft and trying it out delayed me in putting in the other three machines for the No. 2 mill until February, 1909. * * * Q. 12. "When were those machines completed? A. 12. Those machines were completed the latter part of November, 1908, or the first part of December. I cannot say just which. * * * Q. 16. Did you transfer to the corporation the accounts due from the Utica Knitting Company to yourself or thereafter to become due for those four machines? A. 16. I transferred all accounts due me to the Jordan Machine Company upon its incorporation. Those accounts included the machines sold to the Utica Knitting Company."

In relation to a guaranty regarding infringement signed by him as president, given later, he says:

"My reason for signing my name as president of the Jordan Machine Company was that I considered it would have more weight with the manufacturers by doing it in that way."

He denies that he had authority from the company to do any such thing. He also testifies that, before the company was organized, he carried on the business under the name "Jordan Machine Company." As this was the fact, there is no significance in the use of that name alone by Jordan even after the organization of the company if confined to some business of his own not transferred to that company. On this subject Jordan said:

"XQ. 85. Did you turn over to the Jordan Machine Company the defendant in this suit all your interest in this business at or about the time of the incorporation of the company? A. Yes. XQ. 86. So that, after you had turned over your interest in this business, you owned nothing personally in connection with this business of manufacturing turning machines which you had previously carried on. That is what I understand you to mean? * * * A. Yes. * * * (Ans. to XQ. 88.) I transferred all parts and incomplete machines. I had some machines which I had orders to send out on approval for which I turned over the accounts. XQ. 89. Did you keep for yourself any completed machines, incomplete machines or parts of machines? A. I did not."

Mr. Jordan repeatedly says that these completed machines were not transferred to the defendant corporation. Mr. Wertime, an officer of the company and an attorney at law, who prepared the incorporation papers and attended to the transfer of the property says the corporation commenced to do business about February 1, 1909, and that Mr. Jordan stated the property that was to be transferred to the company, and that later he drew a bill of sale, and that neither the statement nor bill of sale included any manufactured, completed, machines, and that Mr. Jordan did transfer an account against the Utica Knitting Company.

[4] Prior to March 9, 1909, the complainant commenced sending out letters to the purchasers and users of the Jordan machines alleging infringement, and, in effect, threatening suits. Mr. Jordan, then president of the defendant corporation, sent to such purchasers and users, in some cases at least, and to the Utica Knitting Company, a guaranty letter dated March 9, 1909, signed, "Jordan Machine Co.,

by Cornelius Jordan, President," to which reference has been made, stating:

"In consideration of the purchase by the Utica Knitting Company from Jordan Machine Co. of four (4) pipe loading machines the said Jordan Machine Co. guarantees that said machine is covered by an application for letters patent made to the Patent Office of the United States and also guarantees that the same is not an infringement upon any other patent or patents granted by the Patent Office of the United States government," etc.

This letter was not sent to the complainants, and is not an admission upon which they can rely as an estoppel. This letter purports to be written and was written by the president and manager of the defendant corporation, and the use of the words "said Jordan Machine Co." makes it an admission that said four machines were purchased by the Utica Company of the Jordan Company corporation. This, however, sent for the purpose of quieting the Utica Company and getting pay for the machines, does not change the actual facts, or estop the defendant company from proving them as a defense to this action by the Palmers. The complainants here can use that admission as evidence that the defendant corporation did sell the four machines, but it does not between these litigants establish that as a fact if the proven facts show the truth to be otherwise. As between the Utica Company and the defendant company in a suit upon the guaranty, the admission would be conclusive. The defendant would be estopped to deny its truth in the absence of fraud. If Jordan and Wertime tell the truth, Jordan, doing business under the name of Jordan Machine Company, sold these machines to the Utica Company, even if title did not pass until paid for in March, 1909, and the defendant corporation had nothing to do with their manufacture, construction, or sale, as Jordan never sold them to the defendant corporation. If the Utica Company had finally refused to accept them, and had returned them, they would have been the property of Cornelius Jordan, not of the Jordan Machine Company, defendant, although subject in equity, possibly to an equitable lien. But they did not come back, and the defendant company did nothing except to receive the pay therefor under its assignment of the account. Under such a state of facts, it would be unjust and inequitable to charge the defendant corporation as an infringer. It is evident that Jordan did not intend to sell or transfer these machines to the Jordan Machine Company incorporated, and that such corporation did not intend to purchase them.

[7] To constitute a sale by agreement, there must be an intent to sell and an intent to purchase, a purpose to pass title. If A. delivers a horse to B. on contract that B. is to try him and keep him if satisfactory and pay \$200 therefor, and A. then sells the account or demand for the \$200 to C., and B. concludes not to accept the horse, and so returns him, who owns the horse, A. or C.? So, if B. keeps the horse 10 days before making up his mind, does the ownership of the horse pass to C. during that time? As between A. and B., the title to the horse may not have passed, but, as between A., B., and C., the title is either in A. or B., not in C. Whatever the relationship between the Utica Company and Jordan as to these machines, the Jordan Machine Company, incorporated the defendant here, never made or used or sold

these machines or took part in so doing. Jordan sold other machines of the same construction as these Utica Knitting Company machines before the corporation commenced business and assigned the accounts, money due, or to become due therefor to the corporation, but he did not sell the machines or any interest therein to the defendant company, and the defendant corporation had nothing to do with the making, using, or selling. No doubt Cornelius Jordan was an infringer in making and selling machines such as were sold the Utica Company, including those, but his sins in this regard cannot justly be loaded on the defendant corporation of which he became stockholder and president. I cannot find that the defendant company took any part in the infringement.

As infringement by the defendant corporation is not made out, there will be a decree dismissing the bill, with costs.

NEW JERSEY PATENT CO. et al. v. MARTIN.

(Circuit Court, N. D. Iowa, Central Division. February 22, 1911.)

No. 171.

1. PATENTS (§ 326*)—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT—PUNISHMENT FOR CONTEMPT.

Where complainants in a suit for infringement, after filing a petition to have defendant adjudged in contempt for violation of a preliminary injunction, filed an amended bill, and on that and the original bill a consent decree was entered for complainants in which they waived all claim for damages, and no costs were awarded in favor of or against either party, complainants were not thereafter entitled to have a fine imposed on defendant in their favor in the contempt proceedings sufficient to reimburse them for their counsel fees, costs, and disbursements in the main case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 613-619; Dec. Dig. § 326.*]

2. PATENTS (§ 326*)—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT.

A defendant held in contempt for violation of a preliminary injunction against infringement of a patent.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 326.*]

3. CONTEMPT (§ 38*)—POWER TO PUNISH—FORMER ADJUDICATION.

Where at the time set for hearing a motion to punish defendant for contempt for violation of an injunction, ex parte affidavits taken by petitioners were suppressed on defendant's motion, and the hearing was continued for the taking of testimony, such proceeding did not put defendant in jeopardy nor constitute a bar to a subsequent hearing.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 117-121; Dec. Dig. § 38.*]

In Equity. Suit by the New Jersey Patent Company and the National Phonograph Company against Edward H. Martin. On citation for contempt. Defendant adjudged in contempt.

Kelleher & O'Connor and Herbert H. Dyke, for petitioners.
Wesley Martin, for defendant.

REED, District Judge. December 23, 1907, the petitioners, as complainants, exhibited to this court their bill of complaint against the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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defendant Edward H. Martin for the alleged infringement by him of United States letters patent No. 782,375, issued to the New Jersey Patent Company February 14, 1905, as the assignee of Jonas W. Alysworth, for alleged new and useful improvements in composition for making duplicate phonograph records. The bill contained the usual prayer for preliminary and permanent injunctions, and for damages and an accounting. A demurrer to it was overruled (see 172 Fed. 760), and the defendant in due time answered the bill January 14, 1908. After due notice to the defendant, a preliminary injunction was granted continuing in force until the further order of the court a restraining order, which was issued December 27, 1907, and duly served upon defendant, enjoining and restraining him from further infringing said patent, or in any way interfering with the carrying out of the selling system of the complainant National Phonograph Company as alleged in the bill, and from directly or indirectly using or causing to be used, selling, or causing to be sold any Edison phonograph records or other apparatus, articles, or devices not licensed by the said complainants embodying or constructed in accordance with the invention and improvements set forth in said patent.

On April 11, 1908, the petitioners, complainants in said suit, presented to the court their petition, alleging upon information and belief that, since the granting of said preliminary injunction and the service of the same upon said defendant, he, the said Edward H. Martin, his agents, servants, and employés, have used, and are continuing to extensively use and sell, phonograph records embodying the invention and improvements set forth in said letters patent in defiance of said injunction and in contempt of this court, to the great and irreparable damage of the complainants. An order was thereupon issued and served upon the defendant requiring him to appear before the court and show cause on or before May 12, 1908, why he should not be punished as for contempt for violating said injunction. The defendant appeared and answered, denying that he had in any way violated the injunction, or that he was guilty of any contempt of the authority of this court. Evidence was then taken by the petitioners in the form of affidavits, without notice to the defendant, in support of their alleged violation of said injunction by the defendant, and the same were presented to the court at the June term, 1908. The defendant appeared at such term, and objected to the use of such affidavits upon such hearing, and moved to strike them from the files upon the ground, among others, that the charge could not rightly be heard or sustained upon ex parte affidavits, and that he had had no opportunity to cross-examine the affiants. This motion was sustained, and the petitioners were then granted leave to take their testimony in support of said alleged violation of the injunction, and the defendant his evidence in opposition thereto, by oral examination of witnesses before a special examiner, each party to give to the other due notice of the taking of such testimony. See 166 Fed. 1010.

In the meantime the petitioners, as complainants in the main suit, proceeded to take their testimony upon the merits of the bill, some of which was taken on and after July 8, 1908, and filed July 15th, and

during its taking it was developed that other persons were or had been engaged with the defendant in the alleged infringement of said letters patent and the violation of said injunction by him. Thereupon, and upon July 14th, the petitioners obtained leave to file, and did file on July 17, 1908, an amended bill of complaint bringing in and making parties defendant to the main suit with the original defendant, Fred N. Martin, M. M. Martin, the Martin Telephone Company, and R. L. Sterling, and alleged that each of said defendants as well as the defendant Edward H. Martin had infringed and were infringing complainants' said letters patent, and asked for damages and an accounting against each, and that they also be enjoined and restrained from further infringing said patent. To the bill as so amended each of the defendants thereto answered on February 25, 1909.

On August 26, 1909, a final decree in the main suit was entered by consent of all the parties thereto, in which it was adjudged and decreed that the New Jersey Patent Company was the sole owner of said patent, that the same was valid, and that the National Phonograph Company was the exclusive licensee of the New Jersey Patent Company to manufacture, sell, and use the invention described in said patent. The complainants waived an accounting and damages as against each of the defendants, and an injunction was granted against them, their clerks, servants, agents, and employés perpetually restraining and enjoining them and each of them from directly or indirectly infringing said patent, or in any manner interfering with the National Phonograph Company in carrying out its selling system as set forth in the bill of complaint as amended. The decree does not provide for costs in favor of or against either party. Afterwards, and in 1910, the petitioners took their testimony in support of their petition alleging the violation by the defendant Edward H. Martin of the preliminary injunction. The testimony so taken shows that in December, 1907, prior to the filing of the original bill, said defendant obtained some 4,000 or 5,000 phonograph records from the Ohio Phonograph Company of Youngstown, Ohio, made according to the complainants' letters patent No. 782,375, and sold by said company in violation of the selling system of the complainant National Phonograph Company, and that the defendant had sold some of such records and offered for sale others in infringement of the patent, and in violation of such selling system; that in March, 1908, after the granting of the preliminary injunction, the defendant also sold and offered for sale, others of said records in violation of said injunction; and complainants now ask that defendant Edward H. Martin be punished as for contempt in so violating the injunction, and that he be also fined in addition to such punishment for the benefit of complainants in an amount sufficient to compensate them for the damages they have sustained because of his alleged infringement of the patent, the fees of their counsel, and for the costs and other expenses incurred by them in prosecuting the contempt proceedings. A summary of such costs and expenses claimed to have been so incurred is set forth in the brief of counsel for the petitioners as follows:

Klehm, receipts for disbursements (itemized).....	\$ 532 62
H. H. Dyke, counsel fees.....	350 00
Other counsel.....	975 00
Witnesses (mileage and attendance).....	271 83
Examiner & stenographer taking testimony.....	305 00
Sheriff's and clerk's fees.....	81 40
Printing	277 50
Total	\$2,793 35

In addition is a claim for damages for injury to the business and trade of petitioners, and for additional fees of counsel in presenting this motion to the court, which it is claimed cannot be definitely known at the time of making such summary.

[1] It is needless to say that defendant should not be punished to the extent claimed for the benefit of the complainants. The damage to complainants and injury to their business, if any, because of defendant's infringement of the patent and his violation of the selling system of the National Phonograph Company, occurred wholly or nearly so by reason of his infringement of the patent before the filing of the original bill and the issuance of the preliminary injunction, and for all such damages and injuries, if any, the complainants waived their right thereto by consenting to the decree which was entered on the 26th day of August, 1909, and they cannot now recover such damages by way of punishment of the defendant to be imposed for their benefit. The sales by the defendant after the issuance of the preliminary injunction caused no material damage to the complainants in addition to the damages caused prior to the filing of the bill. In any event, such damage, if any, was caused prior to the filing of the amended bill in July, 1908, and might have been recovered upon the final hearing but for complainant's waiver thereof in the final decree. The defendant therefore can rightly be punished only for his violation of the preliminary injunction, which punishment may include the reasonable costs and expenses of the prosecution for such violation.

[2] The defendant is a man of intelligence, and the evidence convinces beyond any doubt that he intentionally violated the preliminary injunction. His efforts to show that the sales of phonograph records subsequent to the issuance of the injunction were by the Martin Telephone Company or its general manager and the Martin Music Company without his knowledge is a mere ruse to shift the responsibility for such sales. The Martin Telephone Company is a corporation organized under the laws of Iowa, in the name of which the defendant conducts most of his business. He was its president and principal stockholder, and controlled the management of all of its affairs. The defendant M. M. Martin is his wife, and is or was a stockholder of the telephone company and its secretary, but took no active part in the management of its business. There was but one other stockholder and he owned only a nominal amount of its stock, and the defendant Sterling was an employé under the title of manager or general manager, but acted under the general directions of the defendant Edward H. Martin. The Martin Music Company was another name under which the defendant conducted a business of dealing in musical instru-

ments, sheet music, and other goods usually carried by such dealers, and, while there is some evidence that this business was turned over to his son Fred M. Martin prior to the commencement of the suit, the evidence leaves no room to doubt that the defendant himself sold a number of these phonograph records, and received the pay therefor after the preliminary injunction was served upon him. The violation of the writ was deliberate and intentional, and cannot be overlooked. Parties must know that writs of injunction are not issued by the courts as a mere pastime and for their own pleasure, to be observed, or not as those against whom they are issued may elect, but are issued to protect and preserve the property rights of parties pending litigation between them; and those against whom they are issued and upon whom they are served must be given to understand that any intentional violation of them will not be tolerated, but will be punished, and by imprisonment if necessary, to vindicate the authority of the court and protect the rights of parties involved in the controversy in which they are issued.

[3] The contention of counsel that the defendant has been once in jeopardy because of the proceedings at the June term of court, 1908, when the affidavits were suppressed at his instance, and that he cannot now be rightly tried for such alleged contempt, is untenable. See *Murphy v. Massachusetts*, 177 U. S. 155-159, 20 Sup. Ct. 639, 44 L. Ed. 711.

There was then no hearing upon the merits of the alleged contempt, but only a preliminary hearing at the instance of defendant upon the question of the competency of the ex parte affidavits which complainants proposed to offer in support of the alleged contempt. There was in fact no other hearing, the testimony contained in such affidavits was not considered, the charge against the defendant was not heard, and the question of his guilt or innocence of such charge is now presented for the first time for determination. The defendant's plea or defense of prior jeopardy is therefore overruled, and he will be fined in the sum of \$350 because of his violation of the preliminary injunction, and the costs of taking the testimony before the examiner which was begun February 5, 1910, including the statutory fees and mileage of witnesses examined at such hearing and the legal fees of the examiner and stenographer for taking such testimony, and the other taxable costs that pertain alone to the contempt proceedings. If such fine and costs are not paid within five days after the filing of this opinion and order, the defendant will stand committed to the county jail of Webster county, Iowa, until they are paid; and the clerk will issue the proper warrant so committing him. Of the \$350 when paid the clerk will pay the petitioners \$150 to apply upon the services of their counsel that pertain alone to this contempt proceeding.

It is ordered accordingly.

WESTINGHOUSE ELECTRIC & MFG. CO. et al. v. OHIO BRASS CO.

(Circuit Court, D. New Jersey. February 10, 1911.)

1. PATENTS (§ 114*)—SUIT TO OBTAIN PATENT—LACHES.

The remedy by bill in equity to obtain a patent which has been refused by the Patent Office, given by Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), is a part of the application for the patent, and is governed by the rule as to laches declared by Rev. St. § 4894 (U. S. Comp. St. 1901, p. 3384), which provides that the failure of an applicant to prosecute his application within one year after any action therein shall be regarded as an abandonment, unless it be shown that the delay was unavoidable.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

2. PATENTS (§ 114*)—SUIT TO OBTAIN PATENT—LACHES—UNAVOIDABLE DELAY.

An allegation in a bill to obtain the issuance of a patent under Rev. St. § 4915 (U. S. Comp. St. 1901, p. 3392), filed more than a year after the application was refused by the decision of the Court of Appeals of the District of Columbia in interference proceedings, that complainants brought suit within the year against the successful applicant, to whom the patent was granted, and learned for the first time after such suit had been pending for several months that the defendant had assigned the patent, whereupon that suit was dismissed and the present one was brought against the assignee, does not show that the delay was "unavoidable," within the meaning of Rev. St. § 4894 (U. S. Comp. St. 1901, p. 3384); there being no allegation that the assignment was not recorded, nor that complainants had no means of ascertaining the fact of the assignment.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. § 114.*]

3. WORDS AND PHRASES—"UNAVOIDABLE DELAY."

A delay caused by negligence is not "unavoidable."

In Equity. Suit by the Westinghouse Electric & Manufacturing Company, Harry P. Davis, and Theodore Varney against the Ohio Brass Company. On demurrer to amended bill. Demurrer sustained.

Wesley G. Carr, for complainants.

Brown & Hopkins, for defendant.

RELLSTAB, District Judge. The bill was filed on December 13, 1909, and is based on section 4915 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3392). Its purpose is to determine the right to a patent and to obtain the issuance thereof to the complainant Westinghouse Electric & Manufacturing Company.

The bill sets forth so far as is necessary to an understanding of the questions raised on this demurrer, that on or about the 8th day of May, 1906, the Commissioner of Patents declared an interference between the application of the complainants Davis and Varney for letters patent for improvements relating to supporting structures for trolley conductors and the application of one George A. Mead, the defendant's assignor, for letters patent for the same invention, which applications were then pending in the Patent Office; that said interference was decided by the examiner of interferences, the examiner

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in chief, and the Commissioner of Patents in favor of said Davis and Varney; that upon appeal the Court of Appeals of the District of Columbia decided adversely to said complainants, and adjudged the said Mead to be entitled to said letters patent; that said Davis and Varney, prior to the making of their said application, had assigned their said invention and all their right, title, and interest therein to the said Westinghouse Electric & Manufacturing Company, and that the said Mead, on or about the 3d day of November, 1908, assigned to the defendant all his right, title, and interest in and to his said invention and the letters patent granted him therefor; that complainants, by reason of such adverse decision, have no remedy in connection with the prosecution of their claims for said invention, except that provided by the said section 4915.

On the hearing of a demurrer alleging, inter alia, that no satisfactory cause to comply with the requirements of section 4894, Revised Statutes (U. S. Comp. St. 1901, p. 3384), was stated for the delay in bringing suit, the complainants, upon leave given, amended their bill by adding that complainants, believing the said Mead to be the sole and exclusive owner of said letters patent, did on or about the 16th day of February, 1909, file a bill against him in the United States Circuit Court for the Western Division of the Northern District of Ohio, under the provisions of said section 4915, praying the issue of letters patent to the Westinghouse Electric & Manufacturing Company, upon said application of Davis and Varney; that the time for the filing of defendant's pleading was thrice extended upon Mead's request; that by the defendant's answer, filed on or about the 12th day of July, 1909, complainants were advised for the first time that the letters patent for the invention in controversy, subsequent to the issue thereof, had been assigned to the Ohio Brass Company, defendant in the present suit; that upon the 11th day of September, 1909, complainants moved for leave to amend their bill of complaint to include the said Ohio Brass Company as party defendant; that such motion was denied on the 6th day of October, 1909; and that on the 5th day of January, 1910, the said suit was dismissed. Their prayer is that the said Davis and Varney may be adjudged to be the first and true inventors of said invention, and that a decree may be entered whereby the said Westinghouse Electric & Manufacturing Company may be enabled to obtain the issuance of letters patent upon said invention.

Sections 4894 and 4915, Revised Statutes, are as follows:

4894: "All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

4915: "Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his

claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not."

[1] The demurrer must be sustained on the third ground assigned, which reads as follows:

"That the said complainants have, in and by their said amended bill of complaint, made and stated such a case as would bar a court of equity from granting any relief under section 4894, Revised Statutes, as amended by act approved March 3, 1897."

The failure of the complainants to institute the present proceedings within one year after the last official action, on their application for letters patent, viz., the adverse decision of the Court of Appeals of the District of Columbia, is a bar to such proceedings. The bill, as amended, does not state the time of such adverse decision; but it alleges that Mead assigned his said letters patent to the defendant on or about November 3, 1908, and as the bill in this case was not filed until December 13, 1909, and the remedy by bill in equity given by section 4915 is a part of the application for the patent, and is governed by the rule as to laches declared by section 4894 (*Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290, 30 L. Ed. 1223), the complainants are barred from maintaining their bill, unless the delay in filing it was unavoidable.

The right to retry the merits of an application for a patent, by bill in equity, after the tribunals in the Patent Office and the Court of Appeals have passed upon the original application, is purely statutory, and is subject to such restriction as Congress may prescribe. There is a time when the successful litigant is entitled to the full fruits of his victory. In controversies over alleged invention, Congress has declared that a failure to prosecute an application for a patent within one year after action thereon constitutes an abandonment of such application, unless the delay was unavoidable.

[2] The delay was not unavoidable. The excuse pleaded is that complainants were not aware that the defendant was the owner of the letters patent until the year had expired. But such lack of knowledge was not unavoidable. "Unavoidable," as defined by the lexicographers, means inevitable; a condition of affairs impossible to avert. Perhaps the word as here used is not to be given such a strict meaning; but certainly it was intended to penalize a year's delay due simply to negligence. The legislative purpose was to spur the litigants to activity. To delay without cause, or, when the cause is completely within the control of the party charged with the duty to act, the failure to so act, is neglect, and negligence is antithetical to unavoidability. Ample provision is made in the Patent Office for the recording of assignments of patents. While such recording is not positively enjoined, section 4898, Revised Statutes (U. S. Comp. St. 1901, p. 3387),

declares that such assignment shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent Office within three months from the date thereof.

The bill does not allege that the assignment to the defendant was not recorded, or that the complainants had no means of ascertaining whether such patent was assigned. As the burden is upon the complainants to show that the delay in instituting the present proceedings was unavoidable, in the absence of proper contrary averments, it is to be presumed that, if they had made the proper inquiries, the fact of assignment would have been made known to them. Their lack of knowledge, therefore, is not due to conditions over which they had no control, but to their negligence in not seeking knowledge of the exact condition of the title. Not having sought information, their negligence in this respect is as culpable as if they had knowledge and disregarded it. In Lay v. Indianapolis Brush & Broom Mfg. Co., 120 Fed. 831, 836, 57 C. C. A. 313, 318, in answer to the insistence of counsel that an attorney's negligence would constitute unavoidable delay, the court said:

"The other assumption is that, if the complainants failed in their application through the negligence of their attorney, the delay would be unavoidable, which is wholly unwarranted in the law. It is of the very nature of negligence that it should not be unavoidable; otherwise, it would not be actionable. The negligence of the attorney would be the negligence of the principal. The purpose of the statute was to put an end to such pleas, and there would be no limit to a renewal of these applications, if every application, however remote, could be considered under the plea of negligence of attorneys, by whom their business is generally conducted."

In that case, the attorney's negligence was imputed to the principal. In this case, it is not even asserted that the failure to know of the assignment was due to the negligence of some person other than the complainants.

[3] Failure to prosecute within the year because of clerical error in noting the dates, mistaking the remedy to obtain a new hearing, sickness for only a part of the limited period, mislaying the papers, as well as neglect of the attorney to prosecute, contrary to desire of applicant, have been held by the Patent Office tribunals as not unavoidable. Ex parte Warren, 96 O. G. 2410; Ex parte Collins, 97 O. G. 1372; Ex parte Bohlecke, 97 O. G. 2743; Ex parte Fritts, 101 O. G. 1131; Ex parte Beecher, 101 O. G. 1132; Ex parte McElroy, 101 O. G. 2823; Ex parte Miller, 105 O. G. 2057; Ex parte Marconi, 108 O. G. 796; Ex parte Clausen, 118 O. G. 838; Ex parte Block, 119 O. G. 963; Ex parte Hess, 126 O. G. 3041.

A like meaning as herein attributed is given to the same word found in section 14a of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), relating to the discharge of bankrupts. In this subdivision it is provided that the application for a discharge must be filed within 12 months next subsequent to the adjudication, unless it is made to appear that he was unavoidably

prevented from filing it within such time. In re Lewin, 135 Fed. 252, 14 Am. Bankr. Rep. 358; In re Harris and Algor, 117 Fed. 575, 15 Am. Bankr. Rep. 705; In re Glickman & Pisnoff, 164 Fed. 209, 21 Am. Bankr. Rep. 171.

Nor did the institution of proceedings within the year in the United States Circuit Court for the Western Division of the Northern District of Ohio satisfy the requirement of section 4894. That requirement is to prosecute the application, and that presupposes that action be taken in the right tribunal and against the right party. In Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 137 Fed. 80, 82, 70 C. C. A. 1, 3, it was said that:

"Abandonment of an application destroys the continuity of the solicitation of the patent. After abandonment, a subsequent application institutes a new and independent proceeding."

The action in the Ohio circuit having been dismissed because the necessary party to defend was not brought into court, it is as if it had never been instituted, so far as the present action is concerned.

The demurrer is sustained, and the bill dismissed.

LOUDEN MACHINERY CO. v. STRICKLER.

(Circuit Court, W. D. Wisconsin. March 7, 1911.)
Nos. 30-D, 34-D.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—PULLEY FOR HAY CARRIERS.

The Louden patent, No. 515,296, for a round-topped swinging pulley for hay carriers, was not anticipated, and discloses patentable novelty; also held infringed.

2. PATENTS (§ 328*)—NOVELTY—HAY CARRIER.

The Louden patent, No. 620,467, for an improvement in grappling hooks for hay carriers, is void for lack of novelty.

3. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HAY CARRIER MECHANISM.

The Louden patent, No. 555,605, for a locking dog for track hangers for hay carriers, held valid, but, as limited by the prior art, not infringed.

In Equity. Two suits by the Louden Machinery Company against Frank B. Strickler. Decree for complainant in first case in part, and for defendant in second case.

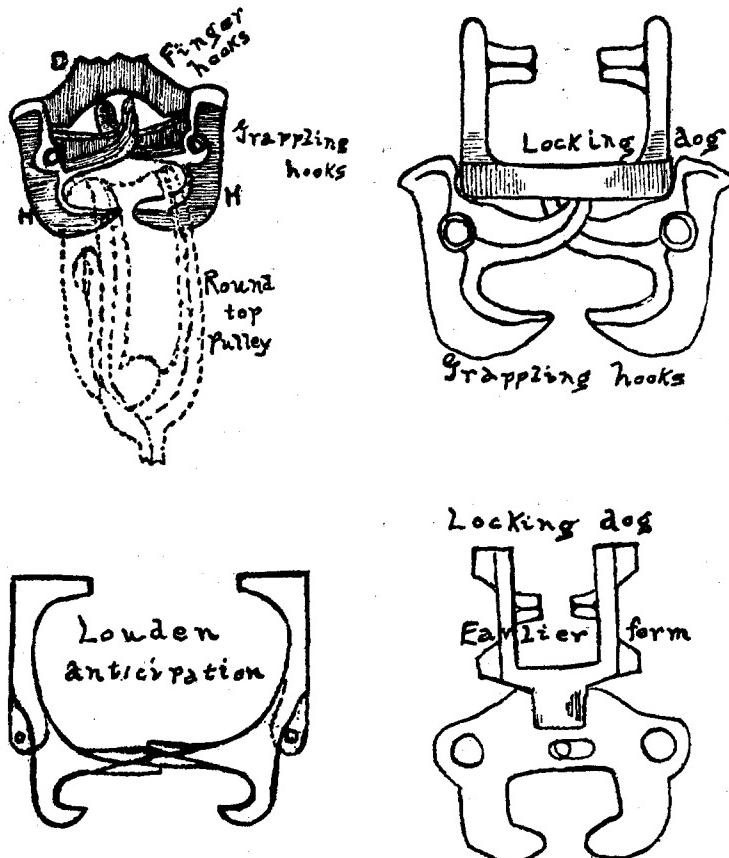
Jones, Addington, Ames & Seibold, for complainant.

Offield, Towle, Graves & Offield, for defendant.

SANBORN, District Judge. Bills for infringement of three patents: No. 515,296, issued to complainant February 20, 1894; No. 620,467, issued to William Louden February 28, 1899; and No. 555,605, issued to William Louden March 3, 1896. As an aid to clearness, a description of the Louden self-locking patent contained in Lou-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

den Machinery Co. v. Janesville Hay Tool Co. (C. C.) 141 Fed. 975, 982, may be read, in connection with the following cuts:



In the opinion referred to it is stated that the hay carrier there involved, patented August 19, 1890, marked the final step in the development of the art. It is shown in this record, however, that there were still serious defects in operation, which it is now asserted have been fully remedied, so that the art has again reached its final stage, and will, it is to be hoped, continue to progress.

The three forms of improvement are indicated in the cuts. Round-topped swinging fork pulleys are covered by the first patent, the finger hooks on the upper arms of the grappling hooks by the second, and the circular bottom locking dog by the last. The object of the new pulley was to gain free swinging movement in place of rigidity. The older locking heads could only register by a vertical pull, while the round-topped pulleys register vertically and at any side angle up to 45 degrees. The object of the finger hooks was to make both arms move in unison. Formerly the vertical movement of the registering head,

striking both upper arms of the mated grappling hooks, made this unnecessary; but with the invention of the new form of pulley, having an angular approach, only one arm might be caught and moved by it, so it was better to arrange the arms so that they would co-operate, and move together. The last device, or circular locking dog or key, was made desirable by the improvements of Miller, Ney, Brower, and Hall, relating to swiveling or turntable carriers. Their patents are all prior to the first Louden patent here in question. The invention of Miller, No. 288,839, dated April 5, 1883, shows a division of the upper and lower parts of the carrier. The lower part, carrying the pulley and grappling hooks, is swiveled on the upper part, carrying the track wheels and locking dog, so that the lower portion may swing like a turntable. This allows power to be applied at either end, and relieves side strains on the pulley and grappling hooks. Louden's improvement, clearly shown by the cuts, introduced a locking dog with a circular bottom operating between the opposite upper arms of the grappling hooks, in place of a sliding bar, obtaining a better result by cheapened means.

[1] 1. The round-topped pulley, No. 515,296: The prior art has been carefully considered. All prior patents, except Cross, No. 407,924, December 8, 1888, belong to the old type of locking devices, described in the Janesville Case cited, having registering heads adapted to lock only on vertical approach. The Cross invention, on the other hand, would clearly infringe, and, if actually earlier than Louden, would anticipate. It was so held by the examiner of Louden's application. The objection was met, however, by Louden's affidavit, showing a construction covering his present claims as early as November 4, 1886. The testimony relating to this shows very satisfactorily that Louden anticipated Cross by two years. The burden of proof is fully met. I see no reason, therefore, for denying novelty. There is a new result, and new mode of operation. Infringement is also clear, being substantially admitted.

[2] 2. The finger hooks, No. 620,467: Construction and operation are clearly indicated by the cuts. No anticipation appears, unless by an earlier invention by Louden himself, patent No. 559,508, also shown in one of the cuts. The object sought by both devices was to make the grappling hooks move in unison. Both are operative and successful, but the second is a considerable improvement. The first device needed careful adjustment, never working satisfactorily. It was too expensive, and easily got out of order. The other always works, keeps in order, and can be cheaply made, without the necessity of machining, filing, or careful adjustment. It seems clear, however, that no invention was required to create the improved form. It is only a development of the first, readily suggested by ordinary mechanical skill. The earlier claim is for grappling devices "having forked tongues extended inwardly across the throat of the carrier, so as to catch on each other and communicate movement one to the other." This claim evidently reads on the later device. Patent No. 620,467 should therefore be held invalid, as lacking novelty.

[3] 3. The locking dog patent, No. 555,605: The four claims in suit read as follows:

"1. The combination of an upper frame adapted to run on a track, a lower frame swiveled to the upper frame and carrying pulley-supporting mechanism, and a dog having an annular lip adapted to engage said mechanism at any point on its circumference.

"2. The combination of an upper frame adapted to run on a track, a lower frame swiveled thereto and carrying pulley-supporting mechanism, a dog having upwardly-extending arms and an annular lip adapted to engage said pulley-supporting mechanism at any point on its circumference, and a stop to engage the upwardly-extending arms, substantially as set forth.

"3. The combination of an upper and a lower frame swiveled together, a dog mounted in the upper frame and having an annular lip, and a hook or arm pivoted in the lower frame and adapted to engage the lip of the dog at all points on its circumference, substantially as and for the purpose set forth.

"4. The combination of an upper and a lower frame swiveled together, a sheave journaled in said lower frame, a rope passed over said sheave so as to form a loop, a pulley-block hung in said loop, a pivoted hook or arm to engage and support said pulley-block, and a dog having an annular lip adapted to hold the hook or arm in engagement with the pulley-block at all points on its circumference, substantially as set forth."

Specifications, claims, and drawings all call for a locking dog with an annular or ring-shaped base. All the locking dogs of the prior art relating to swivel carriers had solid cylindrical bases. Were it not for this, the claims might fairly be broadened so as to cover a cylindrical base; but, if that be done, the first and second Louden claims read on the structures of the prior art. Construing the Louden claims as they read, defendant does not infringe, since its locking dog has a solid, cylindrical base, almost identical with those of the earlier patents of Miller and Ney. In any event, claims 3 and 4 are not infringed, because limited to one grappling hook or arm, while defendant uses two, and both necessary to the operation of its carrier.

The combination of the first claim of the patent in suit, broadly construed, covers four elements, being an upper frame running on the track, a lower frame swiveled thereto and turning thereon, pulley-supporting mechanism in the lower frame, and a locking dog with cylindrical base adapted to engage the supporting mechanism at any point on the base. It is claimed for complainant that Louden has dispensed with one of these elements, being a horizontal sliding bar, with which a cylindrical based locking dog engages to support the pulley. However, as I am able to understand the matter, and as Mr. Louden testifies, this sliding bar is part of the pulley-supporting mechanism. If "cylindrical" be substituted for "annular," this claim 1 reads squarely on the drawings of the Miller patent of 1883, No. 288,839. The sliding bar should be regarded as an inwardly-extending upper arm of one of the Louden grappling hooks, present in the later patent in a different form. I cannot see that Louden has dispensed with any element found in Miller; also in the Ney patent of 1884, No. 308,848. The locking dogs of Ney and Miller are the same as in Louden (aside from the annular form), except that Louden's cylindrical base is much larger. This is shown by one of the cuts.

At the same time it cannot be denied that Louden simplified the means used in the earlier devices, and also obtained an improved result, more efficient and cheaper. That his invention, construed as the claims literally read, is a good, patentable combination, does not admit

of the slightest doubt. So construed, as I think it must be under the prior art, defendant does not infringe.

In case 30-D, the decree should adjudge validity of patent 515,296, infringement, and that No. 620,467 is anticipated by the earlier Louden patent, and therefore invalid for want of novelty, without costs for or against either party. In case 34-D, patent 555,605 should be adjudged valid, but not infringed, with costs in favor of defendant.

DOBLE v. PELTON WATER WHEEL CO.

(Circuit Court, N. D. California. December 30, 1910.)

No. 14,722.

1. PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—HYDRAULIC NOZZLE.

The Doble patent, reissued letters, No. 12,460, for a needle regulating deflecting hydraulic nozzle for the propulsion of tangential water wheels, was not anticipated, covers a true combination, and discloses patentable invention; also *held* infringed.

2. PATENTS (§ 52*)—ANTICIPATION—ACCIDENTAL USE OF DEVICE.

The mere accidental employment of a feature or element of a device, where its real value, for a purpose for which it is afterward put in use by another, is not recognized at the time of such accidental use, cannot be invoked to anticipate a patent for the later device.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 70; Dec. Dig. § 52.*]

3. PATENTS (§ 18*)—INVENTION—SIMPLICITY OF DEVICE.

Simplicity of a device is no evidence of want of invention nor of obviousness, but in such cases the question of patentability may, and in many cases must, be determined largely from the results attained.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 18; Dec. Dig. § 18.*]

In Equity. Suit by May E. Doble against the Pelton Water Wheel Company for infringement of letters patent, reissued No. 12,460, for a hydraulic nozzle, granted to William A. Doble June 22, 1909.

Miller & White, for complainant.

Booth & Acker, for defendant.

VAN FLEET, District Judge (orally). In this case I have requested the attendance of counsel this morning that I may announce the conclusions I have reached. The suit is one for the infringement of a patent. It has proven a very interesting case to me, not only by reason of its importance to the parties, but by reason of the intrinsic character of the questions involved, which have induced very careful consideration at my hands. Ordinarily, perhaps, I might content myself with a brief statement of my conclusions, but in view of the very able and elaborate manner in which the case has been presented upon both sides, and the apparent earnestness with which questions have been urged, I feel that something more is due to counsel than a mere statement of bald conclusions without suggestion of the considerations which have moved me thereto.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The patent in suit covers an improvement in hydraulic nozzles, that specific character of nozzle which is designated in the art as a "needle regulating deflecting hydraulic nozzle" for the propulsion of tangential or impact water wheels, to be used in power plants for the generation of electricity, and, as well, for the propulsion of machinery in flour mills, sawmills, and other like purposes. No question is made in the case as to the value in practice of the device covered by this patent. That is demonstrated by the fact that since it was put upon the market it has gone into very general use, and has in fact been largely introduced and adopted by the defendant. And there is no question, therefore, but that, if the patent covers a valid device, it is being infringed by the defendant.

[1] An examination of the elements covered by the patent discloses that the needle regulating deflecting nozzle is not a new thing in the art. A deflecting nozzle, in fact, has been known for a considerable period, the necessities of the practice requiring, for the successful operation of a plant propelled by a tangential water wheel, that there be means for readily deflecting the nozzle off the wheel in order that its speed may be thereby controlled, and the element of a needle regulating device for such a nozzle is also old in the art, and one that was in use at the time that the patent in suit was granted.

The particular element of novelty which tends to distinguish the device of the patent from the existing art is in the manner in which the nozzle is coupled to the pipeline. In order to have a deflecting nozzle, there is the necessity of connecting the nozzle with the supply pipe or pipe line by some character of rotatable joint which will permit movement and deflection by some appropriate means, and the deflecting means that has been generally adopted in connection with such rotatable joint is the usual and ordinary mechanical governor of standard form, which is not involved here and therefore is unnecessary to describe. The value of the needle regulating device has grown out of the fact that the mere deflection of the nozzle was found not to be sufficient for purposes of perfect regulation. It would deflect the stream off the wheel, but it could not entirely regulate its speed with relation to the load upon it, it being found that in practical operation, and especially as illustrated in its use in the propulsion of wheels for the generating of electricity, the load on the wheel varies greatly and not regularly, and thereby it becomes essential for the purposes of having efficient service by the wheel that its speed be regulated by means of some method which will enable its varying load to be taken care of by the regulating means. This has been accomplished through the use of a deflecting nozzle regulated by a needle; the latter device being a form of valve which is introduced into the nozzle, and so adjusted that it can be readily moved in such a way as to either partially or entirely close the mouth of the nozzle in case of necessity; thus reducing or enlarging the jet as required.

The particular form of nozzle covered by this patent is a curved form of nozzle which enables this valve or needle regulating device to be introduced at a point forward of the rotatable or pivotal joint, and so as to pass through the casing or wall of the nozzle and bring the

regulating mechanism outside the nozzle and forward of the joint so as not to interfere with the passage of the stream through that portion of the nozzle; that being the essential purpose that is subserved by the curvature of the nozzle. But the curvature of the nozzle being at a point forward of its joint connection with the supply pipe, and its needle regulating device being introduced forward of that connection, the wall or casing of the nozzle serves not only the purpose I have indicated, but also as a support for the stem of the needle, and thus maintaining the point of the needle valve in equilibrium with reference to the point of the nozzle. So far as the features that I have indicated are concerned, the elements covered by the patent were old in the art, and were known to the inventor of the device covered by the patent at the time he took out the patent. But, prior to the issuance of the patent in suit, the deflecting needle regulated nozzle as used in practice had been pivoted in such manner to the pipe line that the pivotal points were at right angles with the plane of its curvature or the plane of its sinuosity, as it is indifferently termed in the evidence, and it was found that the force exerted by the high pressure of the stream in passing through the curved nozzle induced a constant effort to in common parlance straighten out the nozzle—that is, straighten out the pipe—and that this effort of the stream resulted in what are termed reactory strains which would induce the nozzle, by reason of the manner in which it was pivoted, to move or rotate upon its pivots and interfere very seriously, and to an extent which it was found to be necessary to overcome, with the action of the governor, which required very delicate adjustment. It appears that this difficulty was one which gave rise to long and very serious consideration by those versed in the art and repeated efforts to overcome these reactory strains in order that the governor might be free to perform its function of deflection without having to combat and take up and be affected by these reactory strains. This difficulty as disclosed by the record gave rise, as I say, to a great deal of study by expert engineers to overcome it; but down to a time shortly prior to the application by the assignor of the complainant in this case for the patent in suit that problem had not been successfully solved. That it was solved by the device involved is very clearly disclosed by the record.

The patent in suit covers a device whereby the nozzle is pivoted to its supply pipe with the plane of the axis of its pivotal points in the same plane with its curvature or sinuosity, and that results in the pivots taking up these reactory strains, and thus relieving the strain upon the governor. The pivots being in the same plane as the curvature of the nozzle and at right angles to the direction of flow, the reactory strains are thereby thrown upon these pivotal points and thus there is no tendency of the nozzle to rotate upon these pivots, and, the nozzle being relieved of the weight of these reactory strains, the governor is left free to deflect it on or off the wheel, with nothing to take care of but the weight of the nozzle itself and the water passing therethrough. This relieves the device of the necessity of employing what had theretofore been employed in nozzles of that character, pivoted at right angles to the plane of sinuosity, of having a counterweight at-

tachment, the purpose of which was to take up as far as possible and relieve the governor of these reactory strains. The use of counterweights for that purpose had been found to be wholly inadequate and insufficient because of the variation of the load upon the wheel. Of course, the counterweight had to be of fixed capacity or weight, and consequently it could not change or adjust itself to the varying load upon the wheel, and therefore it could not efficiently counteract the effect of these reactory strains and thus relieve the governor mechanism.

Now, as I have before suggested, there is no question, and can be none under the evidence in the case, as to the value in the art of the device covered by the patent in suit. The defenses are not that it is wanting in value, but that it is without novelty as being wholly anticipated by the existing or prior art; that in the first place the changes here made as exhibited in the device in suit from the art as it previously existed is a purely mechanical one, resulting as said in defendant's brief from a mere quarter turn given to the nozzle in the method of pivoting it to the supply pipe—a thing which it is said was obvious to the most ordinary mechanic skilled in that class of mechanism. And it is likewise urged that, assuming that this was not a mere mechanical change, nevertheless the precise method of pivoting a nozzle to a pipe line existed in the prior art, and that that feature of the device was thereby fully anticipated. It is further claimed that, if the several elements as described in the claims of the patent are to be regarded as necessary elements therein, the device shows, not a combination, but a mere aggregation of those various elements; in other words, such an aggregation as results from the mere coupling together of separate elements, each one working according to the law of its own being, and in no wise modified or controlled by the others with which it is united.

As to this last claim, I do not think it necessary for me to go into much detail as to the considerations which have moved me to that conclusion, but I have become satisfied, and especially as a result of the re-examination of the case that I have made since the physical inspection of the practical working of the device in suit, made by me in company of counsel since my first reading of the briefs, that this device can in no just sense be successfully characterized as a mere aggregation. I have no doubt that the various elements involved do so coact, the one with the other, that while, not changing the essential action of each or any of them, they do nevertheless so modify each other that they bring about a new and valuable unitary action as a whole and produce a result which brings the device fully and clearly within a proper designation of a patentable combination. The removal of the reactory strains from the governor by throwing them upon the pivots as indicated, not only leaves the governor free to more readily and efficiently perform its function of deflecting the nozzle off the wheel, but it eliminates from the device as heretofore practiced the element of counterweights for taking up those strains, thereby simplifying it; while the effect of these changes is to enable the action of the needle valve to more readily and efficiently co-ordinate with the governor mechanism in deflecting the jet back upon the wheel, thereby accomplishing a readier and more perfect regulation of the wheel than had ever before been possible.

I am also of opinion that the various anticipating devices pleaded and put in evidence, with the single exception that I shall hereafter mention, may be largely discarded from consideration in determining the question of anticipation. I do not think that as illustrated by the evidence any of these devices is such as can be said to exhibit the equivalent of this device or anything essentially tending to evidence anticipation; and this includes as well Defendant's Exhibit 2, which is I believe designated as "Bulletin No. 9 of the State Mining Bureau," involving a cut or publication of a device which does show a method of needle regulation as therein disclosed but which even to my unskilled eye, and, as demonstrated by the fact that it has never been sought to be put into use, discloses, as contended by complainant, a device that would not be practicable in the art. Its necessary mechanical construction, as illustrated by the evidence, is such as to violate what seems to me from my examination of the case one of the primary necessities of that sort of a device, and that is that the interior of the nozzle be kept as absolutely free as possible from obstruction or any means by which the water may be arrested or interfered with in its passage. This publication exhibits a device of such patently impracticable character by reason of the introduction of the regulating device of the needle into the interior of the nozzle bore, and thereby requiring the existence of a large open chamber at the side of the nozzle, that it presents to my mind evidence very satisfactory why it has never been sought to be put into actual use; and, of course, a practical and successfully operating device cannot be anticipated by one wholly impracticable.

There is one exception, as I have indicated, to this somewhat general and sweeping discard of these alleged anticipating devices that demands more definite reference, and that is Defendant's Exhibit No. 11, embodying what is known as the "Hagmaier installation" at Mill Creek plant No. 1, which was one of the installations that was examined by myself in company with counsel on the occasion adverted to above. It is very strenuously urged, and the weight of the contention of defendant is put upon this feature of the evidence, that this installation at Mill Creek plant No. 1, known as the "Hagmaier device," discloses a full anticipation of the device in suit or its equivalents; that is, it discloses a curved nozzle with a rotatable joint pivoted in the same plane as the nozzle's sinuosity, that it discloses equivalent regulating means, not only at the point of discharge of the nozzle, but as well through the medium of the cut-off gate in the rear of the joint, and that, in other words, it fully anticipates the device in suit, and I am free to state frankly at this time, in view of the fact that counsel may not have been aware of the particular object which existed in my mind at the time that I requested a physical inspection, that that was the moving consideration which induced a desire on my part to visit these plants and see the devices in practical operation. I must confess that the argument in the brief of counsel for the defendant, which was exceedingly plausible and forcible, had affected my mind to a very considerable degree as to the value of this device as an anticipation of the one in suit. But, as the result of a re-examination of the case in the light of that inspection, I have

become thoroughly convinced that the contention that this Hagmaier device exhibits such anticipation cannot be sustained. It is true that it is a curved nozzle but is a nozzle of peculiar construction. It is what is termed in the briefs a double or twin nozzle each branch of which is of precisely the same capacity and the two branches of which unite in the main body of the nozzle which is itself pivoted to the supply pipe. The nozzle was designed really for the purpose of projecting upon a pair of twin wheels upon the same shaft two jets of water from the same supply-pipe and it is a device which, the main trunk representing the body of the nozzle, branches out in arms of a curved form through which one stream strikes the water wheel to the right and the other one to the left and it thereby is used as a means of turning two wheels that run as I say upon the same shaft. Now it is true that that is a curved nozzle; that is, each one of these separate branches is curved in form, but they were not curved in form for any such purpose as required by the device in suit. They are unattended by any needle regulating device, and it is perfectly patent from the form of the device that the curvature of the arms is solely that the stream may strike the wheels directly rather than at an angle. It has removable tips on each branch of the nozzles and the quantity of flow may thus be changed within certain restricted limits but only by stopping the plant and unscrewing one sized tip and putting thereon one of a smaller dimension or larger dimension, as the case may be. But, of course, as is perfectly obvious to any one at all skilled in the art, this is not, as put by the witnesses, a regulating device. It is merely a replacement of one size of tips for another, and it cannot take the place nor perform the function of the needle regulating device which is found in the patent in suit. So far as the claim that the cut-off gate in the rear of the rotatable joint constitutes a means of regulating the flow, I hardly think that the defendant seriously contends for that proposition, since it is very manifest from all the evidence, or its great weight, that not only is that means never resorted to for the purpose of regulation, but that it would not be either safe or practical to attempt it. As is very clearly shown by the evidence, it is one of the results of hydraulic phenomena that, if you interfere with the flow of the stream at a point remote from the point of ejection, you will immediately depreciate and very largely destroy the efficiency of the flow, and consequently the efficiency of the jet. Moreover, it very clearly appears that to attempt that means of regulation would be attended with great danger to the permanency and safety not only of the cut-off gate, but of the pipe line. I am perfectly satisfied, therefore, that neither the removable tips nor the cut-off gate subserves the same purpose or is in any just sense the equivalent of the needle regulating device found in the patent in suit.

[2] The main contention, however, with reference to this device is that it anticipates what defendant strenuously contends is the single element of value partaking of the slightest novelty in the device of the patent in suit, and that is the fact that the Hagmaier installation is pivoted in the plane of the sinuosity of its nozzle arms; and that it is so pivoted is true. There is evidence by Mr. Hagmaier and by one or

two other witnesses indicating that at the time of the conception of that device he had in mind in part the very purpose admitted to be subserved by that feature of the device in suit—that is, the taking up of these reactory strains—but I find myself wholly unable to give sufficient credence to that feature of the evidence to enable me to find that such was the fact. It seems to me that it is opposed to and contradicted by the physical circumstances and by the history of that device and by the character of the device itself, and what it was intended to subserve. That device, as I have indicated, was designed and installed for the purpose of enabling the stream to be projected upon two wheels upon the same shaft. It necessarily had to be deflectible, and, it being a twin or double nozzle, I have no doubt that the method of pivoting that device to the pipe line was largely, if not solely, with reference to the means of vertical deflection from the wheels, since it could not very well be deflected laterally. That the idea of its pivoting being a means to take up reactory strains could have existed in the mind of the one who conceived that device is not plausible, for the very reason that, the device being in equilibrium, the force of the two arms of the nozzle being precisely on a standard of equality, as shown by the evidence, the necessary effect of one branch of the stream was to take up or counteract any reactory strains that might be induced by the other. It is claimed that it would perform the function of taking up the reactory strains in either arm in the event that the other became clogged. But I cannot for a moment believe that any such contingency was in the mind of the man who conceived that device, for it is perfectly obvious from a practical point of view that immediately upon such an event happening—it is not disclosed in the evidence that it has ever happened—the unit would undoubtedly be at once shut down for the purpose of removing such obstruction. I am satisfied, therefore, as I said a few moments ago, that that device was conceived to meet the necessities of that particular situation, and that it was pivoted in the plane of its sinuosity simply for the purpose of deflection and not for any such purpose as that feature was employed in the device in suit; and, furthermore, that its effect for the purpose here employed was not and could not have been discovered in the working of that device. That being true, it is well established that the mere accidental employment of a feature or element of a device, where its real value for a purpose for which it is afterwards put in practice by another is not recognized at the time of such accidental use, cannot be invoked to anticipate a later device. While it may be conceded, as defendant contends, that the essential point of novelty in the device in suit rests solely and alone in the particular feature of the method of pivoting it to its pipe line, I do not regard it as at all material if that be admitted, since it is well established you cannot construe a patent for a combination such as this with reference to novelty as to any distinct separate feature; for that purpose the device is to be judged as a unit, and it is to be determined from its unitary action whether it be a valuable combination or whether a mere aggregation. You cannot take it piecemeal and finding that its various elements have been anticipated in different devices of the prior art, none of which, however, cover all of the elements which are to be

found in the combination, and thereby successfully sustain a defense of anticipation. You must find all the elements of the combination or their equivalents in some particular device which is claimed to be an anticipation; and therefore it seems to me that, although it be conceded that the real change from the existing art made in the device of the patent in suit was the method of pivoting it to its pipe line so that its pivots would take up these reactory strains, such concession does not in any wise militate against its being held to involve novelty.

[3] And, lastly, as to the objection that the material change in the device of the patent from the existing art is purely a mechanical change of simple and obvious character, I am fully persuaded that this claim cannot be sustained. That it appears simple, now that it has been accomplished, may be conceded; but that it was obvious is fully negatived by the evidence as to the earnest and repeated efforts made to accomplish the result which has been attained. Simplicity is no evidence of want of invention nor of obviousness. The question of patentability in such an instance may and in many cases must be determined largely from the results attained; and those results are such in this device as to disclose novelty. I am persuaded therefore from a re-examination of the whole case that the defenses interposed cannot be sustained.

As indicated, I have not reached these conclusions without very painstaking thought and examination, but I can say unhesitatingly that after such re-examination my mind is left free from doubt, so far as my judgment dictates, as to the correctness of these conclusions. I would have preferred, had it been compatible with the other work upon my hands, to have put my views in this case in writing; but, not having that opportunity, I trust counsel can sufficiently gather from these very general and somewhat desultory suggestions the views that have actuated my judgment.

In accordance with these considerations, a decree may be entered in favor of the complainant, and provision made therein for having the question of damages referred to the master.

In re WOODMAN.

(District Court, D. Massachusetts. November 12, 1910.)

No. 15,897.

BANKRUPTCY (§ 140*)—RECLAIMING GOODS—OWNERSHIP.

Petitioner, a manufacturer of biscuit, sold them to the bankrupt in tin cans, costing about 54 cents each and bearing petitioner's advertising matter, so that no one else could use them to contain food products without violating the laws of the United States; petitioner having the exclusive right to sell them under its patent. There was no written contract between petitioner and the bankrupt as to the ownership of the cans; but it was petitioner's practice to charge the bankrupt 50 cents for each can delivered, and to credit him with 50 cents for each empty can returned. *Held*, that such charge would be regarded as a mere deposit to insure the return of the cans, and that no title thereto passed to the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 140.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In the matter of bankruptcy proceedings of Frank W. Woodman. On petition to review a referee's order denying the petition of the National Biscuit Company to reclaim certain biscuit containers. Overruled and petition allowed.

Hutchins & Wheeler and Lincoln Bryant, for National Biscuit Co. Bernard Berenson, trustee, pro se.

DODGE, District Judge. At the time of his bankruptcy, the bankrupt, a grocer in Chelsea, had in his possession 31 tin cans, made by the National Biscuit Company to contain biscuit sold by them, stamped with their name, and constructed according to a pattern belonging to them. The Biscuit Company had for 10 years been supplying him with biscuit in similar cans upon his order. The practice was to charge them against him at 50 cents each, and to credit him with 50 cents for every one returned empty. The Biscuit Company demanded them from the receiver (to whom the trustee has since succeeded), and later brought this petition to reclaim them. It has proved a claim against the bankrupt, in which no charge for these cans has been included.

I think the course of dealing between the parties with regard to cans, as disclosed by the evidence, shows that both parties had always regarded the cans as the Biscuit Company's property. The bankrupt's testimony is to that effect, as is that of the salesman and manager called by the petitioner. The evidence seems to me to warrant the conclusion that the charge or credit of 50 cents was regarded by both parties, not as the purchase price of the cans, but as a deposit to insure their return. It appears that no one else could use them for containing food products without violating the laws of the United States; also that, while their original cost was about 54 cents, they wore out and became useless, on the average, in the course of three or four trips. That nothing in writing ever passed between the parties to the effect that the petitioner was to retain its property in the cans does not seem to me enough to require a different conclusion. The bankrupt, so far as appears, had never undertaken to sell any of the cans to other parties, and I find no indication that any such resale by him was contemplated, or any other disposition of them by him than their return when empty. That the Biscuit Company had the exclusive right to sell them under its patent renders it less easy to suppose that such a transfer was intended as would leave the bankrupt free to sell them as he might choose. I am therefore unable to hold that the property in them passed to the bankrupt, even upon the terms that he might, at his option, return them or retain them as his property.

I must therefore overrule the dismissal of the petition to reclaim, and direct that it be allowed.

In re VAIN

(District Court, N. D. New York. April 19, 1911.)

BANKRUPTCY (§ 410*)—PETITION FOR DISCHARGE—EXTENSION OF TIME—"UN-AVOIDABLY PREVENTED."

Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3427), provides that any person, after the expiration of a month and within the next 12 months subsequent to adjudication, may file an application for discharge, and, if it shall be made to appear to the judge that the bankrupt was "unavoidably prevented" from filing it within such time, it may be filed within, but not after, the expiration of the next 6 months. Section 14b requires a denial of the application in case the bankrupt has been granted a discharge in voluntary proceedings within 6 years. *Held*, that the fact that, if a bankrupt applied for a discharge within 12 months, it would necessarily be denied because of his discharge in voluntary proceedings within 6 years, such fact did not "unavoidably prevent" him from filing his application for discharge within such time, so as to authorize an extension of time to file until after the 6-year period had expired.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 410.*

For other definitions, see Words and Phrases, vol. 8, p. 7152.]

In the matter of bankruptcy proceedings of Fred W. Vaine. On order to show cause why the time of the bankrupt to file his petition for discharge should not be extended after the expiration of the year subsequent to adjudication. Order discharged.

Daniel J. Cosgro, for bankrupt.

Walter H. Wertime, for creditor.

RAY, District Judge. April 25, 1905, Fred W. Vaine, the above-named bankrupt, was discharged from his debts in a voluntary proceeding in bankruptcy. December 8, 1909, he was again adjudged a voluntary bankrupt. He allowed the 12 months in which he might have applied for a discharge to go by, and now petitions this court to extend the time in which to file his petition for a discharge to some date subsequent to April 25, 1911, so that 6 years shall have elapsed between his first discharge and the filing of his petition for a second discharge. The petitioner claims that he has been "unavoidably prevented from filing" his application for a discharge in this second proceeding "within the next 12 months subsequent to being adjudged a bankrupt," within the meaning of section 14a of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), which reads as follows:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

On his petition for an order extending the time, an order to show cause was issued, and on the return thereof a creditor of the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

appears and opposes such extension on the grounds that the reasons alleged for not filing such application for a discharge within the 12 months are entirely insufficient to justify the granting of such order; that Vaine was not unavoidably prevented from filing such application; and that it appears his reason for not filing it is that he knew, if he filed it within the 12 months, his discharge would be refused, because of the provisions of section 14b, the material part of which reads as follows:

"The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard and investigate the merits of the application and discharge the applicant unless he has * * * or (5) in voluntary proceedings been granted a discharge in bankruptcy within six years."

The petitioner claims in his petition that he was unavoidably prevented from filing his application for a discharge within the 12 months because of poverty, sickness in his family, and because of the provisions of section 14b quoted, inasmuch as such provisions of the law operates to prevent a discharge on a petition heard within 6 years of the granting of the prior discharge. The contention is that if Vaine had filed his application for a discharge within 12 months from December 8, 1909 (that is, prior to December 8, 1910), the matter must have been heard and passed upon prior to the expiration of the 6 years (that is, prior to April 25, 1911), and the refusal of a discharge would have followed, and that hence he was by operation of the statute "unavoidably prevented" from filing his application within said 12 months.

I can give no such construction to the provisions of section 14. Subdivision "b" of section 14, as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 (U. S. Comp. St. Supp. 1909, p. 1310), was intended to prevent the filing of voluntary petitions in bankruptcy by the same person oftener than once in 6 years, and not merely to space discharges to the same person 6 years apart. If the latter is the purpose of the amendment, it can be made effectual by the bankrupt and court or referee in bankruptcy, even if the second application for a discharge is filed within the 12-month period, as the court or referee may postpone a hearing therein until the expiration of the 6-year period, when there will be no legal obstacle to the granting of the second discharge. This procedure would not prevent a second discharge, based on a petition in voluntary proceedings filed 2, 3, or 4 years after the granting of the discharge in the first proceeding. I do not consider that a bankrupt is "unavoidably prevented" from filing his application for a discharge within the 12 months for the reason that, if he does, his discharge will be, or may be, denied because of the provisions of section 14b.

The petition for this extension of time does not show any substantial ground for not filing the application for a discharge within the 12 months. The objections and affidavits filed in opposition to the extension, in connection with the petition itself, show that no grounds exist; that is, that the petitioner, Vaine, was not unavoidably pre-

vented from filing his application for a discharge within the next 12 months subsequent to being adjudged a bankrupt.

The application for an order extending the time in which to file an application for a discharge is therefore denied.

In re HOGAN.

(District Court, W. D. Wisconsin. April 13, 1911.)

1. INSURANCE (§ 586*)—INTEREST TO BENEFICIARY.

Where a policy provided that it should be paid to the beneficiary of insured last designated on the back of the policy, if living, one so designated, under the Wisconsin law, took a vested interest in the policy, subject only to the possibility that she might assign or surrender the policy and destroy such interest.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.*]

2. BANKRUPTCY (§ 143*)—BENEFICIARY'S INTEREST IN POLICY—RIGHTS OF TRUSTEE.

Where a bankrupt was designated as beneficiary in a policy on the life of his mother, which directed that it should be paid to the beneficiary of the insured last designated on the back of the policy, if living, and the insured died four days after the filing of the bankruptcy petition, leaving the bankrupt as a designated beneficiary, his interest in the policy was one which he could have transferred, and which therefore vested in the trustee under Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3451), providing that the trustee is vested with all property which, prior to the filing of the petition, the bankrupt by any means could have transferred.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 143.*]

In the matter of bankruptcy proceedings against William D. Hogan. On petition to review a referee's ruling denying the trustee's claim to an alleged interest of the bankrupt in certain insurance on the life of his mother. Petition granted, and determination reversed.

Charles F. Lamb, for creditors.

Matthew S. Dudgeon and Chas. G. Riley, for bankrupt.

SANBORN, District Judge. The question presented by petition to review the referee's ruling relates to the bankrupt's interest in a policy of insurance upon the life of his mother, Susan Hogan, and in which he was a beneficiary. The policy bears date December 14, 1900, for \$4,000, "to be paid to the beneficiary of the insured last designated on the back of this policy, if living." By designation made February 15, 1901, the bankrupt, Sadie J. Hogan, and Matthew Hogan were designated beneficiaries. The bankrupt filed his voluntary petition June 18, 1909, and the mother died four days later, June 22, 1909, without having made any change of beneficiaries. Thereupon the question arises whether the share of the bankrupt in the insurance was a vested interest passing to the trustee, or only a possibility. The referee took the latter view, deciding that the bankrupt was not required to schedule such possibility, and need not pay it to the trustee. This

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ruling is based upon the settled rule of Wisconsin that the life insured has the absolute power of disposition, and may defeat the contingent right of the beneficiary by appointing others, either by will or assignment, or may surrender the policy, at his own discretion.

[1] By the Wisconsin law the interest of a beneficiary in a life insurance policy, living the insured, is a vested interest, subject to be divested by the exercise of such *jus disponendi* or surrender. Such interests are well known in the real property systems of the various states, particularly in those states, like Wisconsin, which have adopted the New York real estate code of 1830, as well as in the English system of equitable estates. In all these systems such interests are as fully transferable as estates in possession. In Wisconsin the Supreme Court has for 30 years recognized both this absolute power of disposition of the insured and this vested interest of the beneficiary. *Foster v. Gile*, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; *Rawson v. Milwaukee Mut. Life Ins. Co.*, 115 Wis. 641, 92 N. W. 378; *Slocum v. Northwestern Nat. Life Ins. Co.*, 135 Wis. 288, 115 N. W. 796, 14 L. R. A. (N. S.) 1110, 128 Am. St. Rep. 1028; *Meggett v. Northwestern Mut. Life Ins. Co.*, 138 Wis. 636, 120 N. W. 392.

In the *Slocum* Case the question arose whether a beneficiary could maintain a suit for damages caused by the wrongful termination of the policy by the insurance company and insured during the lifetime of the insured. While the earlier cases holding that the beneficiaries' interest is a vested one were approved, the power of disposition was held to include the power of wrongful destruction, and that such vested interest was only an expectancy; in other words, a vested interest, absolutely subject to destruction by the insured, by conduct either lawful or wrongful. And in the *Meggett* Case an assignment by the beneficiary, made by consent of the insured, was sustained, and held to destroy all the rights of the original beneficiaries.

By the law of Wisconsin, therefore, the interest of the bankrupt in his mother's policy was vested, subject only to the possibility that she might assign or surrender the policy and thus destroy such interest. It was an interest vested, subject to divestiture.

[2] By section 70a of the bankrupt act the trustee is vested with all property which prior to the filing of the petition the bankrupt "could by any means have transferred." Certainly he could have transferred this insurance interest, because it was vested. With the mother's consent he could have assigned it absolutely, without her power of destruction. *Meggett v. Northwestern*, *supra*. Without her consent he could have transferred it, subject only to her *jus disponendi*, and to her right to make some arrangement with the company to surrender the policy. This seems to be the Wisconsin rule of property, to be followed by this court. If this is not so, the repeated and consistent rulings of the Wisconsin Supreme Court, that the interest is a vested one, would seem to have no meaning or effect whatsoever. While the question is by no means free from doubt, I think the order of the referee should be reversed.

This opinion is, of course, confined to the case presented in the statement of facts. It is easy to see that, where the insured survives

the bankruptcy proceedings, the beneficiary's interest would be practically worthless. No purchaser of it could afford to pay anything for it, because of the absolute power of destruction possessed by the insured. All that is intended to be decided is that where the death of the insured occurs before the bankrupt estate is closed, without any act of his by way of assignment or surrender, the insurance belongs to the trustee. Cases bearing upon the question are Gould v. N. Y. Life Ins. Co., 132 Fed. 927, 13 Am. Bankr. Rep. 233; Carr v. Myers, 211 Pa. St. 349, 60 Atl. 913, 15 Am. Bankr. Rep. 116; Re Buelow, 98 Fed. 86, 3 Am. Bankr. Rep. 389.

Proceedings will be stayed for 30 days for the purpose of review by the Circuit Court of Appeals.

FLOYT v. SHENANGO FURNACE CO. et al.

(Circuit Court, D. Minnesota, Fifth Division, April 29, 1911.)

1. MASTER AND SERVANT (§ 311*)—INJURIES TO SERVANT—LIABILITY OF FELLOW SERVANT.

Negligence of a superintendent in failing to see that a ladderway in the mine was in reasonably safe condition, resulting in injury to plaintiff, a fellow servant, constituted mere nonfeasance in failing to perform a positive duty of the master, for which such superintendent was not liable, under the rule that a servant is not liable to third persons or coemployés for nonfeasance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1236; Dec. Dig. § 311.*]

2. REMOVAL OF CAUSES (§ 36*)—JOINDER OF RESIDENT DEFENDANTS—SEPARABLE CONTROVERSY—NO CAUSE OF ACTION.

Where plaintiff joined a resident coemployee as a party defendant to an action against his nonresident corporate employer to recover for injuries alleged to have resulted because of the master's negligent failure to provide plaintiff with a reasonably safe place in which to work, and the complaint on its face disclosed no cause of action against such resident defendant, his joinder was fraudulent, and no bar to a removal of the cause to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. § 36.*]

Fraudulent joinder of parties to prevent removal, see note to Offner v. Chicago & E. R. Co., 78 C. C. A. 362.]

Action by Arthur Floyt against the Shenango Furnace Company and another. On motion to remand the cause to the state court. Denied.

J. De La Motte, for plaintiff.

Washburn, Bailey & Mitchell, for defendants.

AMIDON, District Judge. This cause came on to be heard upon the motion of the plaintiff to remand the case to the state court, and was heard upon the complaint and the petition filed by the defendant Shenango Furnace Company for the removal of the cause to the federal court.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] It appears from the complaint that the defendant Shenango Furnace Company, a foreign corporation, is engaged in operating an underground mine, and in connection therewith employed what is known as a "ladderway" leading from one level of the mine to another. The workmen were required to pass over this ladderway in the performance of their duty, and the complaint charges that the defendant failed to perform its duty to maintain this appliance in a reasonably safe condition. The complaint further charges that the defendant James Hodgdon is a citizen of the same state as the plaintiff. He is known as a "mining captain," and was charged with the supervision of the mine and the workmen engaged therein, and that it was also his duty to see that the appliances used in the mine were in a reasonably safe condition. The only negligence charged against him is simply nonfeasance, in that he failed to perform the positive duty of the master to properly inspect and repair the ladderway. Upon well-established principles of the common law, Hodgdon was not liable to third parties or coemployés for nonfeasance. For that he is liable only to his employer. Bryce v. Southern Ry. Co. (C. C.) 125 Fed. 959; Mecham on Agency, §§ 569, 573; Greenberg v. Whitcomb Lumber Co., 90 Wis. 231, 63 N. W. 93, 28 L. R. A. 439, 48 Am. St. Rep. 911; Murray v. Usher, 117 N. Y. 542, 23 N. E. 564; Drake v. Hagan, 108 Tenn. 265, 67 S. W. 470.

[2] When the complaint thus discloses upon its face that the plaintiff has no cause of action against the employé who is made defendant, the cause is removable by the other defendant, if the proper diversity of citizenship exists between that defendant and the plaintiff. Marach v. Columbia Box Co. (C. C.) 179 Fed. 412; Lockard v. St. Louis & San Francisco R. R. Co. (C. C.) 167 Fed. 675; Chicago, R. I. & P. Ry. Co. v. Stepp (C. C.) 151 Fed. 908.

The case of Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, settles the question, that has for some time been in doubt, that when an employé is joined by the plaintiff as co-defendant with the employer, and it is made to appear that the plaintiff in fact has no cause of action against such employé, and the circumstances are such that the plaintiff must have known that he had no cause of action when he made him a defendant, and that such employé is joined as a defendant solely for the purpose of defeating the right of the other defendant to remove the cause into the federal court, the joinder of the employé is then fraudulent, and the cause may be properly removed by the other defendant, if the requisite diversity of citizenship exists. In the case just referred to, the fact that the plaintiff had no cause of action against the employé did not appear on the face of the complaint, but was disclosed by the petition and by affidavits, and upon the showing thus made it was held that the fact that the plaintiff had no cause of action against the employé justified the inference that his joinder as a defendant was fraudulent. To the objection that this inference ought not to be drawn, the court said at page 185 of 204 U. S., at page 188 of 27 Sup. Ct. (51 L. Ed. 430):

"It is objected that there was no proof that Wecker knew of Wettingel's true relation to the defendant, and consequently he could not be guilty of

fraud in joining him; but even in cases where the direct issue of fraud is involved, knowledge may be imputed where one willfully closes his eyes to information within his reach."

If a showing by affidavit that the plaintiff has no cause of action as against the employé will sustain a removal by the other defendant, surely that result ought to follow when the complaint upon its face makes the same disclosure. There can be no higher evidence that the joinder is fraudulent than the fact that on the face of the complaint, under well-established principles of law, no cause of action is stated against the employé. It has been invariably held that, if the plaintiff dismisses his action as to the employé, the cause may then be removed into the federal court by the other defendant; but if the complaint states no cause of action against the employé, the case stands the same as it would upon a dismissal as to him. Under such circumstances, it appears upon the face of the pleading that there is only a single controversy, and that that controversy is wholly between the plaintiff and the other defendant. Upon such a record it would seem altogether plain that the cause is removable into the federal court, when the proper diversity of citizenship exists between the plaintiff and the only defendant as to whom a cause of action is stated.

The motion to remand is therefore denied.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court, W. D. New York. April 6, 1911.)

1. CARRIERS (§ 37*)—TRANSPORTATION OF CATTLE—28-HOUR LAW—FAILURE TO FURNISH WATER.

Where cattle were transported in patent cattle cars, equipped with troughs affording an opportunity to water them without unloading, but the cattle were kept in the cars for a period longer than that authorized by statute, without water being introduced in the troughs for at least a part of the cattle, the carrier was liable for the penalty provided by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]).

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

2. CARRIERS (§ 37*)—TRANSPORTATION OF CATTLE—SPACE.

Where, in the shipment of cattle from Chicago to New York, one of the cars, 36 feet long, contained 21 bulls, tied side by side to alternate sides of the car, and in a number of other cars from 18 to 19 large cattle were carried, the cars were too heavily loaded; it appearing by uncontradicted proof that cattle under transportation should have at least 2½ feet of space for each animal.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 37.*]

Action to recover a penalty by the United States of America against the New York Central & Hudson River Railroad Company. Judgment for the United States.

John Lord O'Brian, U. S. Atty.

Hoyt & Spratt (Alfred L. Becker, of counsel), for defendant.

HOLT, District Judge. This action is brought to recover a penalty under Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Supp. 1909, p. 1178), to prevent cruelty to animals while in transit by railroad, commonly called the "28-Hour Law." That act provides that no railroad transporting cattle from one state to another shall confine them in cars more than 28 consecutive hours, which in certain cases may be extended to 36 hours, without unloading them for rest, water, and feeding. The act also provides that:

"When animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply."

On March 7, 1910, 17 car loads of cattle were shipped from Chicago to New York City. The time of confinement had been duly extended to 36 hours. They were delivered to the defendant at Suspension Bridge. At that time they had been confined 32 hours and 15 minutes. The defendant then transported the cattle to Newberry Junction, Pa., where they were delivered 18 hours later, after a continuous confinement of 50 hours and 20 minutes. The cattle were delivered at Newberry Junction to the Philadelphia & Reading Railroad, to be transported to New York. It was, in substance, a shipment from Chicago to New York, a total run of about 65 hours.

These cattle were all carried in what are called "patent cattle cars," which purport to afford proper food, water, space, and opportunity to rest to the cattle without their being unloaded. All of these cars were arranged with hayracks, and with a space at the top of the car in which hay could be placed, from which it was to fall down into the rack. Some of the cars had, and some had not, arrangements for watering the cattle in the car. The cars which had such arrangements were furnished with four sets of pans, with four pans to each set, each set fastened on a pipe, on which they turned as on a pivot. There was a door in the center of each car, on each side, and one of the four sets of pipes and pans ran from each end of the car to the center door on each side. When not in use, the pans could be turned up against the side of the car. When required to be used for watering the cattle, they were turned down in a horizontal position, and water was introduced by a hose into one of these pans, which was connected by the pipe with the other pans, so that the water from the hose ran through the pipe into all the pans. When these pans were turned down for the cattle to drink, there was no appliance for holding them secure in a horizontal position, and it was a common thing for them to be tipped over by the cattle, and the water spilled out. Frequently the men in charge, when watering the cattle, used various appliances to secure them in position.

The only place between Chicago and Newberry Junction in which any hay or water was supplied to the cattle was Suspension Bridge. At Suspension Bridge the cattle in the cars in which there was no provision for supplying water in the car were unloaded and given water, and then reloaded. In the other cars the cattle were not unloaded. Four of the cars contained bulls, each tied, the first one to one side of the car, and the next to the other side, in alternation. The train arrived at Suspension Bridge about midnight. There was a platform in front of the stockyards there, a little longer than eight

cars. It was usual to take down from each cattle train eight cars, and unload those to be unloaded, and supply feed and water to the patient cars. There were hydrants and hose there with which to furnish water. The hose used for supplying water to the cars was rather short, although there was an extra length of hose, which was frequently used there in order to convey the water to the further side of the cars.

[1] The evidence satisfies me that on the night in question no water was introduced at Suspension Bridge into the troughs on the further side of the four cars containing the bulls, and that in two other cars the cattle tipped up the pans, and the water spilled out, and no more was provided, so that they practically got no water there. I think that this particular type of cars ought to be provided with some apparatus which would securely fasten the pans, when placed in a horizontal position to receive water, so that they could not be tipped over until the fastenings were removed.

The government claims that a number of these cars contained no hay on their arrival at Suspension Bridge, and that no hay was put in the cars there. This is positively testified to by Mr. O'Leary, the government inspector, who was there on the night in question. Kinney, the manager at the Suspension Bridge Stockyards, and McQuillan, his assistant, testified that they had no special recollection of what took place on the night in question, but that it was their uniform practice to put hay in all the cars that needed it, and O'Leary admits that they did put hay in one of the cars on the train. Kinney and McQuillan both impressed me as honest witnesses and as careful, prudent men.

It is for the interest of the shippers to have their cattle properly fed on these trips, as the cattle always shrink in weight to some extent on long journeys, and their weight as beef is worth more than the weight of the hay. It is also to the interest of the railroad to furnish hay, because whatever hay is furnished is sold and charged to the shippers at a profit. I think, if Kinney furnished hay to one car, he probably would have furnished it to the other cars, if he had thought they needed it. Kinney may possibly have seen that there was sufficient hay remaining in the other cars, which O'Leary may not have seen. Upon the whole evidence, I think there is sufficient doubt in the case whether there was any neglect to furnish the necessary amount of hay at Suspension Bridge to prevent the recovery of a penalty on that ground.

[2] It is also claimed that in this shipment cattle were packed so tightly in some of these cars that they did not have proper space and opportunity to rest. In one of the cars, 36 feet long, 21 bulls were tied side by side, and in a number of them 18 and 19 large cattle were carried. I do not think that they had sufficient space to lie down, certainly not without danger of being injured by being trampled on by the others. It is probably true that they would not all want to lie down at one time; but to compel cattle to stand for 65 hours continuously under such wearisome conditions as must attend a transportation by rail for such a period of time is clearly a serious form of cruel-

ty. The evidence is uncontradicted that cattle under transportation ought to have at least $2\frac{1}{2}$ feet of space for each animal. That is the space required by the United States statute relating to shipment of cattle at sea, and obviously it seems a small enough space to be occupied by cattle anywhere. I think that the charge that the cattle transported in some of these cars did not have proper space and opportunity to rest is established.

The transportation of cattle on railroads for long distances at the best involves a good deal of hardship and suffering. The provisions of the act for their protection are conservative enough, and should be strictly enforced, particularly in the matter of furnishing them water. The evidence shows that many cattle, while being transported on a railroad, will not eat much; but they become excited and feverish, and want a good deal of water. To transport cattle from Chicago to New York without giving them any water on the way is serious cruelty.

My conclusion is that the government should have judgment in this case for the penalty demanded of \$500, with costs.

UNITED STATES v. GRIDLEY.

(Circuit Court, D. Idaho, Central Division. February 20, 1911.)

1. PUBLIC LANDS (§ 116*)—ISSUANCE OF PATENT—CONCLUSIVENESS.

A patent issued to an assignee of a soldier's additional homestead scrip does not have the effect of a judgment, and the government is not precluded from ascertaining such rights as it may have in case the issuance of the patent was induced by fraud or was the result of mistake, though the officers of the government made an investigation of the rights of the parties so as to relieve them from a charge of negligently recognizing the claim and issuing a patent thereon.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 325; Dec. Dig. § 116.*]

2. PUBLIC LANDS (§ 138*)—BONA FIDE PURCHASER—WHO IS.

Where the government has by patent conveyed the legal title to land, and a purchaser from its grantee is vested with the legal title, though he purchased from the entryman before patent, but after final proof, and the purchase was made in good faith and for a valuable consideration without knowledge of any fraud of the entryman, the government may not sue to cancel the patent for the entryman's fraud.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. § 138.*]

3. PUBLIC LANDS (§ 138*)—BONA FIDE PURCHASER—WHO IS.

A purchaser in good faith and for value of a soldier's additional homestead scrip, which merely consists of ex parte declarations under oath by persons having no relation to the government of facts which, if true, disclose a right to receive an additional homestead, acquires only a claim which becomes effective if the scrip be valid, and he is not, as against the government issuing to him a patent for an additional homestead on the faith of the validity of the scrip, a bona fide purchaser, and the government, on discovering that the scrip is a forgery, may sue to cancel the patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 368; Dec. Dig. § 138.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suit by the United States of America by Charles E. Gridley to set aside a patent to land. Decree for complainant.

C. H. Lingenfelter, U. S. Atty.

Sullivan & Sullivan, for defendant.

DIETRICH, District Judge. The United States brings this suit to set aside a patent to 120 acres of land; the same having been issued to the defendant, Charles E. Gridley. The facts as disclosed by the stipulation and the undisputed testimony of the defendant are: That one William J. Taylor was entitled to enter a soldier's additional homestead, under the provisions of section 2306 of the Revised Statutes of the United States. Another person, for a valuable consideration, on April 17, 1905, sold and transferred what purported to be this right to one D. N. Clark, of Washington, D. C., the assignment being in due form and properly attested and acknowledged, as required by the rules and regulations of the United States Land Office, and being accompanied by an affidavit in the name of William J. Taylor, setting forth what purported to be the facts of his service in the United States army, together with affidavits of other persons who claimed to have personal knowledge of the facts therein stated. In short, the papers appeared in due form to constitute what is commonly known as "soldier's additional homestead scrip," but they were all executed without the knowledge or authority of William J. Taylor, the soldier. On June 17, 1905, Clark, by an assignment duly executed, transferred the scrip to the defendant, through a broker or agent residing at Helena, Mont. The defendant at that time resided, and still resides, in Blaine county, Idaho, and was unacquainted with any of the parties. He negotiated the purchase by correspondence through the United States mail, paying for the scrip at the rate of \$8.25 an acre. After its purchase, he presented it at the United States Land Office at Hailey, Idaho, on August 3, 1905, together with an application for the tract in controversy, which at that time was public land subject to entry; and in all respects he complied with the law and the rules and regulations of the Land Office relating to such entries. The papers were in due course forwarded by the officers of the local land office to the General Land Office at Washington for examination, and on June 11, 1906, the register and receiver issued to the defendant a final certificate. Between said 3d day of August, 1905, and April 19, 1907, the officers of the General Land Office made inquiry and examination in the usual course of their duties in such matters, as to the truth of the facts set forth in the assignment of Taylor, including an inquiry through various departments of the United States for the purpose of ascertaining the truth of the statements of claimants, and whether or not William J. Taylor was in truth and in fact a beneficiary as claimed by him under section 2306, and whether the facts set forth in his affidavits were true or not. Investigation was also carried on with the Adjutant General's office, at Jefferson City, Mo., with the military secretary of the War Department, with the auditor of the War Department and with the Bureau of Pensions. Inquiries were made as to the truth of the statements contained in the affidavits of said pre-

tended Taylor and as to mustering-in, service, and discharge from the United States Army during the Rebellion, of William J. Taylor in Company M., Thirteenth Regiment, Missouri Volunteer Cavalry. It also included a comparison of the signatures of the real William J. Taylor, soldier, and the William J. Taylor claiming to be a beneficiary, a tracing of the signature of the Taylor who had served in the army being furnished by the War Department. The inquiry also covered the whereabouts of William J. Taylor, especially on the 17th day of April, 1905, when he made the assignment to Clark, and the office of the Bureau of Pensions, on January 8, 1906, advised the Commissioner of the General Land Office that in their pension records they had the deposition of one who had served in the same company with Taylor, and had known him in boyhood and lived in the same neighborhood; and it further included facts concerning the marriage, size of family, nativity, address, and residence of said William J. Taylor, since March 13, 1871. Thereupon, on the 19th day of April, 1907, patent was issued to the defendant, the patent containing the following clause:

"The claim of Charles E. Gridley, assignee by mesne conveyances of William J. Taylor, has been established and duly consummated in conformity to law."

The defendant was not aware of, and did not know or suspect, or have any reason to suspect, that the scrip was spurious until some time after patent had issued to him, and about the time the suit was commenced. So far as disclosed by the record, he acted in perfect good faith, and paid a fair price for the scrip.

[1] The first point urged by the defendant is that by reason of the proceedings taken in the Land Office after the defendant presented the scrip, including the investigation made by the officers of the department, the patent is to be regarded as in effect a judgment in defendant's favor, and that the issues here presented are therefore res adjudicata. It is difficult, and perhaps impossible, with entire accuracy to formulate a statement of the distinction which, under all circumstances, differentiates a case where the patent operates as a conclusive judgment and where it is subject to judicial inquiry and to be set aside if found to have been issued by reason of fraud or mistake; but I am not convinced that the present case falls within the former class. In *United States v. Minor*, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110, a discussion of the question is concluded with the following language:

"But in proceedings like the present, wholly *ex parte*, no contest, no adversary proceedings, no reason to suspect fraud, but where the patent is the result of nothing but fraud and perjury, it is enough to hold that it conveys the legal title, and it would be going quite too far to say that it cannot be assailed by a proceeding in equity and set aside as void, if the fraud is proved and there are no innocent holders for value."

In no true sense can it be held in the case at bar that there was an adversary proceeding in the Land Office. So far as appears, neither the defendant nor the complainant doubted the genuineness of the scrip. The records in the possession of the government disclosed the right of William J. Taylor, the soldier, to an additional homestead entry, and

the statements contained in the affidavits which constitute the script were apparently true in all material respects, except as to the identity of the author of the claimant's affidavit. As to that question, the sources of information were as accessible to the defendant as to the officers of the government, and no greater obligation rested upon the latter than upon the former to know the truth. The investigation made by the officers does not go further than to relieve them from a charge of carelessly or negligently recognizing the defendant's claim and issuing the patent. The government is not thereby precluded from asserting such rights as it may have, in case it be true that the issuance of the patent was induced by fraud or was the result of mistake, provided that the defendant is not an innocent purchaser for value.

The second defense is that, notwithstanding the gross fraud of his original assignor, the defendant is protected against a suit for cancellation by the fact that he is a bona fide purchaser for value. Of the existence of such a rule there can be no question, for it is firmly established by an unbroken line of authority; but the plaintiff denies its application to the present case. Conceding that the defendant acted in good faith and was conscious of no wrongdoing, it still asserts that the rule is not broad enough to afford him protection because it is confined to cases where the defendant in his purchase, and by the conveyance to him, acquires the legal title; in other words, a purchase in good faith can be only of the legal title from one who is at the time invested therewith.

It may be remarked in passing that the case is not like that of Mofat v. United States, 112 U. S. 24, 5 Sup. Ct. 10, 28 L. Ed. 623, where a patent was issued to a fictitious person. In such a case, there being no grantee in esse, the patent is inoperative, and is equivalent only to a declaration of the government that it conveys the land to no one. Here the grant was to the defendant himself, a real person, and the patent was not rendered ineffective by the false impersonation or forgery by which its issuance was induced. That it conveyed to the defendant the legal title, or that he now holds the same, is, I think, not open to question, nor is it requisite to the defense of purchase in good faith that the purchase should have been from one who at the time held the legal title. It may be necessary that the defendant be the holder of such title at the time the suit is commenced, but the date of the acquisition is not always of vital importance. Plaintiff's statement of the rule is in this particular substantially like that found in the headnote to Hawley v. Diller, 178 U. S. 476, 20 Sup. Ct. 986, 44 L. Ed. 1157, which was criticised and repudiated by the court in United States v. Detroit Lumber Company, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, and held not to be an accurate statement of the law.

[2] By the latter decision, it is established that, where the government has by patent conveyed the legal title, it cannot successfully maintain a suit against a purchaser from its grantee to cancel the patent for the fraud of the entryman, where the defendant is at the time the suit is brought vested with the legal title, even though it purchased from the entryman before patent, but after final proof; provided, of course, the purchase was in good faith and a valuable con-

sideration was paid without knowledge of the fraud. The rule is well stated in the opinion rendered in the Detroit Lumber Company Case by the Circuit Court of Appeals (131 Fed. 668, 67 C. C. A. 1), where it is said:

"When the patents had issued, the power of the Land Department had ceased, and the Detroit Company's position was conditioned by every attribute of that of a bona fide purchaser. Conceding that the indispensable elements of such a defense are absence of notice of the fraud or defect, good faith, payment of value, and the legal estate, it is not material at what time or in what order the purchaser acquires them. It is only necessary that they all concur in him at the same time. It is indispensable to this defense that the consideration should be paid before notice of the defect; but it is not essential that it should be paid before or at the time the title is conveyed. It is sufficient if the payment is completed at any time before notice of the defect is received. * * * Finally, counsel for the government say—and this seems to be the argument upon which they most implicitly rely—that acquisition of the legal title was indispensable to the defense of a bona fide purchase; that the legal title to all but 13 of the 44 tracts was in the United States when the Detroit Company purchased; that the title to the timber on these 31 tracts which the Detroit Company bought was a mere equitable title evidenced by the final receipts; that these receipts constituted notice to the Detroit Company that they had been secured by the fraud and perjury of the entrymen and entrywomen, and that the company could not divest itself of this notice by the subsequent issue of the patents and the acquisition of the legal title which inured to it thereunder. There are many reasons why this argument is not persuasive. In the first place, conceding for the present, without admitting or deciding this to be the law, that a legal estate in the vendee is an essential condition of the defense of a bona fide purchase, such an estate vested in the Detroit Company before it received any notice of the alleged fraud. In the second place, the patents, when issued, related back to the dates of the applications upon which they were founded, and vested the legal estate in the timber in the Detroit Company as of the date of its purchase from the Martin Company, and before it had notice of the fraud. And, in the third place, the Detroit Company was an innocent purchaser for value, in good faith, of the equitable title to the timber, evidenced by the final receipts, and the legal title vested in it by the issuance of the patents before the government assailed either."

But, while the rule thus stated is more liberal than that now contended for by the government, is it broad enough to protect the defendant here? Ordinarily, where the defense of purchase in good faith has been set up to protect the defendant against a suit of this character, the purchase appears to have been made after the issuance of patent. In exceptional cases, it was after the delivery of the final receipt at a time when the entryman had fully performed all of the conditions precedent to his right to receive patent. The equitable title had been fully earned, and the proper officers of the government had issued a certificate as evidence thereof. In either case, the vendor had title, either legal or equitable, and the representatives of the government had placed in his hands the evidence of that fact. In making payment therefore the purchaser paid for either a legal or equitable title, which was at the time of the payment vested in the vendor, who held authentic evidence thereof in the form of either a final receipt or a patent.

[3] A different condition is presented by the record in this case. When the defendant purchased and made payment for the scrip, his vendor was the owner of neither the legal nor the equitable title to the

land in question. The scrip, as it is called, consisted of nothing more than ex parte declarations under oath, by persons having no official relation to the government, of certain facts, which, if true, disclosed a right on the part of the claimant to receive title to a certain amount of land. The papers might or might not be of value, depending upon the truthfulness of the statements therein contained. The mere execution of the affidavits and the assignment of the claim initiated no right, either equitable or legal, to any tract of land. The right was of no greater dignity than that of a qualified citizen to pre-empt or to enter under the homestead laws a certain amount of land. The claim became effective to initiate title only upon proper application in the United States Land Office for a specific tract. The defendant bought and paid value for what in good faith he believed to be a valid right, which, however, turned out to be a worthless simulation. He received nothing. The purchase complete, he held in his hands a mere forged instrument, a counterfeit, totally devoid of real value. This he presented to the proper officers in the belief that it was genuine, and, acting upon a like belief, the officers issued to him the patent. There was no valuable consideration. The valuable consideration essential to the defense of a purchase in good faith was paid by the defendant, not for any title, either equitable or legal, which had been transferred by the government to the holder of the scrip, but for a claim which was without merit, for scrip which was mere counterfeit, a forgery. The defendant himself became the actor in inducing the government to convey to him a title which it was under no obligation to convey. He was acting in good faith, it is true, but his position is not materially different from that of one who, through mutual mistake of the parties, makes payment for property received by a counterfeit or by a forged note or bill. Assuming that it was extinguishing its obligation to convey to the soldier, William J. Taylor, a hundred and twenty acres of land, the government issued to the defendant, who falsely, though unwittingly, represented himself to be the assignee of William J. Taylor, the soldier, the patent in question. Profound though our sympathy for the defendant may be on account of the despicable fraud of which he became the victim, his loss is a misfortune for which the government is in no wise responsible. When he parted with the consideration upon which he now relies as an element of this defense, there was no relation of privity between him or his vendor and the government. He was not misled by any action or representation on the part of any officer of the government. His assignor had not been clothed by the government with apparent title or any indicia of title.

Upon principle I am unable to distinguish the case from one where payment for property is made by a forged instrument; and the general rule in such cases is that, where the parties are ignorant of the forgery, the subject of the transfer, in equity and good conscience, continues to be the property of the vendor. "One who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money

which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration which has once existed fails by subsequent election or other act of either party, or of a third person; but there is never at any stage of the transaction any consideration for the payment." *Leather Manufacturers' Bank v. Merchants' Bank*, 128 U. S. 34, 9 Sup. Ct. 4, 32 L. Ed. 342. In *Hammond v. Allen*, 36 U. S. 63, 9 L. Ed. 633, the defendant had employed the plaintiff to prosecute a claim which he held against the Portuguese government, agreeing to pay him a large compensation. At the time the agreement was entered into both parties were ignorant of the fact that the claim had already been allowed. The case was brought to cancel the contract. The court said:

"Allen is not chargeable with fraud in entering into the contract, nor in using the most persevering efforts to get possession of the installment paid. That the contract was entered into by both parties under a mistake is unquestionable. Neither of them knew that the Portuguese government had allowed the claim. Can a court of equity enforce such a contract? Can it refuse to cancel it? That the agreement is without consideration is clear. * * * Suppose a life estate in land be sold, and at the time of the sale the estate is terminated by the death of the person in whom the right vested, would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud. If he did not know it, on the ground of mistake. In either case would it not be gross injustice to enforce the payment of the consideration? If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration? These are cases in which the parties enter into the contract under a material mistake as to the subject-matter of it. In the first case the vendor intended to sell, and the vendee to purchase, a subsisting title, but which in fact did not exist; and, in the second, a horse was believed to be living, but which was in fact dead. If in either of these cases the payment of the purchase money should be required, it would be a payment without the shadow of consideration, and no court of equity is believed ever to have sanctioned such principle."

It is not thought to be material that here the government transferred property instead of paying money. Both it and the defendant, acting under a mutual mistake, assumed that the transfer was to extinguish an existing obligation, namely, the obligation of the government to convey to William J. Taylor, the soldier, a certain amount of land. Instead of receiving the consideration which both parties understood was to be paid, it received nothing at all. Its obligation remained unextinguished and undiminished.

The principle is elaborately discussed and illustrated in *Terry v. Bissell*, 26 Conn. 23. It was there said:

"Suppose the defendants had proposed to sell, and had sold, a bar of metal as gold, which turned out to be mere dross, colored and disguised, without a particle of gold, or a barrel of flour which was examined on the surface, but below was mere sawdust or gravel, or a barrel of beef which turned out to have one layer of beef and the rest was brick bats and stones, or a box of chisels which turned out to be scrap iron, would the seller be permitted to insist that it was a sale and keep his money? * * * In some of the cases which we have cited and commented on, it is said that where there is a mutual mistake of fact there is not a sale, because there is a failure of consideration; in others, because there is an implied warranty of genuineness, or of kind and description; and still in others because the thing is not in existence. But the true idea is, as I think, that, if the thing contracted for is essentially nonexistent, there is nothing to sell and transfer, no subject-matter for an intelligent and perfect understanding between

the parties. The parties may undoubtedly bind themselves by express agreements as they please, but where the thing intended to be sold and transferred does not exist, as if the horse be dead, the ship lost, the goods burnt, or the instrument forged, there can be no sale, unless we adopt a new definition of that legal term."

In 2 Pomeroy's Equity Jurisprudence (3d Ed.) p. 870, the learned author says:

"Cancellation is appropriate when there is an apparently valid written agreement or transaction embodied in writing, while in fact, by reason of mistake of both or one of the parties, either no agreement at all has really been made, since the minds of both parties have failed to meet upon the same matters, or else the agreement or transaction is different with respect to its subject-matter or terms from that which was intended."

See, also, Crowe et al. v. Lewin, 95 N. Y. 423; Fritzler v. Robinson, 70 Iowa, 500, 31 N. W. 61; Geib v. Reynolds, 35 Minn. 331, 28 N. W. 923; Fleetwood v. Brown, 109 Ind. 567, 9 N. E. 352, 11 N. E. 779.

The case of United States v. Sierra Nevada Wood & Lumber Company, 79 Fed. 691, was much relied upon at the argument by the defendant as being directly in point because of the similarity of facts; and in the respect that there, as here, the fraud consisted in the forgery of scrip or land warrants, the cases are not essentially different, but the distinction which is here thought to be controlling undoubtedly exists; as appears in a single sentence of the opinion. "Clear and strong," says Judge Hawley, "as the equity of the United States in these cases must be admitted to be, it is self-evident that it is no clearer or stronger than that of the innocent purchasers (the defendants) of the legal title to the lands, who paid a valuable consideration therefor, and have made valuable improvements thereon, in good faith, without any notice of the illegal acts committed by the person or persons who wrongfully and fraudulently obtained the patent from the United States. * * * They relied, and had a right to rely, upon the patent issued by the government, in a case where it had the unquestioned jurisdiction and right to issue the patent. The fact that the government was imposed upon was not their fault."

It is clear that a different case is here presented, for the defendant's assignor had neither title nor evidence of title. The defendant bought the spurious scrip at his peril. The government had no responsibility in the premises. In presenting it and asking that the land in controversy be conveyed to him, he must be understood to have represented that it was genuine, that it was what it purported to be, that it was in truth and in fact the right of the soldier, William J. Taylor, "that it was gold, and not merely gilded dross."

It follows that the relief prayed for must be granted, and a decree will be entered accordingly.

MITCHELL v. BIG SIX DEVELOPMENT CO.

(Circuit Court, D. Missouri, S. W. D. at Joplin. January 9, 1911.)

No. 19.

1. EQUITY (§ 295*)—PLEADING—SUPPLEMENTAL BILL.

If a supplemental bill be filed after decree, it must not only be germane to the purpose of the original bill, but must be in aid of the decree or to revise it, and it cannot then perform the office of an amended bill unless the matter of amendment was not known, or for some reason, not chargeable to the fault of the complainant, could not be brought to the attention of the court by way of amendment during the progress of the case and before decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 583; Dec. Dig. § 295.*]

2. EQUITY (§ 301*)—PLEADING—SUPPLEMENTAL BILL.

In determining whether a supplemental bill filed after decree is demurrable for laches, reference may be had to the record, including the answer in the original case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 593; Dec. Dig. § 301.*]

3. EQUITY (§ 296*)—PLEADING—SUPPLEMENTAL BILL AFTER DECREE—LACHES.

Complainant brought suit in equity for cancellation of a mining lease, which he had declared forfeited, as a cloud on his title, and to enjoin the lessee from further operation or trespasses on the mining property. Between the time of the filing of the bill and the issuance of a preliminary injunction, defendant continued to operate the mine, and paid complainant the royalty stipulated in the lease on the ore mined, which complainant accepted. Subsequently final decree was entered granting complainant the relief prayed for. *Held*, that complainant could not maintain a supplemental bill, not filed until nearly five years after decree, to recover damages for the waste and trespass committed by defendant by operating the mine between the time of the declared forfeiture and the granting of the injunction, as the facts were fully known to him before decree, and might have been set up by way of amendment to the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 586; Dec. Dig. § 296.*]

4. EQUITY (§ 423*)—JURISDICTION TO GRANT INCIDENTAL RELIEF—AWARDING DAMAGES FOR TRESPASS IN INJUNCTION SUIT.

In a suit in equity brought by a lessor of mining property for a cancellation of the lease, and to enjoin waste or trespass by the lessee in continuing to operate the mine after a forfeiture of the lease had been declared, the court had jurisdiction to award damages for such waste or trespass whether committed before or after suit brought; complainant having the right in the latter case to bring in the matter by amendment to the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 990; Dec. Dig. § 423.*]

In Equity. Suit by S. Duffield Mitchell against the Big Six Development Company. On demurrer to supplemental bill. Demurrer sustained.

See, also, 70 C. C. A. 569, 138 Fed. 279, 1 L. R. A. (N. S.) 332.

S. Duffield Mitchell, pro se.

Thomas Hackney and Grayston & Spencer, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

VAN VALKENBURGH, District Judge. May 31, 1898, complainant leased to the defendant company certain mining properties in Jasper county, Mo., for a period of 10 years, for the purpose of mining for lead and zinc ores, including the sinking of shafts, the mining of said land in good faith, the keeping on hand of sufficient machinery so as to permit sufficient mining, proper operation, and an increase in the capacity thereof. As rent or royalty therefor defendant agreed to pay complainant 12 per cent. of the market value of all ores mined and sold during its tenancy. July 11, 1903, complainant filed in this court his bill in equity, charging: That the defendant corporation had not performed the acts and duties required by it, but, on the contrary, had failed and refused to keep the drifts in said land drained of water to permit efficient mining thereof, and had failed to mine said ground in a workmanlike manner, and had removed, or caused to be removed, a pillar or pillars in said ground, which in mining said ground had been left to support the surface, and had failed properly to timber and secure the drifts of said ground from caving, by reason of which, and other failures, the ground had subsided, caved, and fallen in, to the great detriment and damage of said land. That by reason of its failure to comply with the requirements and conditions of the lease the defendant had forfeited the same, and the lease by its terms had ended and determined. That the complainant electing to enforce said forfeiture, as against defendant, had on the 7th day of July, 1903, declared said lease forfeited, had made re-entry on the land described, and declared an ouster of the defendant therefrom. That notwithstanding the re-entry by complainant, the defendant refused to surrender the lease, and continued to claim and assert rights thereunder, and threatened to continue to do so, and to cause said land to be mined, and to take the ores, rock, and earth therefrom, to the irreparable damage of the complainant. That the defendant was insolvent, and his remedy at law inadequate, and that he would be subjected to great damage and injury to property and loss of money during the period of time from the date of forfeiture to the date of final judgment, wherefore the complainant prayed that this court might decree: First. "That defendant has no estate, interest, or title in or to the lease, or in or to the land covered thereby and described therein." Second. "That the title of complainant to said described land is unaffected by said lease, or any claim whatsoever of the defendant." Third. "That the lease is no longer in force and effect in favor of the defendant, and that the same may be canceled, annulled, and surrendered into the possession and keeping of the plaintiff." Fourth. "That the defendant corporation, its attorneys, officers, servants, and agents, pending this bill be specially and on final hearing that it be perpetually restrained and enjoined from asserting any claim whatsoever under said lease, and from remaining or continuing in possession of the land described therein." Fifth. "That the plaintiff may have such other and further relief as the equity of this case may require." There was no prayer for an accounting nor for the ascertainment or allowance of any special damages for the waste alleged to have been committed or threatened.

The defendant demurred to the bill, and October 6, 1903, the demurrer was overruled and a temporary restraining order and injunction were granted restraining and enjoining the defendant, its officers, agents, and servants, pending the bill, from the operation of the mines in question. The defendant answered, and the case proceeded to final proofs and argument, with the result that April 13, 1904, a decree was rendered finding the issues for the complainant, annulling the lease and setting aside the same as a cloud upon the complainant's title, and the injunction theretofore granted was made perpetual. On May 3, 1904, an appeal was allowed and perfected, and on April 22, 1905, the decree was affirmed by the Circuit Court of Appeals for this Circuit. The case is found reported under the same title in 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332.

During the period between July 11, 1903, when the bill was filed, and October 6, 1903, when the restraining order was issued, the defendant continued to operate the mines and took therefrom ores which sold for the gross sum of \$24,644.51, upon which sum it paid to the complainant \$2,954.70, being the 12 per cent. which the provisions of the lease required it to pay to the complainant as rent or royalty, and the complainant accepted the payments thus made. This situation was set up with particularity in defendant's answer filed October 16, 1903, and was urged as a waiver of the forfeiture, which, however, was not allowed either below or in the appellate court. At a January Term, 1910, of this court, nearly five years later, complainant asked leave to file his supplemental bill in said cause, reciting the former bill and the proceedings thereunder, and announcing his purpose to ask an accounting for damages and waste accruing from July 11, 1903, to October 7, 1903, by reason of the extraction of ores by defendant during that period in the amount as above set forth, on the theory that such relief flowed from and was in aid of the decree rendered in favor of complainant under the original bill. This application was opposed by the defendant on the following grounds:

"(1) The relief sought by the proposed supplemental bill is not germane to the original bill; not supplemental thereto, and designed to cure some oversight, cover some change in situation, or round out and complete the remedy sought and granted by the original proceeding.

"(2) Before issue joined, the complainant had full and complete knowledge of the facts on which he now seeks to base his supplemental bill. He took no action until more than five years after the decree of this court, and nearly five years after affirmance of that decree in the Court of Appeals. His laches precludes him from obtaining the right to file a supplemental bill.

"(3) Complainant's petition for leave to file supplemental bill shows on its face a perfect defense to such bill."

The learned judge who then presided over this court permitted the supplemental bill to be filed, but in so doing recognized the gravity of the objection made, and did not foreclose himself nor this court from their subsequent consideration. This is evidenced by his memorandum filed with the order. He said:

"It is an established rule of equity procedure that the granting of leave to file a supplemental bill is discretionary with the court. This discretion ought not to be arbitrarily or inconsistently exercised against the applicant, for the reason that, if the leave be denied, the applicant is cut off from the

opportunity of vindicating the sufficiency of the pleadings and his right in the premises before the appellate courts. And therefore, as the granting of the leave to file the supplemental bill does not operate as any great hardship to the defendant, for the reason that if the bill is insufficient, and the party is not entitled thereto, no decree or leave could be had thereon; and for that reason the court will not in the first instance enter into any technical nicety on the question of the sufficiency of the pleading, but will leave such matter to a later determination. * * * For this reason, the court has concluded to grant the leave, as of the date when the application was presented, leaving the matter of objection thereto interposed by defendant's counsel to be raised by demurrer, or other plea which may seem then to be proper."

Conformably to the mode of procedure indicated by the court at that time, the defendant seasonably renewed its objections in the form of demurrer to the supplemental bill. I shall take up these objections somewhat out of the order in which they are urged by counsel for defendant.

First. Does the supplemental bill in this case disclose a perfect defense to such bill? The bill as filed contains this averment:

"That after said July 11, 1903, the date when the complainant filed his bill in equity in this honorable court and until October 7, 1903, the date when the temporary restraining order aforesaid was granted by this honorable court, the defendant corporation, notwithstanding the filing of said bill and the charges and the prayers for relief therein, continued to mine upon or to permit and require its sublessees to mine thereon and to produce and extract from said land large tonnage and quantities of lead and zinc ores, which your petitioner believes and is informed was sold for the value of \$24,644.51, upon which said sum the defendant paid to your orator 12 per cent. thereof, to wit, the sum of \$2,954.70 as rent or royalty, which the provisions of the said lease required it to pay to your orator."

Of this allegation counsel for defendant say:

"This payment of the contract rental while not waiving the complainant's right to maintain his action for a continuing cause of forfeiture was an accord and satisfaction and adjustment of all complainant's claim for mesne profits, use, and occupancy of the property for that period."

In support of this contention counsel cite Cleve v. Mazzoni, 45 S. W. 88, 19 Ky. Law Rep. 2001. That was a case where the tenant of a building held over after forfeiture was declared, which forfeiture was subsequently sustained on appeal. Meantime the plaintiff had accepted the regular rental pending the litigation. Afterwards he sought to recover damages for the unlawful detention. The court said:

"For all time the tenant is in possession he would be liable for use and occupation; and, if the landlord is willing to receive and the tenant to pay the contract rental, this would be but an adjustment of the liability for use and occupation."

It seems to me that the case at bar is readily distinguishable from that case, in that there the property detained after forfeiture was a rental building, and the only damages that could be laid would be a reasonable rental for its use and occupancy which might fairly be assumed to have been fixed and accepted by the parties in the rental contract and evidenced by the payments made thereunder. Here the damages sought to be recovered are the value of the ores removed to the injury and depreciation of the freehold, damages sounding in

waste or trespass. Furthermore, it cannot be said as a legal conclusion that the acceptance of this royalty, which, as we have seen, did not waive the forfeiture, was an accord and satisfaction as the result of an agreement between the parties consummated by a meeting of their minds in the settlement or adjustment of the claim under consideration. It has been held:

"A tenant is liable, in the absence of an express agreement to the contrary, for causing a permanent injury to the demised premises over and above the ordinary wear and tear, when such injury is caused by his wrongful act or negligence. * * * The right to sue for injuries committed by the tenant or those for whose acts he is liable is not waived by the subsequent acceptance of rent." 24 Cyc. 932, 933. And see Chalmers v. Smith, 152 Mass. 561, 26 N. E. 95, 11 L. R. A. 769.

It is true that the acceptance of this royalty without protest, the apparent satisfaction of the complainant therewith, to be inferred from the length of time that he has permitted to elapse before making claim for additional remuneration, lends color and substance to defendant's contention, but, owing to the essential differences respecting the uses of the property involved in the two cases, and to the further fact that the damages claimed are not for mesne profits or use and occupation, as was the case in Cleve v. Mazzoni, I prefer not to rest my conclusions here upon the reasoning of that case.

Second. Is the bill properly supplemental, and is the relief sought germane to the original bill? "A supplemental bill, as its name imports, is a new bill supplemental to the original bill and filed in the same suit in aid of the original bill." 2 Street, Fed. Eq. Prac. § 1155, p. 701. "Originally, the supplemental bill was chiefly used for two purposes: (1) To bring before the court matter in existence at the time of the filing of the original bill, but not alleged therein, because either not then known to the plaintiff or deemed impertinent; (2) to bring before the court new facts occurring subsequent to the filing of the bill. But, as indicated above, the first of these two functions of the supplemental bill is no longer exercised, the same end being now attained, for the most part, by amendments. It follows, under the present practice of our courts, the chief function of the supplemental bill is to bring forward new facts or events and to cure defects in the suit resulting from the occurrence of these events during the progress of the suit." 2 Street, Fed. Eq. Prac. § 1159, p. 703. "The supplemental bill, as regards the case-made and the relief sought in it, must have a legitimate and natural connection with the case-made and the relief sought in the original bill. The subject-matter of the supplemental bill must be, in a word, germane to that of the original bill. The new relief properly obtainable by a supplemental bill usually consists of a modification or enlargement of the relief originally sought." 2 Street, Fed. Eq. Prac. § 1168, p. 709. "A supplemental bill is a mere addition to or continuation of the original bill, constituting therewith a single record, and both must be read together. Hence there must be such a connection between the matter of the original and of the supplemental bill that a single bill combining the matter of both would not be multifarious. It follows, further, that the supplemental bill must not be repugnant to the original." 16 Cyc. 361. It will be observed

that most of the functions referred to in these quotations from the text-writers are in the nature of amendments to the original bill, and for such purposes the distinctions formerly existing between amended and supplemental bills have been largely broken down in actual practice by the courts. Of course, amended bills can only be filed during the progress of the litigation before decree and generally before answer, except with leave, while supplemental bills, in proper cases, may be filed after decree. Supplemental bills, so called, however, are frequently filed before decree for the purpose of amending the original bill. *Sheffield & B. Coal, Iron & Ry. Co. v. Newman*, 77 Fed. 787, 23 C. C. A. 459; *New York Security & Trust Co. v. Lincoln St. Ry. Co. et al. (C. C.)* 74 Fed. 67. An additional function of the bill is by way of aider to the original bill, as in *Mellor v. Smither*, 114 Fed. 116, 52 C. C. A. 64, and *Root v. Woolworth*, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123. And, of course, it may be used as in the nature of a bill of review. And, as has been said in *Root v. Woolworth*, supra:

"A supplemental bill may also be filed, as well after as before a decree; and the bill, if after a decree, may be either in aid of the decree, that it may be carried fully into execution, or that proper directions may be given upon some matter omitted in the original bill, or not put in issue by it, or by the defense made to it. * * * But, where a supplemental bill is brought in aid of a decree, it is merely to carry out and to give fuller effect to that decree, and not to obtain relief of a different kind on a different principle; the latter being the province of a supplementary bill in the nature of a bill of review, which cannot be filed without the leave of the court."

[1] It is deducible from the foregoing as well as from the uniform decisions of the courts in federal jurisdictions that, if a supplemental bill be filed after decree, it must be in aid of that decree or to revise it. It cannot then perform the office of an amended bill, unless the matter of amendment was not known, or for some reason not chargeable to the fault of the complainant, could not be brought to the attention of the court by way of amendment during the progress of the case and before decree, and, of course, the relief sought must be germane to the purposes of the original bill. Can it be said that the relief sought in this supplemental bill is not germane to that prayed in the original bill, and could not have been urged upon the court by timely amendment? If this question in both branches be answered in the negative and complainant knew of the circumstances entitling him to this relief in time to have presented his claims to the court in the original case, then this bill is neither timely nor properly supplemental for the purposes for which it is employed. It does not seek to impeach the original decree, but asks other and further relief growing out of the very circumstances upon which the original prayer was founded, and this brings us to a consideration of the third and last objection urged by the demurrer. This objection is made in the following language:

"Before issue joined the complainant had full and complete knowledge of the facts on which he now seeks to base his supplemental bill. He took no action until more than five years after the decree of this court, and nearly five years after affirmation of that decree in the Court of Appeals. His laches precludes him from obtaining the right to file a supplemental bill"

The effect of lapse of time upon the right to file a bill of this nature has been exhaustively discussed by our Court of Appeals in *Kelley et al. v. Boettcher et al.*, 85 Fed. 55, 29 C. C. A. 14, *Wilson v. Plutus Mining Co. et al.*, 174 Fed. 317, 98 C. C. A. 189, *Broatch et al. v. Boysen et al.*, 175 Fed. 702, 99 C. C. A. 278, and the rule clearly defined. It is there stated:

"Courts of equity are not bound by, and act in analogy to, the statutes of limitation relating to actions at law of like character. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches within that time. When a suit is brought after the statutory time, the burden is on the complainant to show in his bill and by his proof that it would be inequitable to apply it to his case."

And, where the laches is not disclosed on the face of the bill, it must be set up in the answer, and demurrer will not lie. "It is settled that the defense afforded by the statute, as well as the defense arising from laches merely, may be taken by demurrer, where the facts stated in the bill show that the time within which suit should be brought has elapsed, and no circumstance is shown to indicate any valid excuse for not having brought it within that time." *Nash v. Ingalls*, 101 Fed. 645-649, 41 C. C. A. 545.

[2] And, generally speaking, in determining whether the supplemental bill is demurrable for laches, reference may also be had to the record, including the answer in the original case, and this is true because in the very nature of things the supplemental bill must be read in connection with the original bill, constituting therewith a single record. The very right to file such a bill depends largely upon the situation of the parties and of the subject-matter in the original proceeding. Equity Rule 58; *Mosgrove v. Kountze* (C. C.) 14 Fed. 317. Of course, where reliance is placed upon circumstances such as those recited in *Kelley v. Boettcher*, *supra*, to induce a court of equity to apply the doctrine of laches in a shorter time than that fixed by the statute, to wit, the death or removal of parties and radical changes in the condition and value of the property, impossibilities in the production of proofs, and the like, which have arisen during the period of inaction, such circumstances, if not appearing upon the face of the bill, must be raised by answer. It will be conceded that the appeal to the Circuit Court of Appeals suspended all rights that had not accrued prior to decree.

[3] If complainant's right of action presented by the supplemental bill had accrued prior to decree and might have been asserted and considered in the original litigation, then his claim is barred by the analogous statute of limitations, unless he has shown in his bill that it would be inequitable to apply the doctrine of laches in his case. If, on the other hand, the rights here urged did not accrue until after decree, then from the standpoint of time alone the action is not barred, and it devolves upon the defendant to show, either from the face of the bill or by answer, that extraordinary circumstances exist which require the application of that doctrine. A familiar form of laches, more strictly equitable in its nature and not analogous to that arising under stat-

utes of limitation, is presented where new matter is not brought to the attention of the court within such time as is required under the situations peculiar to the specific case. "But in whatever form a supplemental bill is brought forward, if it is for newly discovered matter, it ought to be filed as soon as practicable after the matter is discovered; for, as we shall presently see, if the party proceeds to a decree after a discovery of the facts upon which his new claim is founded, he will not be permitted afterwards to file a supplemental bill, in the nature of a bill of review, founded on such facts." Story's Eq. Pl. § 338, p. 396. "It seems to me to be a general rule that a supplemental bill for newly discovered matter should be filed as soon after the new matter is discovered as it reasonably may be. If, therefore, the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on those facts; for it was his own laches not to have brought them forward at an earlier stage of the cause." Story's Eq. Pl. § 423, p. 480. "Application for leave to file a supplemental bill based on facts that occurred and were known to the plaintiff soon after the filing of the bill comes too late after the cause has been heard and determined on a lengthy reference to the master. Before the requisite leave will be granted to file a supplemental bill attacking a decree on the ground of newly discovered facts, it must appear that those facts could not have been discovered in the exercise of reasonable diligence in time to have been set up in the original bill or in an amended bill." Street, Fed. Prac. § 1184, p. 722. "Leave will not be given after decree to file a supplemental bill to set up matters which might with reasonable diligence have been ascertained and determined in the original decree, nor will it be permitted to vary the relief or principles established by the decree." 16 Cyc. 360, and cases cited. This supplemental bill does not seek to impeach the decree in the sense of setting aside the relief there granted, nor is it in aid of that decree in the sense of seeking to give effect to the relief there granted, because all the relief there prayed was granted and became immediately effective. What complainant does seek by this bill is to enlarge the relief formerly sought, to obtain relief of a different kind and on a different principle. The decisions in this circuit and elsewhere are agreed that this cannot be done in situations like the present one.

In *Mosgrove v. Kountze* (C. C.) 14 Fed. 315, the original bill sought to subject certain real estate in the bill described to the payment of a judgment previously recovered against the Omaha & Northwestern Railroad Company. It was in the original bill averred that the respondents had received certain bonds amounting to \$112,000, which they had converted to their own use, but it was not sought by the original bill then to subject the real estate to the payment of the judgment. A decree was rendered granting to complainants all that was asked in their bill. Thereafter they asked leave to file a supplemental bill for the purpose of subjecting this personal property also to the payment of the balance alleged to be due upon the judgment. It was objected that the facts set forth in the supplemental bill might have

been ascertained and pleaded by way of amendment to the original bill. McCrary, Circuit Judge, sustained the objection, saying:

"It is well settled that leave will not be granted, after decree, to file a supplemental bill for the purpose of setting up matters which might by the use of due diligence have been ascertained and pleaded by way of amendment in the original suit. * * * Even if we do not look beyond the allegations of the original bill, we have ample proof that the facts sought to be set by way of supplemental bill was, or might have been, known to the complainants at the time the original suit was commenced. But as already stated, it is sufficient if it appears that the facts sought to be set up by way of supplemental bill were known in time to have been presented by way of amendment to the original bill. It is not enough that they were not known when the original bill was filed. * * * It appears, therefore, that the complainant chose to proceed against the real estate alone, doubtless upon the expectation that it would be entirely sufficient to satisfy his judgment. If in this he was mistaken, it does not by any means follow that he can at this late day file a supplemental bill in the same case for the purpose of reaching other and different property."

To the same effect is Henry et al. v. Travelers' Ins. Co. (C. C.) 45 Fed. 299. Caldwell, Circuit Judge, said:

"Where the end may be obtained by an amendment, a supplemental bill will not be allowed. * * * It is well settled that a supplemental bill brought for new matter must be filed as soon as practicable after the matter is discovered"—citing Hoff, Ch. Pr. p. 398, wherein it is said: "A party will not be permitted to file a supplemental bill when he has submitted or agreed to a decree, after full knowledge of the facts which he seeks to bring forward by the supplemental bill."

In City of Omaha v. Redick, 63 Fed. 1, 11 C. C. A. 1, our Circuit Court of Appeals, speaking through Judge Thayer, said:

"A supplemental bill in the nature of a bill of review to obtain a modification of a decree on account of newly discovered facts cannot be entertained when it appears that the new facts or circumstances were well known to the complainant prior to the entry of the original decree. * * * It remains to be considered whether, upon the authorities, a supplemental bill in the nature of a bill of review to obtain a modification of a decree can be properly entertained, which discloses no facts pertinent to the litigation and to the issues involved therein, except such as were well known to the complainant prior to the first decree. A leading case on that point is Pendleton v. Fay, 3 Paige [N. Y.] 204, where it was held that a supplemental bill ought to be filed as soon as the new matter sought to be inserted therein is discovered, and that, if a party proceeds to a decree after the discovery of the facts upon which the new right or claim is founded, he will not be permitted afterwards to file a supplemental bill, in the nature of a bill of review, founded on such facts."

Where a court of equity takes jurisdiction in a case like the present one, it draws to itself cognizance of the entire controversy. Having obtained jurisdiction upon sound equitable grounds for the purpose of preventing a multiplicity of suits, it will retain it for further relief and will do full justice between the parties; and that, though the party may also be entitled to an action at law. In the Elevator Case (C. C.) 17 Fed. 200-204, Mr. Justice Miller said:

"When either party, lessor or lessee, claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity on general principles, and ask to have that lease set aside, canceled and annulled. In that case the court of equity sits holding the scales of justice evenly between the parties, and may say that it believes

that such acts have been done by the lessee, for instance, as ought to terminate the agreement, or that he shall account by compensation and by payment of damages. And the court will declare the agreement at an end, and set aside, and annulled, and will make such orders as seem proper and right."

In *Preteca et al. v. Maxwell Land Grant Co.*, 50 Fed. 674, 1 C. C. A. 607, the Court of Appeals for this Circuit said:

"From the averment of the bill it is obvious the complainant resorted to equity to avoid a multiplicity of suits and irreparable damage resulting from continued acts of waste and trespass to land. These are recognized heads of equity jurisdiction. A court of equity may take cognizance of a controversy to prevent a multiplicity of suits, although the exercise of such jurisdiction may call for the adjudication upon purely legal rights and confer purely legal relief; and so a court has jurisdiction to restrain waste and trespass to land where the facts are of such a nature that the law cannot afford adequate relief."

This court took jurisdiction admittedly to restrain the commission of such trespasses as were charged in the bill which threatened to render the property valueless for mining purposes. Such jurisdiction is sustained by all the authorities (*Oölagh Coal Co. v. McCaleb et al.*, 68 Fed. 86, 15 C. C. A. 270; *Dimick v. Shaw*, 94 Fed. 266, 36 C. C. A. 347; *Erhardt v. Boaro et al.*, 113 U. S. 537, 5 Sup. Ct. 560, 28 L. Ed. 1113), and, incidentally having obtained jurisdiction for that purpose, the court may, and did, for the purpose of preventing a multiplicity of suits, retain it for further relief, removed a cloud upon the title, quieted the title, and determined the right of possession. *Big Six Development Co. v. Mitchell*, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332. It might also as well, had it been asked to do so, have determined the damages from waste and trespass arising during the pendency of that litigation for which recovery is now sought. The right to full relief was the contention of complainant in the original suit and lies at the foundation of the present bill as supplemental thereto. It was the keynote of the opinions both of the Circuit Court and of the Circuit Court of Appeals, and is supported by abundant authority.

In his brief complainant urges the right of a court of equity to grant this relief; in fact, that the jurisdiction of this court once having been assumed for the purposes set out in the original bill is an exclusive one and that complainant is therefore barred from other jurisdictions or from an action at law for the damages. In support of the former proposition he cites the *Salton Sea Cases*, 172 Fed. 792, 97 C. C. A. 214. It is there held that:

"Where a court of equity has acquired jurisdiction of a suit to enjoin a continuing trespass upon land, it may also, to prevent a multiplicity of suits, award damages for the injury already done, although the same would also be recoverable by an action at law."

And damages were awarded to the extent of \$456,746.23. In the opinion (pages 799 to 802, inclusive, 172 Fed., 97 C. C. A. 223), the authorities are collected and carefully considered. The following extract from *High on Injunctions* (4th Ed.) p. 669, is quoted and approved:

"Where, therefore, a proper case is presented for an injunction, an account of the waste already committed and a decree for damages may be had in the injunction suit. Indeed, this would seem to be but the exercise of the ordinary prerogative of equity that, when one resorts to a court of equity for one purpose, his case will be retained until the entire matter is disposed of upon the principle that the court having jurisdiction of the cause for one purpose will retain it to give general and complete relief, thereby preventing a multiplicity of suits."

But complainant while contending for this same principle as sustaining the relief prayed and accorded in the original suit, and as a foundation for that sought by his supplemental bill, nevertheless asserts that his right to an accounting for damages did not accrue until after decree in the primary action which was afterwards stayed by appeal; and that, in as much as five years had not elapsed between the affirmance of that decree and the filing of his supplemental bill, he is entitled to this supplemental relief. In support of this contention he relies upon the decision of the Supreme Court in *New Orleans v. Gaines*, 15 Wall. 624-633, 21 L. Ed. 215. This reliance of complainant ignores the distinction between damages in the nature of mesne profits or for use and occupation and those arising from waste and trespass. Mesne profits are such whereto the right is created by an action of ejectment brought and actually carried into judgment, not damages which accrued anterior to or at the instant of the ouster. "While the action of ejectment remained in its original state, actual damages were awarded the plaintiff. But later, when the action was adopted as a mode of trying the title to real property and the proceedings became fictitious, the parties only nominal, the practice was introduced of allowing the claimant in ejectment to recover only nominal damages. Consequent upon this it was necessary to devise some other means by which the claimant might have substantial relief, and this was effected by a new application of the common action of trespass *vi et armis*, generally termed an action of 'mesne profits,' in which the plaintiff complained of his ejection and loss of possession, stated the time during which the defendant held the land and took the rents and profits and prayed judgment for the damages which he thereby sustained. The reason for this division of remedies seems to have been purely a matter of convenience, for it is obvious that, when both questions were tried in the same action and the judgment was for the defendant, the time consumed upon the question of damages had been so much time wasted. Moreover, it was found that examination into the question had a tendency to distract the attention of the jury from the more important question at issue, and so it was suggested by the court and acquiesced in by the profession that the action might be divided so as to let the question of title alone be passed on in the ejectment with nominal damages 'for conformity,' and leave the amount of actual damages to be ascertained in a subsequent action." 10 Am. & Eng. Encyc. of Law, 535-537, and cases cited. This must have been the situation in *New Orleans v. Gaines*, 15 Wall. 633, 21 L. Ed. 215, wherein it was said:

"Until the decree in the main suit there was here an existing cause of action to recover the mesne profits. No special action could be maintained for them until the title to the property should be judicially determined.

* * * Speaking strictly, there was not only no cause of action, but no right to the mesne profits until the judgment in the original suit."

By statute in many states this rule has been changed, and it is optional with the plaintiff whether he demand and recover the mesne profits in his action of ejectment or pretermit them there and recover them in a subsequent action. In others the recovery in ejectment is the exclusive remedy. This is indicated by the decision of the Supreme Court in *Clay v. Field*, 115 U. S. 260, 6 Sup. Ct. 36, 29 L. Ed. 375, where it is said:

"By paragraph 2512 of that Code (Miss.), mesne profits for which any defendant in ejectment is liable may be sued for and recovered, either in the action of ejectment, or by a subsequent separate action."

Of course, the original proceeding in *New Orleans v. Gaines* performed the offices of a suit in ejectment.

The damages here sought to be recovered arise from waste or trespass. It is unnecessary for the purposes of this action to determine which. Indeed, latterly the distinctions between waste and trespass have been largely obscured, if not obliterated. In support of his action complainant cites authorities involving both "waste" and "trespass," and uses the terms interchangeably. The Circuit Court of Appeals speaks of the acts complained of as "continuing waste or continuing trespass," and both terms are repeated throughout the opinion. Manifestly a cause of action accrued for either upon the commission of the unlawful acts. The establishment of title was not essential to the bringing of the action. The old action for waste has almost wholly fallen into disuse, and its place has been taken very generally by the action on the case in the nature of waste. The action on the case in the nature of waste is not of a possessory character, but is an action for the recovery of damages merely. A lessor may maintain the action, although he permits the tenant to retain possession after the commission of waste and accepts rent for the full term for which the premises are let. Case in the nature of waste will lie against a tenant for years after the expiration of the term or after notice to quit, and may be maintained by any one having a reversionary interest in the premises wasted against any one who does the injury whether a tenant or a stranger. To prevent the commission of threatened waste, equity gives the remedy by injunction. This remedy has obvious advantages over the common-law remedies; and hence it is that the remedy by injunction has not only superseded the old common-law actions, but has to a great extent taken the place of the action on the case for damages. The remedy may be applied although a statute provides a remedy at law, unless, of course, the legal remedy is adequate. If the remedy at law is inadequate, an injunction will be granted in all cases where a legal action would lie to recover possession of the land wasted or to recover damages.

The foregoing principles are announced in the American & Eng. Encyc. of Law in its discussion under the title of Waste, and are borne out by the authorities cited in support. See 2 Taylor's Landlord & Tenant (9th Ed.) p. 298, and following:

"In ordinary cases the account for waste already committed is incidental to the relief by injunction against future waste, and is directed upon the principle of preventing a needless multiplicity of suits."

[4] It follows that an action at law for this damage existed within the knowledge of the complainant before issue joined, and therefore it may be fairly stated that the statute of limitations with its equitable analogy began to run before issue joined in the original suit. But, aside from that, complainant, having elected to appeal to a court of equity in the first instance, could still have prayed for such relief and could have had his damages ascertained in the main action as an incident thereto. Such a theory would not have precluded the actual accounting from taking place after the rendition of the decree, and is not inconsistent with the common practice of instituting accountings under proper circumstances after final decree. But here the complainant asked specific relief. He received exactly what he asked for. Then he waited nearly five years, and now seeks to reopen this litigation for the purpose of obtaining other, further, and different relief—not prayed in the original bill, not seasonably suggested to the court by amendment or otherwise, while the action was pending in which it might have been urged. No doubt he was at that time satisfied with the royalty he had already received, electing to accept it for the use and occupancy of the mine for the limited period before the restraining order was granted. His afterthought comes too late. The case falls directly within *Mosgrove et al. v. Kountze et al.* (C. C.) 14 Fed. 315; *Henry et al. v. Travelers' Ins. Co.* (C. C.) 45 Fed. 299; *City of Omaha v. Redick*, 63 Fed. 1, 11 C. C. A. 1. It may well be doubted whether the bar analogous to that of legal limitations has not arisen. *Kelley et al. v. Boettcher et al.*, 85 Fed. 55, 29 C. C. A. 14. But it is unnecessary to place the decision upon that ground. He is seeking at this late date to make a supplemental bill long after decree perform the office of a timely amendment. Statutes of limitations are statutes of repose designed to bring litigation to a seasonable end. A like purpose inheres in the doctrine of equitable laches.

The demurrer must be sustained, and the bill dismissed.

MUNROE et al. v. CITY OF CHICAGO.

(District Court, N. D. Illinois, E. D. February 16, 1911.)

No. 10,346.

NAVIGABLE WATERS (§ 20*)—FAILURE TO OPEN BRIDGE—LIABILITY FOR INJURY TO VESSEL—NEGLIGENT NAVIGATION.

The steamer *Markham*, going up Chicago river at night, when 800 feet away, signaled for the opening of the jackknife bridge at Taylor street, owned by the city. The bridge was not opened, and the steamer proceeded for 400 or 500 feet at slow speed, signaling twice more, and then stopped and backed; but her momentum and the current carried her against the bridge, and she was injured. The bridge was equipped, as required by the government regulations, with two red lights in the center, one on the end of each opening section, which changed to green lights when the sections and lights were raised. A city ordinance also required

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

a signal to be shown on the approach and signaling of a vessel, when for any reason the bridge could not be opened; but such ordinance was not observed. Held, that the red lights shown were in effect danger signals, showing that the bridge was closed, that so long as they remained so the steamer was bound to keep under such control that she could be stopped before striking the bridge, and that the injury was due to her negligent navigation, and the city could not be held liable therefor.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 90; Dec. Dig. § 20.*]

In Admiralty.' Suit by William Munroe and others, as owners of the steamer Markham, against the City of Chicago. Decree for respondent.

C. E. Kremer, for libelants.

Edward J. Brundage, Corp. Counsel, and Charles M. Haft, Asst. Corp. Counsel, for respondent.

CARPENTER, District Judge. On October 19, 1909, the steamer Markham was bound up the Chicago river, and while opposite Polk street signaled for the Taylor street bridge. The first signal was given when about 800 feet from the bridge. The Markham was proceeding under slow check, as slow, in fact, as it was possible for her to go and maintain steerage. It was about 5 o'clock in the morning. The atmosphere was clear, and the captain could see the two red lights in the center of the bridge. This bridge was of the jackknife or bascule variety, and was equipped with the lights prescribed by the Lighthouse Board under the direction of the Department of Commerce and Labor, namely: There were placed on each leaf, near the point where they touched, and on the upstream and downstream sides, a square lantern swinging behind a frame containing a circular panel of red and green colored glass, with the result that when the bridge was closed there would be shown on the upstream and downstream sides two red lights close together in the center of the bridge, and when completely open two green lights at an elevation on each side of the opening. There were also stationary red lights at the lower side of each leaf, showing the width of the channel. The lights in the center of the bridge flashed red when the bridge was down, and green when the bridge was open. On the morning of the accident the bridge was down, with the two red lights in the center showing, indicating that the bridge was closed.

When the Markham had proceeded 200 or 250 feet, after her first signal, her master signaled again for the bridge to open. The bridge was not opened, nor was any bell rung (indicating to those on the street that the bridge was opening, or about to be opened), nor was any other signal given which could have led the master of the vessel to believe that the bridge was to be opened. The steamer then proceeded about 200 feet further downstream, when she signaled a third time and stopped her engines. The current was carrying the boat towards the bridge at about three miles an hour, and the captain, at this point realizing that the bridge was not going to open, backed the steamer. The momentum of the boat, however, carried it against the bridge, and a damage resulted, it is claimed, of \$1,000. The pilot house was taken off, and one of the spars broken.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The answer of the city sets up the following ordinances of the city of Chicago, which were admitted to be in force at the time of the accident:

"992. Vessel Signals.—The commissioner of public works is hereby required to provide and maintain at the several bridges over the Chicago river and its branches and the Calumet river, in the best and most practicable manner, vessel signals as required by this article.

"993. Signals Prescribed.—Each signal shall be a ball of suitable material of red color for use in the daytime, and shall be not less than twenty-four inches in diameter. The signal for the nighttime shall be a red lantern of such size and so placed and arranged, when elevated, as to be easily seen up and down the river and the street. Such signals shall be elevated when upon the approach of any vessel, such vessel having signaled for the bridge, the bridge tender for any reason cannot open such bridge, and the same shall remain elevated until the bridge can be opened: Provided, also, that after any bridge has been open for the purpose of permitting vessels to pass through, the proper signal shall be elevated before the bridge is closed and be kept elevated for fully ten minutes for such persons, teams, or vehicles as may be in waiting to pass over, if so much time shall be required when such signals shall be lowered. At all other times such signals shall remain lowered.

"994. Duty of Vessels—Penalty.—It shall be unlawful for the owner, officer, or other person in charge of any vessel in transit upon the Chicago river and its branches or the Calumet river or any part thereof, to attempt to navigate any such vessel past any of the bridges over said river or branches while said signals are elevated, or while the said bridges or any of them may be opening or closing. Any person who shall violate any provision of this section shall be fined not less than ten dollars nor more than fifty dollars for each offense."

It is claimed by the libelant that it was the duty of the city to open the bridge upon proper signal being given by the vessel; that a bridge is an obstruction to navigation, and must be operated with a minimum of inconvenience as to vessels; that the right of navigation is paramount to all other rights. It is also claimed that under the city ordinance it was the duty of the city to have given some signal, advising the vessel that the bridge was not going to open, and that such signal must be given in time to permit the vessel to guard against striking the bridge.

Great reliance is placed by libelant upon the case of Clement v. Metropolitan West Side El. Ry. Co., 123 Fed. 271, 59 C. C. A. 289, decided by the Court of Appeals in this Circuit in 1903. In that case the steamer Prince, proceeding south from Washington street bridge, in the Chicago river, passed safely through the Washington, Madison, and Adams street bridges. At the Adams street bridge the captain signaled for the bridge at Jackson street, and when about 150 feet north of Jackson street signaled for the opening of the Metropolitan Railway bridge. It was at night, and the red lights on the Metropolitan bridge were showing. The Jackson street bridge opened, pursuant to the signal; but, through some defect in the machinery, the railroad bridge could not be operated. It appeared from the evidence that the master of the vessel could not see the red lights on the Metropolitan bridge until after he had passed through the draw of the Jackson street bridge, and at that time he could not check his vessel, so as to prevent a collision with the railroad bridge. The Court of Appeals held that the failure on the part of the railroad company to raise the bridge

promptly, when it had ample notice of the approach of the vessel, was an act of negligence, and that it was the duty of the railroad company, when its bridge tender found that the bridge would not open, to give some sort of a warning signal "that would timely notify the vessel of the difficulty and of the danger that was imminent, of which she could not otherwise be informed."

Libelant also relies upon *City of Chicago v. Mullen*, 116 Fed. 292, 54 C. C. A. 94, which holds that the city, by the ordinance already quoted, has designated a means by which those in charge of vessels plying the river shall know whether the bridge is or is not opened for passage, and that masters of vessels are entitled to rely upon a proper display of the signals provided for in the ordinance. In that case, however, the bridge, which was operated by electricity, was opened to let the vessel go through; but it failed to stop at the center protection, and the fact that it was operated by a bridge tender who knew nothing about electrical machinery was held to constitute the negligence which caused the accident. The vessel was invited to proceed through the draw, because the bridge opened in response to its signal.

The city, in this case, had complied with the requirements of the Lighthouse Board. By its ordinances it had prescribed some further regulations with reference to the signals on the bridges. If the city had operated the signals prescribed by the ordinances so as to mislead the captain of the vessel, I would be inclined to hold that by passing an ordinance broader than the federal requirement it would be obliged to live up to it. In this case, however, the master of the vessel was not misled. He knew when he went through the draw at Polk street that the Taylor street bridge was down. At that time he was 800 feet away. There was no time when he had any right to believe that the bridge was going to open, and it was his duty to keep his boat under such control that it would not come into collision with the bridge. The bridge tender gave no signal to proceed—gave no indication that the bridge was going to open. No bell was rung indicating to the traffic on the highway that the bridge was about to open. The only signal apparent to the master of the Markham was the red light provided by the government regulations, which is, in effect at least, a danger signal, and that signal he was bound to observe. It is a matter of common knowledge that a red light used in traffic or transportation means an obstruction or a danger of some sort to the passers-by.

The libelant claims that the vessel was "in extremis." Very likely it was, but placed there by its master. The danger was apparent, and it was the duty of the master to have avoided it, if possible, and the evidence shows clearly that, had the master not taken it for granted that the bridge would open, pursuant to his signal, he could have stopped the boat in time to have avoided the accident.

A single authority, it seems to me, is sufficient to illustrate the rule which is controlling in this case. In *Kelley Island Co. v. City of Cleveland* (D. C.) 144 Fed. 207, it appears that a contractor employed by the city had removed the protection piling from in front of certain submerged beams around a bridge. Neither the contractor nor the city had furnished to navigators any warning that the protection had

been removed. At the same time, it was well known to the captain of the steamer which was damaged. The court said:

"The removal of these protection piles may have been a concurring cause of the injury, but the accident did not occur because there was no warning there to inform navigators of the river how close they might approach the pier with safety. The Ohio did not strike the hidden beams because her master thought it was safe to go there; but she went there in spite of the master and wheelsman, and when, according to their testimony, they were endeavoring to keep farther out in the channel and away from the pier. The captain of the Lutz testifies that he was trying to keep out as near the middle of the channel as he possibly could; that he knew the protection piling had been taken out, and he told the pilot, as they were going upstream, to keep away from the center pier as far as possible, as 'she had her protection removed.' The wheelsman gives the same account of it. Now the libellant has strenuously endeavored to hold the city liable for this accident, and we may assume that this testimony is true, since such bearing as it has is against the contention of the city's liability. It follows, therefore, from all the testimony in the case, that the accident would have happened, even if the city, or the city's contractor, had maintained some warning signal indicating the point beyond which it was dangerous to go. If that be true, the city could not be at fault in relation to this accident, if, in the work of removing the pier, it removed the protection piles. To say that because, in the progress of the work of repair or reconstruction, it had removed the piles set up to protect vessels and protect the bridge, it could be held liable for a collision between a passing vessel and a portion of the pier, when the collision did not occur in consequence of the failure to warn navigators of the location of the pier, is to say, in effect, that the city did not have the right to remove the protection piles at all, if, in the course of the reconstruction of the bridge, it seemed to become necessary to do so. I therefore hold that the city is not liable."

It is true the Circuit Court of Appeals for this Circuit, in Clement v. Metropolitan West Side El. Ry. Co., supra, said:

"A bridge spanning a navigable river is an obstruction to navigation, tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary; the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may readily be opened to admit the passage of craft, and maintained in suitable condition thereto. It is also his duty to place in charge those who are competent to operate the bridge to watch for signals, and to open the bridge for the passage of vessels, and for the performance of such delegated duty he is responsible. It is also his duty to equip the bridge with proper lights giving warning of the position of the bridge and of its opening and closing. If for any reason the bridge cannot be opened, proper signals should be given to that effect, such as will warn the approaching vessel in time to heave to. A vessel, having given proper signal to open the bridge, and prudently proceeding under slow speed, has, in the absence of proper warning, the right to assume that the bridge will be timely opened for passage. She is not bound to heave to until the bridge has been swung or raised and locked, and to critically examine the situation before proceeding, but may carefully proceed at slow speed upon the assumption that the bridge will open in response to the signal, and may so proceed until such time as it appears by proper warning, or in reasonable view of the situation, that the bridge will not be opened, when it becomes the duty of the vessel, if possible, to stop, and, if necessary, to go astern."

This ruling does not, it seems to me, in any way relieve the master of the Markham from his obligation to exercise common sense when confronted with a situation that was perfectly apparent. The only signal exhibited from the bridge was a danger signal, indicating that

the bridge was not open. He had a perfect right to proceed at a slow speed upon the assumption that the bridge would open in response to his signal; but he had no right to proceed at such a speed, having due regard for the current and the distance between him and the bridge, that he could not stop and back his boat in time to avoid the accident. As well might it be said that a vessel approaching the Chicago avenue crib in a fog, whose captain saw the obstruction in ample time to stop or change his course, could proceed and damage his boat by collision with the crib, and then claim damages from the city because it had not given proper signal by way of whistle or bell.

The position which I have taken seems to be borne out fully in the two cases of *Smith v. City of Shakopee*, decided by the Court of Appeals in the Eighth Circuit; the first trial being reported in 97 Fed. 974, 38 C. C. A. 617, and the second in 103 Fed. 240, 44 C. C. A. 1.

The accident in this case was due entirely to the fault of the master of the *Markham*, and the libel is dismissed, at libellant's costs.

In re WILLIAM HILL & SONS.

(District Court, E. D. Pennsylvania. April 19, 1911.)

No. 3,151.

1. EVIDENCE (§ 461*)—TESTIMONY AFFECTING WRITINGS—ADMISSIBILITY.

Under an agreement, in a note secured by collateral, that the securities should be applicable to any other obligation held by the payee, parol evidence offered by the payee is not admissible to show that the parties understood that the collateral was to cover the debts of the pledgor's firm.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

2. PARTNERSHIP (§ 187*)—PLEDGES—APPLICATION OF COLLATERAL.

An agreement, in a note secured by collateral, that the securities should be applicable to any other obligation held by the payee, entitles the payee to apply surplus proceeds of the collateral to an obligation of a firm of which the maker is a partner.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 340, 342; Dec. Dig. § 187.*]

In the matter of William Hill & Sons, bankrupts. On review of an order of Referee Alfred Driver on a claim to surplus funds. Affirmed.

George J. Edwards, Jr., and John E. Sibble, for trustee.
William S. Furst, for Southwark Nat. Bank.

J. B. McPHERSON, District Judge. William Hill was a member of the bankrupt firm. Since March, 1896, the firm had been a depositor and borrower in the Southwark National Bank, and owed the bank about \$10,000 when the petition was filed. William Hill individually had also been a depositor and borrower; his separate transactions beginning in November, 1904. When the petition was filed his individual debt was \$4,800, and for this sum the bank held certain stock and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

two policies of life insurance as collateral security. The stock has been sold and the proceeds properly applied. The policies have a known surrender value of \$2,400, and this is about \$1,600 more than enough to pay the balance due. Who is entitled to this surplus? The trustee of Hill's individual estate claims it, and the bank also claims it on account of the firm's indebtedness. The bank's position is based upon these facts: When Hill borrowed from the bank in 1904, and whenever the note was afterwards renewed, he signed the printed form commonly used by the bank, which contained, *inter alia*, the following clause:

"And it is further agreed that the securities hereby pledged, together with any that may be pledged hereafter, shall be applicable in like manner to secure the payment of any past or of any future obligations held by the holders of these obligations, and all of the securities so pledged and in their hands shall stand as one general continuing collateral security for the whole of the obligations of the undersigned, so that the deficiency on any one shall be made good from the collaterals for the rest."

[1] Other evidence was offered—a declaration of Hill, and some testimony given by the president of the bank—to the effect that Hill and the bank understood that the collateral was to cover the debts of the firm, as well as Hill's individual debt; but I give it no weight. In my opinion, nothing in the case takes it out of the general rule that the meaning of a written agreement is to be drawn from its own language, read in the light of the transaction and the situation of the parties. I therefore exclude the evidence in favor of the bank as I should be disposed to exclude evidence against the bank.

[2] The situation briefly was this:

The firm of which Hill was a member was already indebted to the bank upon partnership notes—or, if not actually so indebted at the precise date in November, 1904, was at all events a business customer, and was likely to become so indebted at any time in the usual course of affairs. Upon such notes Hill was already liable as a partner, or would be so liable whenever they should be given. He desired accommodation for an individual purpose, and gave an individual note, securing it by the collateral in question. What did the parties mean by the foregoing clause? To my mind they meant what they seem to say: All the collateral is to stand as a general continuing security to protect the bank against "the whole of the obligations" of William Hill, and is to be applied to his past, as well as to his future, obligations. On its face the clause applies, not only to an obligation upon which he would be liable as an individual, but also to an obligation upon which he would be liable as a member of the firm. Both are alike his "obligations," and I find nothing in the circumstances of the transaction or in the situation of the parties to justify a restriction of the natural and ordinary sense borne by the language of the clause. To one kind of obligation, already in existence, he thus adds another kind, and pledges the securities to protect both.

A similar result has been reached in Massachusetts. *Hallowell v. Blackstone Bank*, 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315. There the language of the individual note was:

"On the nonperformance of these terms, said bank applying the net proceeds to the payment of this note and accounting to me for the surplus, if any; and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank."

This was held to justify the application of a surplus to a previous obligation of the firm, although the collateral had been pledged primarily to secure an individual debt—the court saying:

"The question remains whether the bank is entitled to hold the security for the bills which were accepted by Smith's firm, and not by him individually. It cannot be denied that the acceptances were 'claims against him,' or that the words used in his note were broad enough to embrace firm acceptances, unless there is some reason in the context, the circumstances, or mercantile practice, to give them a narrower meaning. *Singer Manuf. Co. v. Allen*, 122 Mass. 467; *Chuck v. Freen, Mood. & Malk.* 259. If Smith had had private dealings and a private account with the bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. *Ex parte McKenna* (City Bank Case) 3 De G., F. & J. 629. See *Lindl. Part. (5th Ed.)* 119, and note. But we are called to construe a printed form used by the bank, and presented by it for those who borrow from it to sign. The question is: What is the reasonable interpretation of such words, when insisted on as a general formula to be used by would-be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff's insolvent alone. The printed form, it may be assumed, would have been used by the bank equally in a case where the borrower was the principal man in his firm and the only one known to the bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the bank held was unknown. This being so, in the opinion of a majority of the court there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claims against the debtor is not inserted with a view to certain specific debts, but as a dragnet to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. *Cory on Accounts and Lindley on Partnership* have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner."

In New York there is an apparently opposing decision—*Bank v. Thompson*, 121 N. Y. 280, 24 N. E. 473—although it is possible to distinguish the cases upon the facts. Thompson individually borrowed from the bank, and secured the loan by a mortgage, conditioned, inter alia, to secure the payment of "all sums of money which now are or shall at any time be due or owing by him to said bank upon any account whatever." Several years afterwards he entered a partnership, and the firm also borrowed money from the bank. The court held that the mortgage did not cover the firm notes, saying:

"It is clear that, at the time of the execution of the mortgage, the parties did not contemplate any firm indebtedness, or any indebtedness of a firm of which Reynolds might be a member. The plaintiff was dealing with him individually, and it was obtaining security for his individual and personal obli-

gations, and a fair construction of the language shows that it was intended to secure such obligations and such only. The language is broad and general, and carefully framed, so as to make sure that all such obligations should be covered. In ordinary commercial language the obligation of a firm would not be spoken of as the obligation of any one of its members, and a firm is regarded as an entity distinguished from all the individual members of which it is composed. * * * This mortgage must be regarded as a commercial instrument, executed in commercial transactions, and must be construed as ordinary commercial men would understand the language used; and we think that among business men a distinction is made between the firm as an entity and the members who compose it, and that this language would not be understood as broad enough to cover the indebtedness of a firm of which Thompson was a member, and for whose debts, jointly with the other members of the firm, he could be made responsible."

Without insisting on the distinction that may be drawn between these decisions, and regarding them as directly opposed, I prefer the ruling in Massachusetts. Special cases may no doubt arise where it may be proper to prove that the parties intended to cover only one class of obligations by a pledge that apparently covers other classes also; but (speaking generally) I perceive no satisfactory ground for restricting the plain, natural meaning of a commercial instrument in common use. The clause in question is ordinarily employed for the precise purpose of reaching all the debtor's pledged obligations, of every kind and whenever given; and, since the object is lawful, there seems to be no reason why as a general rule this ordinary business transaction should not be allowed to have its intended effect. Very recently the Court of Appeals of the Third Circuit—*Soisson v. Bank*, 181 Fed. 641, 104 C. C. A. 371—declined to permit a similar instrument to be varied by parol testimony. But here there is no parol testimony to vary it, or attempt to vary it; and the only ground for seeking to restrict it is the argument, supported by one decision, that a written instrument should be construed to mean something else than the parties themselves have agreed upon. This is a dangerous field to enter upon, especially in the absence of testimony to support the experiment. If the New York case is allowed to stand upon its own facts, the argument has very little to recommend it.

The referee's order was right, and is affirmed; but it is now modified, so that the period allowed by him shall extend to and include May 1, 1911.

WASHINGTON WATER POWER CO. v. WATERS et al.

(Circuit Court, D. Idaho, N. D. September 1, 1910.)

1. EMINENT DOMAIN (§ 1*)—AUTHORITY TO CONDEMN.

Authority to condemn land for public use must be found in the positive law.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. CONSTITUTIONAL LAW (§ 29*)—EMINENT DOMAIN (§ 66*)—AUTHORITY TO CONDEMN—CONSTITUTION—SELF-EXECUTING PROVISIONS—PURPOSES.

Const. Idaho art. 1, § 14, provides that lands may be condemned for certain specified uses, not including flowage for electric power plants, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

then provides that any other use necessary to the complete development of the material resources of the state or the preservation of the health of its inhabitants is declared a public use. Held, that the determination of what should be declared to be public uses in addition to those specified in the constitutional provision was not within the exclusive jurisdiction of the Legislature, and hence, in the absence of statute defining the same, the general constitutional provision would be held to be self-executing, and the courts authorized to determine whether a particular use for which land was sought to be condemned was a public use within such provision.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 29;* Eminent Domain, Cent. Dig. §§ 165-167; Dec. Dig. § 66.*]

3. EMINENT DOMAIN (§ 35*)—RIGHT TO EXERCISE—PUBLIC SERVICE CORPORATION.

A corporation organized to generate and furnish electric energy was a public service corporation authorized to exercise the right of eminent domain, though it did not render a service directly to the public, but furnished electricity for distribution to the consumers by other persons and corporations.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 80; Dec. Dig. § 35.*]

Complaint by the Washington Water Power Company against Charles Waters and others to condemn land for the flowage of Cœur d'Alene Lake incident to the construction of an electric power plant. On demurrer to plaintiff's third amended complaint. Overruled.

Post, Avery & Higgins and Gray & Knight, for plaintiff.
Kerns & Ryan, for defendant.

DIETRICH, District Judge. The defendant's demurrer to the amended complaint herein was submitted orally at the May term, and at that time the view was intimated that, with the exception of certain objections bearing upon the question of federal jurisdiction, it would be overruled. In the third amended complaint to which the demurrer is now submitted, the jurisdictional defects seem to have been cured, and upon further reflection and consideration I am still inclined to hold to the opinion that in other respects the objections are not well taken, and that, therefore, the jurisdictional facts being sufficiently alleged, the demurrer should be denied.

The principal points urged are involved in a case between the same parties, now pending upon appeal from the District Court of the Eighth Judicial District of the state, in the Supreme Court, and through the kindness of counsel I have had the benefit of the elaborate printed briefs prepared in support of the argument to be made in that appeal. The first objection made by the defendants is that the plaintiff cannot maintain the action, which is a proceeding in eminent domain for the condemnation of lands necessarily flooded by the raising of the waters in Cœur d'Alene Lake by the plaintiff for the purpose of generating electrical energy to be used for power and lighting purposes, because the right of eminent domain does not exist except by express enactment, and there is no provision in the laws of the state of Idaho authorizing the condemnation of private property for the purpose of generating power.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

[1] It is not controverted that authority to condemn must be found in the positive law, and I think it must further be conceded that while the Legislature has made general provision for the mode or manner of condemning, and has expressly specified a number of purposes for which private property may be condemned for public use, the purpose or use under consideration has not anywhere been expressly designated or referred to.

[2] While unquestionably, therefore, adequate provision for procedure may be found in the statutes, if the right to proceed exists, that right, if any there be, must be sought for in the Constitution, and not in the statutes of the state. By section 14 of article 1 of the Constitution, it is provided that:

"The necessary use of lands for the construction of reservoirs, or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use, for any useful, beneficial or necessary purpose or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state. Private property may be taken for a public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor."

It will be noted that here there is no express inclusion of a use for power purposes, but the plaintiff relies particularly and exclusively upon the clause which provides that:

"Any other use necessary to the complete development of the material resources of the State, or the preservation of the health of its inhabitants, is hereby declared to be a public use."

In this view, the controversy is reduced to substantially a single question, namely, whether or not under this general clause, in the absence of an expression of legislative will, the judicial department is authorized to determine whether or not a given use is generally or under the particular circumstances of the case, "necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants." It is the position of the plaintiff that such power is conferred upon the courts, and, upon the other hand, the defendants contend that it is exclusively within the province of the legislative department to determine specifically what uses are necessary to the development of the state, or to the health of its inhabitants; in other words, that the clause is to be construed as a delegation of authority, not to the courts, but to the Legislature.

While the question is not entirely free from doubt, my first impression was, and my view still is, that, to give the constitutional declaration effect, it was necessary for the Legislature only to prescribe the requisite judicial procedure, which it is thought is amply provided for in the general statutes pertaining to proceedings in eminent domain. As will be noted, it is declared by the Constitution that any use "necessary to the development of the material resources of the state, or the preservation of the health of its inhabitants," is a public use, and to this statement is appended the further declaration that

"private property may be taken for a public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor." It is well understood that the power of eminent domain is an incident of sovereignty, and may therefore be exercised either by the federal government, or by a state, by virtue of its sovereignty. In the absence of constitutional limitations, the authority to declare for what purposes and under what circumstances and in what manner the power may be exercised rests in the Legislature. However, the people, the primary source of all power, instead of leaving such authority to the unrestricted discretion of their representatives in the Legislature, may express their will in the paramount law, the Constitution, and it may not be doubted that their will so expressed directly is quite as effective as if, through representatives, it were expressed indirectly in legislative enactment. The statutes of the state pertaining to the exercise of the right of eminent domain are found under Title 7 of the Revised Codes of Idaho, commencing with section 5210, which prescribes in some detail the uses in behalf of which the right of eminent domain may be exercised. Sections 5211 and 5212 classify the estates and rights and private property which may be taken for public uses. Section 5213 provides that, before property can be taken, it must appear that the use to which it is to be applied is one authorized by law, and that the taking for such purpose is necessary. Section 5214 provides that, "in all cases where land is required for public use, the state or its agents in charge of such use may survey and locate the same." Sections from 5215 to 5229, inclusive, prescribe in full the procedure to be followed where it is sought to expropriate property for public use, including the ascertainment of the "just compensation" to be paid as a condition precedent to the right to take. It may not be doubted that the declarations contained in the Constitution are at least of equal dignity with those contained in the statute, and are quite as effective as they would be if they had been made by the Legislature instead of directly by the people. That being true, and the Legislature having provided the judicial procedure for condemning property for a public use, it is clear, for instance, that if from section 5210 of the statutes which, as already stated, specifically designates in detail a large number of purposes in behalf of which the right of eminent domain may be exercised, there were omitted all references to the "use of lands for the construction of reservoirs, or storage basins for the purposes of irrigation," the right and power to condemn for such purposes would still be complete because by the fundamental law of the state such a purpose is expressly declared to be a public use, and by general statutory law the mode and method of ascertaining the just compensation and of condemning property for public use has been prescribed. There is nothing left to be done. Taking the Constitution and the statutes together, the law is clear, comprehensive, and complete. The fact that in section 5210 the Legislature has substantially re-enacted the declaration of the Constitution to the effect that the use of lands for the construction of reservoirs, etc., is a public use, is unimportant, and does not operate to enlarge or in any wise modify the right of eminent domain; in other words, what by the terms of the Constitution is declared to be a public use is such a use quite as fully before

as after the Legislature speaks. To the extent of establishing the nature of the use, therefore, the Constitution must be held to be self-executing, and the nature of such a use is not in any wise affected by an affirmative or a negative declaration of the Legislature, or by its silence.

Proceeding a step farther, suppose, for the purpose of illustration, that the general clause which we have been considering were not found in the Constitution, but was found appended to and a part of section 5210 of the Revised Codes. In that case it would not be seriously controverted that the language, though general, would be sufficient to invest the courts with power to determine upon judicial inquiry whether or not any particular use, for which it is sought to exappropriate private property, is necessary to the development of the material resources of the state, or to the preservation of the health of its inhabitants. But, if the clause would have such virtue as a statutory enactment, is there any good reason for denying to it the same effect as a provision of the Constitution? True, it is possible to assume that the people in adopting the Constitution intended to confer the authority upon the Legislature, and not upon the courts, but there is nothing in the instrument reasonably requiring such a construction. The clause is co-ordinated with other clauses which clearly and specifically and positively define certain public uses as not to leave anything for the Legislature to do, and, if it was intended that the general provision should not become operative until it should be amplified and rendered specific by the Legislature, it is strange that such intention was not expressed or intimated by some appropriate phraseology. There is no inherent difficulty in authorizing the courts to perform the function. It is not extrajudicial in its nature, and is closely akin to inquiries which the courts are ordinarily under the necessity of making when the right to condemn is put in issue. We are without any evidence that it was thought by those who formulated the Constitution that the Legislature was more competent or was more likely to reach a just conclusion than the courts; nor does such a view generally prevail. Upon the other hand, we have in the state of Washington evidence of the existence of a contrary opinion, for there we find embodied in the Constitution of the state the declaration that:

"Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such without regard to any legislative assertion that the use is public." Section 16, art. 1, Const. Wash. 1889.

Moreover, if it be true that where the Constitution of a state is wholly silent upon the subject, the power of eminent domain rests entirely with the Legislature, section 14 of article 1 of the Constitution of Idaho, in so far as it defines what are public uses, must be construed not as a delegation of but as a limitation upon the power of the Legislature. Without any previous constitutional authorization, the Legislature could doubtless declare the uses mentioned in section 14 to be public uses and the only effect of the constitutional provision is to withdraw from the Legislature the power to declare

that such uses are not of a public nature. In this view the contention of the defendant would render the clause under consideration wholly superfluous for under his theory it is ineffective until the Legislature sees fit to act, and the power of the Legislature to act is no whit greater under the provision than it would be were the Constitution silent upon the subject.

[3] While the question does not seem to be entirely foreclosed by the decisions of the Supreme Court of the state, in them are to be found certain expressions which, to say the least, strongly tend to support the conclusion here reached. Hollister v. State, 9 Idaho, 8, 71 Pac. 541; Potlatch Lumber Company v. Peterson, 12 Idaho, 769, 88 Pac. 426, 118 Am. St. Rep. 233; Portneuf Irrigation Company v. Budge, 16 Idaho, 116, 100 Pac. 1046. In Potlatch Lumber Company v. Peterson the opinion closes with this language:

"And if, under the provisions of said section 14, art. 1, of the Constitution, the power of eminent domain may be exercised when 'necessary to the complete development of the material resources of the state,' and the lumbering interest is one of the material resources of the state, and that resource cannot be completely developed without the exercise of the power of eminent domain, then that power may be lawfully exercised. The Legislature cannot annul that provision of the Constitution by legislative enactment. The timber interest of our state is one of the great material resources of the state, and it is stated in said section 14 of the Constitution as follows: 'The necessary use of lands * * * to the complete development of the material resources of the state * * * is hereby declared to be a public use.' But it is contended by counsel that said provision is not self-executing. We may concede that contention. But the Legislature has prescribed the procedure for subjecting land to a public use or for exercising the right of eminent domain. Thus by legislative enactment that provision of the Constitution is made effective. The people in this Constitution have declared that the necessary use of lands to the complete development of the material resources of the state is a 'public use,' and the Legislature has provided the procedure to subject such lands to that use."

In considering the question, I have found little assistance in resorting to the Constitutions and the laws and judicial decisions in other jurisdictions, for the reason that there has come under my observation no constitutional provision similar to the one under consideration, and, in the view which I have taken, the entire question turns upon the meaning and effect to be given to this provision.

The further question is raised that the plaintiff is not a public service corporation, the point being that it does not render a service directly to the public, but in the main furnishes power and electricity for distribution to the consumer by other persons and corporations. I do not deem it essential to an understanding of the ruling that the facts be here stated, or that the principle of law be discussed at length. The objection is I think not well taken. Farnham on Waters, p. 2142; Hollister v. State, 9 Idaho, 8, 71 Pac. 541; Rockingham County Light & Power Company v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581; State v. Superior Court, 52 Wash. 196, 100 Pac. 317, 21 L. R. A. (N. S.) 448; Jones v. North Georgia Electric Company, 125 Ga. 618, 54 S. E. 85; Helena Power Transmission Company v. Spratt, 35 Mont. 108, 88 Pac. 773, 8 L. R. A. (N. S.) 567, s. c. 37 Mont. 60, 94 Pac. 631.

Certain other questions are presented, but they cannot in my opinion be properly considered at this time. They may become important when the facts are fully disclosed.

In re STANDARD FULLER'S EARTH CO.

(District Court, S. D. Alabama, S. D. April 12, 1911.)

No. 928.

1. BANKRUPTCY (§ 20*)—JURISDICTION OF BANKRUPTCY COURT—JURISDICTION OF STATE COURT.

An order of a state chancery court appointing a receiver of an insolvent corporation subsequently adjudged a bankrupt entered after the adjudication of bankruptcy which allows a fee for the attorneys of the receiver for services rendered by them in the chancery court, and which adjudges that the fee shall be a priority claim constituting a lien on the assets of the corporation, is void because outside of the jurisdiction of the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

2. BANKRUPTCY (§ 20*)—JURISDICTION OF BANKRUPTCY COURT—JURISDICTION OF COURT.

The bankruptcy jurisdiction when properly invoked in bankruptcy proceedings against a corporation supersedes prior proceedings in the state court for winding up the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. § 20.*]

3. BANKRUPTCY (§ 347*)—FEES OF ATTORNEYS.

The compensation allowed attorneys for professional services in bankruptcy proceedings is a priority claim payable out of the assets of the estate of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 538; Dec. Dig. § 347.*]

4. BANKRUPTCY (§ 347*)—FEES OF ATTORNEYS.

The compensation for legal services rendered the receiver in a state court of a bankrupt prior to adjudication of bankruptcy, which services are beneficial to the estate, is a preferred claim in the right of the receiver, and is part of his expenses in the preservation and care of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 347.*]

In the matter of the Standard Fuller's Earth Company, a bankrupt. From an order of R. T. Ervin, referee, fixing and allowing McMillan & Grayson fees for services rendered by them as attorneys in the chancery court of Mobile as attorneys for the receiver in that court of the bankrupt and for filing petition in involuntary bankruptcy in the bankruptcy court for petitioning creditors, they appeal. Reversed.

McMillan & Grayson, for appellants.

TOULMIN, District Judge. It appears from the record that about the 1st of August, 1910, a bill was filed in the chancery court of Mobile by McMillan & Grayson, representing one H. E. Chapman, who was a stockholder in the insolvent corporation, Standard Fuller's Earth

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company, for the appointment of a receiver to take charge of the property and assets of said corporation, and for the administration and winding up of said corporation for the benefit of whom it might concern. On August 18, 1910, the receiver was appointed. On the 26th of November, 1910, the Standard Fuller's Earth Company was adjudicated bankrupt by this court on the petition of creditors of the company. McMillan & Grayson were the attorneys for said petitioners.

It appears that the chancery court at Mobile on January 23, 1911, made an order allowing said McMillan & Grayson, solicitors for complainant in the cause in that court, a fee of \$1,500, declaring it to be a reasonable and proper allowance to them, and authorizing and instructing the receiver in the cause to pay the same and the cost of the cause remaining unpaid after applying the funds in the hands of the register of the court deposited as security for the costs, the payment to be made out of any funds available for that purpose. It was further ordered by that court that the receiver and his bondsman, after the payment of these fees and the costs of the cause, be and are relieved and dismissed from all further accounting of his administration as such receiver. And the cause was ordered to be dropped from the trial docket of that court. It further appears that McMillan & Grayson were requested to represent the defendant company in the state court proceedings by one H. A. Auer, an attorney who represented the company and who was also its secretary, and, when the receiver was appointed, they also performed services as attorneys for him. The treasurer and general manager of the company was appointed receiver.

[1] I cannot agree with the contention of petitioners that the fee allowed them by the chancery court was a priority claim constituting a lien on the assets of said bankrupt company. And I do not find that said court specifically ordered the same to be paid out of the assets of the company. The order directed that such payment be made out of any funds available for that purpose. This order was made on the 23d of January, 1911, about two months after the said corporation had been adjudicated a bankrupt, and when all of its assets had by operation of law passed under the exclusive jurisdiction and administration of the bankruptcy court. The state court proceedings had been superseded by the proceeding in bankruptcy, and its action in the premises, if its purpose was to fix a lien on said assets, was coram non judice. *In re Smith* (D. C.) 92 Fed. 135; *In re Curtis* (D. C.) 91 Fed. 741; *In re Rogers* (D. C.) 116 Fed. 435; *Abbott v. Summers* (D. C.) 116 Fed. 687. "In the administration of an estate in bankruptcy, the law permits the allowance of one reasonable attorney's fee for the professional services actually rendered to the petitioning creditors in involuntary cases. The attorney is entitled to this reasonable fee as a matter of right. The amount must in all cases be reasonable, to be determined upon evidence of the service performed and of its value, and, if in the absence of evidence of its value, by the court from knowledge of its worth. The amount to be allowed rests in legal judgment and judicial discretion, but not in unrestrained discretion." *In re Curtis et al.*, 100 Fed. 785, 41 C. C. A. 61; *Smith*

v. Cooper, 120 Fed. 232, 56 C. C. A. 578; In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326; Brandenburg on Bkcy. §§ 970, 971, 981, 1034, 1036, 1413. Such fee is provable and entitled to priority (1) when the services were rendered the petitioning creditors in involuntary cases; (2) to the bankrupt in involuntary cases while performing the duties prescribed by the act; and (3) when the services of an attorney are really necessary and required by a receiver or trustee in the performance of their duties in the care and administration of the bankrupt estate. Such fees to be allowed as part of the expense of the care and preservation of the estate. The fees allowed as a priority should be confined to service during the bankruptcy proceedings. Bankruptcy Act, § 64. In Re Zier et al., 142 Fed. 102, 73 C. C. A. 326, supra, the court held that the fact that attorneys were employed by a receiver appointed in a state court proceeding against a corporation, and rendered useful professional services therein, established no legal claim for allowance of fees out of the estate in bankruptcy of the defendant in the state court proceeding, by way of lien upon the assets or otherwise, as they are not performed on behalf of the bankrupt nor in the bankrupt administration.

[2] The bankruptcy jurisdiction, when properly invoked, supersedes the prior proceedings in the state court for winding up the corporation, "as to which the jurisdiction is not concurrent"; that the rule in reference to a voluntary assignment for the benefit of creditors is equally applicable to the claim in that case, which was one for legal services rendered under employment by a receiver in a state court. Such claim is allowable only upon equitable considerations for services from which the estate in bankruptcy has derived benefit, and to the extent only they were beneficial in fact. In re Zier et al., supra. The claim in that case was disallowed.

In Re Peter Paul Book Co. (D. C.) 104 Fed. 786, the court held that no allowance can be made by a court of bankruptcy to an assignee under a general assignment for services rendered as custodian of the property prior to the filing of the petition in bankruptcy against the assignor, even though such services appear to have been for the benefit of the general creditors. The court, however, said the bankruptcy court is authorized to make an allowance for services rendered in preserving the estate subsequent to filing the petition. In Re Rogers, 116 Fed. 435, the court said:

"The federal court will decline to recognize the authority of the state court to incur assets of a bankrupt for the fees and expenses of its officers entered after the proceedings therein were suspended by the bankruptcy proceedings. * * * If the assets are delivered to the trustee by the receiver of the state court, this court will consider any application for compensation which may be made by officers of the state court, and, if allowable, will grant suitable compensation."

In the case of Abbott v. Summers (D. C.) 116 Fed. 687, a debtor made a deed of trust to one Summers for the benefit of creditors. About a month thereafter on an involuntary petition filed by creditors the debtor was adjudicated a bankrupt. In due time Abbott was elected trustee of the estate of the bankrupt. He filed a petition in the bankruptcy court alleging that said deed of trust was in effect a

general assignment for the benefit of creditors, and conveyed and transferred to said Summers all the property and assets of said bankrupt, and prayed that the court make an order directing said Summers to turn over to him the money in his hands (all the property having been converted into money by said Summers) belonging to the estate of said bankrupt. Said assignee, Summers, set up, among other things, in his answer to said petition, a claim for compensation for the services of his attorneys. The court held that he was not entitled to an allowance to pay for the services of attorneys employed by him in the administration of the trust, and cites a number of authorities in its opinion to this effect: (1) That a general assignment for the benefit of creditors is void as against the trustee appointed in the subsequent bankruptcy proceeding, or as against the creditors of such debtor, and that "such an assignment or disposition of property is a fraud on creditors, who have the right to invoke the protection of the bankruptcy act"; (2) that it is "a general principle of bankruptcy laws, not only to administer the assets of insolvent debtors on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be intrusted with the administration"; (3) that "acts done in pursuance thereof (the assignment) confer no rights, when proceedings in bankruptcy are instituted within four months of the date of such assignment"; (4) that "no equity can arise in favor of the assignee, which would entitle him to compensation for services rendered, or to reimbursements for expenses incurred, in an attempt to defeat the operation of the bankrupt law"; (5) that a trustee appointed by a bankrupt debtor must be regarded as a mere agent appointed by the bankrupts to distribute their estate among their creditors; and (6) that, "if it is determined that a voluntary assignee or trustee and his attorney are entitled to compensation for their services, to be paid as preferential claims out of the estate, it will have the necessary effect of conferring upon insolvent debtors the power in all cases to charge their assets with the obligation of paying for the services of such trustees and attorneys as they may see fit to designate." Abbott v. Summers (D. C.) 116 Fed. 687; In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377; In re Tatum (D. C.) 112 Fed. 50; Stearns v. Flick (D. C.) 103 Fed. 919; In re Burka (D. C.) 104 Fed. 326.

In the case of Wilbur v. Watson in the United States District Court for the District of Rhode Island, 111 Fed. 493, the court held that:

"Assignees under a general assignment, which was of itself an act of bankruptcy, and constructively fraudulent and in violation of the bankruptcy act, are not entitled to compensation from the estate for their services rendered prior to the filing of petition in bankruptcy against the assignor, and they cannot retain any sum as such compensation from the proceeds of property in their hands."

"Proceedings in state courts under state insolvent laws are as against proceedings under the bankrupt act coram non judice. Such proceedings have no validity, no more than have proceedings in a state court when once a cause has been properly removed therefrom into a federal court." In re Curtis (D. C.) 91 Fed. 741; Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87. A claim for pro-

fessional advice and legal services rendered an assignee prior to an adjudication of bankruptcy against the assignor, "so far as the assignee would be allowed for payment of the claim, * * * may be preferred in the right of the assignee." *Randolph v. Scruggs*, 190 U. S. 536, 540, 23 Sup. Ct. 711, 713, 47 L. Ed. 1165.

But the court said:

"We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen." 190 U. S. 539, 23 Sup. Ct. 713, 47 L. Ed. 1165.

I can perceive no difference in the application of the rule declared in *Randolph v. Scruggs*, 190 U. S., 23 Sup. Ct., 47 L. Ed., *supra*, and other authorities, to the case of a general assignment and to a proceeding in a state court instituted by a stockholder in an insolvent corporation against said corporation, praying an administration and winding up of said corporation, and obtaining the appointment of the treasurer and general manager of the corporation as receiver in the cause. The bankruptcy jurisdiction, when properly invoked, supersedes the prior proceedings in the state court for the winding up of said estate, as to which the jurisdiction is not concurrent. *In re Zier & Co., Wilbur & Watson*, and other authorities, *supra*. While the application to a state court by a corporation for a dissolution and the appointment of a receiver of its property is not an act of bankruptcy, and it cannot be adjudged bankrupt on that ground, the general rules of law for the administration of the bankrupt estate are alike applicable, whether the estate be administered and settled by an assignee under a deed of assignment or by the bankruptcy court.

[3, 4] My opinion is that the referee erred in decreeing that the compensation of the receiver in the state court and of his attorneys therein as fixed and allowed by the state court is a priority claim against the estate in bankruptcy and the same is reversed, and the cause is remanded to the referee to determine the amount of compensation that should be allowed the attorneys for professional services rendered in the bankruptcy proceedings, which is a priority claim to be paid out of the assets of said estate, also to ascertain and determine the expenses incurred by the receiver in the state court in the preservation and care of the assets of the estate turned over to the bankruptcy court. Such expenses to include reasonable compensation for legal services required and actually rendered the receiver, and which were beneficial to the estate. The claim for such professional services is to be claimed and preferred in the right of the receiver, and as part of his expenses in the preservation and care of the estate.

In re E. B. HAVENS & CO.

(District Court, E. D. New York. April 19, 1911.)

- 1. BANKRUPTCY (§§ 363, 336*)—CLAIMS OF CREDITORS—RIGHT TO DIVIDENDS COLLECTED BY ASSIGNEE FOR BENEFIT OF CREDITORS—CLAIMS—AMENDMENT.**

D., a customer of the bankrupts at the time of their assignment, was a debtor to them for a loan with which the bankrupts had purchased certain stocks for him. After their assignment for the benefit of creditors, D. notified the assignee that he was ready to pay the amount due, and take up his stock, and was informed that the assignee had no such stock in his possession. D. then notified the assignee that dividends would be paid thereon, and that such dividends belonged to him. Dividends were paid to the assignee, and D., without making a complete tender, allowed the assignee to enter up the dividends as a credit to his account, and, after notice that he would demand the dividends as his property, filed a verified general claim in bankruptcy including such dividends. *Held*, that D. waived any preference he might have had with respect to such dividends, and was not thereafter entitled to leave to amend his claim after the time for filing claims had expired, so as to except dividends, and ask for an order that they be paid in full.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554, 523; Dec. Dig. §§ 363, 336.*]

- 2. BANKRUPTCY (§§ 363, 336*)—CLAIMS OF CREDITORS—RIGHT TO DIVIDENDS COLLECTED BY ASSIGNEE FOR BENEFIT OF CREDITORS—CLAIMS—AMENDMENT.**

W. purchased certain shares through the bankrupts as brokers on margin. Before the bankrupts made an assignment for the benefit of creditors, the stock was sold ex dividend. The account was balanced and he had no claim against the bankrupts and owed no money to them when bankruptcy intervened. The dividend was payable to the bankrupts in whose name the stock was registered while it was held on margin, and was later paid to the assignee. *Held* that, though W. could have treated the assignee as his agent and demanded payment of such dividends, he, having filed a claim as a general creditor, waived such right, and was not entitled after the time for filing claims had expired to leave to amend so as to enforce the same.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554, 523; Dec. Dig. §§ 363, 336.*]

- 3. BANKRUPTCY (§§ 363, 336*)—CLAIMS OF CREDITORS—RIGHT TO DIVIDENDS COLLECTED BY ASSIGNEE FOR BENEFIT OF CREDITORS—CLAIMS—AMENDMENT.**

M. purchased certain shares on margin through the bankrupts, of which 200 shares were sold ex dividend before bankruptcy intervened, on which \$400 dividends were subsequently received by the assignee after the filing of the bankruptcy petition. M., at the time of bankruptcy, owed the bankrupts a considerable sum as a loan for carrying 500 other shares and made no demand for the dividends on the stock, the assignee crediting him for the market value of his stock and dividends received, and charging him with the total amount of his loan. *Held* that M., having filed a verified claim against the bankrupts' estate for the net balance due, was not entitled to amend the same after the time for filing claims had expired, so as to assert a right to the payment of such dividend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 550-554, 523; Dec. Dig. §§ 363, 336.*]

In Bankruptcy. In the matter of bankruptcy proceedings of E. B. Havens & Co. On petition of certain creditors for the payment of

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

dividends declared on stocks alleged to have been in the hands of the bankrupts belonging to the claimants at the time of their assignment for the benefit of creditors, and received by the assignee subsequent to the filing of petition in bankruptcy and before election of the trustee. Master's report recommending that the claims be disallowed sustained.

R. M. Cahone and C. S. Cooke, for trustee.
Frederick C. Kronmeyer, for claimants.

CHATFIELD, District Judge. Three creditors have applied for the payment of dividends received by the assignee for the benefit of creditors subsequent to the filing of the petition in bankruptcy, and before the election of a trustee. The facts generally are sufficiently set forth in the special master's report, in which he has recommended that the claims of these creditors be disallowed.

The report was made upon what is known as the De Long claim, and the three creditors are in the same position and have agreed to allow the matters to be disposed of together, for the reason that each of these creditors within the year in which claims could be presented filed a verified claim for the total amount due to him, without claiming any preference or title to the dividends received by the assignee and now made the subject-matter of these motions. The year within which to file claims has expired, and each creditor now asks leave to amend his claim by excepting the amount of these dividends, and then asks for a direction that they be paid in full.

[1] The De Long claim arose under circumstances shown at length in the report of the special master. At the time of the assignment, he was the debtor of the brokerage firm to a considerable amount, in the form of a loan, with which his stock had been purchased. The dividend upon his stock, which had already been declared, was not paid until some days later, and in the meantime Mr. De Long notified the assignee that he was ready to pay up the amount due from him, in order to take up his stock, and was informed by the assignee that no such stock was in the assignee's possession. He then notified the assignee that the dividends would be paid, and that they were his. He now insists that no actual tender was necessary, and, if Mr. De Long had paid up the amount carried as a loan for him, and could have received his stock, then his position would have been like that of Mr. Wurster, whose claim we will next consider.

[2] Wurster had previously purchased some 200 shares upon margin, but before the assignment this stock was sold ex dividend, and the account balanced, so that Wurster had no claim against the Havens firm, and owed no money to the firm when bankruptcy intervened. The dividend upon the stock which he had sold belonged to him, but was payable to the brokerage firm in whose name the stock had been registered, while they held it upon margin, and whose apparent title, therefore, determined the person who would receive the dividend when it was actually paid. This dividend, amounting to \$350, was received by the assignee, and is the basis of Wurster's present claim.

In the Mollenhauer matter a still different situation is presented,

for Mollenhauer had purchased upon margin some 700 shares of stock, of which 200 had been sold ex dividend, under exactly similar circumstances to the Wurster transaction, and on which shares a dividend of \$400 would belong to Mollenhauer, but was to be paid to the brokerage firm, and actually was received by the assignee subsequent to the petition in bankruptcy. But Mollenhauer had also an account with the brokerage firm for 500 other shares of the same stock, as to which his petition was exactly like that of De Long, and at the time of the bankruptcy he owed the brokerage firm a considerable amount as a loan for carrying these 500 shares of stock. If the brokerage firm had had the stock in their possession at that time, or if Mollenhauer had paid up the loan and received his stock, he would have had a credit balance for a considerable amount, and also been entitled to receive \$400 dividend upon the stock previously sold, and \$1,000 in dividends upon the stock which was still being carried for his account. But Mollenhauer did not take the precautions De Long did and made no demand of any sort, with the result that the assignee credited Mollenhauer for the market value of his stock, charged him with the total amount of his loan, and also credited him with \$1,400 for the dividends received. And, again, Mollenhauer allowed the year for the filing of claims to go by, and contented himself with presenting a verified claim for the net balance. He now asks to be allowed to amend this by claiming the \$1,400 in full, and to reduce his general claim against the estate by that amount.

[3] The position of Mollenhauer seems to be the weakest of the three. His claim arises from the striking of a balance, upon which he was given credit for \$1,400, as a matter of bookkeeping, and as if the brokerage firm were still doing business. He never objected to this, although he and many of the other creditors, including De Long and Wurster, agreed to let the Havens firm resume business, providing all the creditors signed the consent, and hence may be excused for the neglect to make demand for his dividends in proper form. Nevertheless he accepted the balance as struck and reported to him, filed his verified claim for that balance, and has slept upon his rights until it would seem that he cannot ask now to have his position bettered at the expense of the other creditors.

As to the Wurster claim, the dividend was easily traced. No balance was necessary, and Wurster was not a general creditor of the bankrupt firm. He should have treated the assignee as an agent, and demanded his property, not the payment of a debt. He also slept upon his rights, made a claim as a general creditor under oath, and, whether this was done out of generosity and to help the bankrupts or from carelessness, it does not seem that he is entitled to be preferred, because he has found out his mistake, after the year in which creditors' rights can be established has elapsed.

As to the De Long claim, the demand made by De Long, and his incomplete and insufficient tender of the amount which he owed, with the notice that he demanded the dividends, puts him in a position where he certainly could have treated the assignee as his agent, and could have insisted upon his right to trace his dividends, to the ex-

tent of demanding that the balance of his account be struck, and that the dividends be kept separate therefrom, and be paid to him in full. But he did not so do. He again allowed the assignee to enter up the dividends as a mere credit item in his account. He then, after having notified them that he would demand these dividends as his property, filed a verified claim, plainly contradictory to that demand, and equivalent to a waiver of his rights, which he might have obtained. The special master has reported that Mr. De Long waived any preference which he might have had, and it would seem that his report is correct in that respect, and should be confirmed.

It is not necessary to take up the general question as to the right of a brokerage firm to sell or pledge stock carried for customers upon margin, nor to discuss the rights of customers to dividends which may be received by an assignee or by an estate in bankruptcy subsequent to the time when the customer's rights are fixed as to his general claim as creditor against the estate. It is assumed in this decision that Wurster, De Long, and Mollenhauer could have taken a position immediately upon learning of the insolvency, in which they could have fixed the balance upon their transactions as of the date when the assignee or officer of the bankruptcy court became a trustee for them. It is also assumed that a dividend or other property coming into the hands of an officer of the court, and traced through his hands as the property of another person, cannot be merged or lost in the corpus of the insolvent estate by the will of the assignee or trustee alone.

The custom of business among brokers or the intent of the customers and the brokers to have such dividends credited to their accounts, and included in the striking of any balance while business is being conducted, would not cover the receipt of such dividends after business had terminated, and the parties' rights had been fixed.

The present motions must be decided entirely upon the rights of the creditors generally to insist that other creditors guilty of laches and estopped by their own actions shall not be allowed to change their position at a time subsequent to the period within which the statute provides that the status of a bankrupt estate shall be determined.

The motions to confirm the report and to deny the claims of the creditors De Long, Wurster, and Mollenhauer will be granted.

In re STANDARD TELEPHONE & ELECTRIC CO.

(District Court, E. D. Wisconsin. April 12, 1911.)

1. BANKRUPTCY (§ 336*)—CLAIMS—AMENDMENT AFTER LIMITATION.

A trustee under a mortgage given to secure bonds of the bankrupt corporation filed a petition before the referee in bankruptcy setting up the mortgage and praying that it be declared a first lien, that the property be sold for cash, and the proceeds applied to the mortgage, with a prayer for other and further relief. Issue being joined, testimony was taken and the bonds introduced in evidence. The mortgage having been

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

held void and the determination having been affirmed by the United States Supreme Court, more than a year after the institution of bankruptcy proceedings, the owner of the bonds filed a claim on the bonds as a general creditor within 60 days after such affirmance. *Held* that, though the proceedings by the trustee under the mortgage did not constitute a sufficient proof of claim within Bankr. Act July 1, 1898, c. 541, §§ 57a, 57b, 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), such proceeding, having disclosed all the facts necessary to show a valid claim against the estate, was amendable after the expiration of the year so as to disclose a valid claim.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 336.*]

2. BANKRUPTCY (§ 328*)—CLAIMS—“LIQUIDATION.”

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), declares that claims shall not be proved against a bankrupt's estate subsequent to one year after the adjudication, or, if liquidated, by litigation, and the final judgment is rendered within 30 days before or after the expiration of such time, then within 60 days after the rendition of such judgment. *Held*, that the term “liquidation,” as so used, was not limited to proceedings having for their object only the ascertainment of the amount due on the claim, but included as well proceedings to ascertain the kind and character as well as the amount of the claim, and hence proceedings against a bankrupt's estate to establish certain bonds as a preferred lien on the bankrupt's assets covered by mortgage given to secure the bonds were proceedings for liquidation, so that, on adverse determination, the bondholders were entitled within 60 days to file their claims on the bonds as general creditors.

[Ed. Note.—For other cases, see *Bankruptcy*, Dec. Dig. § 328.*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4180.]

In Bankruptcy. In the matter of bankruptcy proceedings of the Standard Telephone & Electric Company. On petition to review a referee's order allowing the claim of one Ainslee after amendment as a general claim. Affirmed.

See, also, 157 Fed. 106.

This is a petition for a review of the decision of Hon. E. Q. Nye, referee, who allowed the claim of Mrs. Ainslee on her bonds as a general creditor. The mortgage given to secure such bond covered all the property of the bankrupt, and K. K. Knapp was the trustee named therein. On December 5, 1906, the company was adjudged bankrupt on creditors' petition. On December 21, 1906, an order was entered upon the petition of the trustee in bankruptcy that all of the property of the bankrupt be sold free and clear of encumbrance. Knapp, as trustee under said mortgage, filed a petition before the referee, setting up the mortgage, and praying that it be declared a first lien upon the property of the bankrupt, and superior to the rights of all other creditors, and that the property be sold for cash, and the proceeds of such sale be applied on his mortgage, with prayer for such other, further, or different relief as equity and good conscience might dictate. Issue was joined on this petition, and in February, 1907, came on for a hearing before the referee. Testimony was taken. The bonds, among which were those of the present claimant, were introduced in evidence. It was admitted that Mrs. Ainslee, the present claimant, was the cestui que trust under the trust deed thus presented by Knapp. On March 22, 1907, the referee filed his findings of fact and conclusions of law, and among other things found that the amount due on such bonds was something over \$9,000, but that the mortgage was void under the statutes of Wisconsin. Knapp, as trustee, appealed to the District Court from this decision of the referee, where the decision of the referee was sustained. 157 Fed. 107. The litigation was continued through the Circuit Court of Appeals to the Supreme Court of the United States. In each of said courts the decision of the referee was affirmed. The decision of the Supreme Court was rendered March 7, 1910 (216 U. S. 545, 30 Sup.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Ct. 412, 54 L. Ed. 610). April 18, 1910, Mrs. Ainslee, the claimant, filed a claim before the referee which complied with all the requirements of section 57. The mandate of the Supreme Court was filed with the clerk of the District Court June 13, 1910, so that such claim was filed within 60 days of the adjudication of the Supreme Court.

This claim of Mrs. Ainslee was objected to by the trustee in bankruptcy on the ground that more than one year had elapsed between the adjudication in bankruptcy and the filing of her claim. This objection was predicated upon section 57n of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 561 [U. S. Comp. St. 1901, p. 3444]).

Knapp & Campbell (Van Dyke, Rosencrantz, Shaw & Van Dyke, of counsel), for Mrs. Ainslee.

Miller, Mack & Fairchild, for trustee.

QUARLES, District Judge (after stating the facts as above). [1] The contention of claimant is, first, that the petition presented by Knapp as trustee under the mortgage was in contemplation of law a presentation of the claim of Mrs. Ainslee as the cestui que trust upon the bonds, and that such claim so presented within the year, although informal, may lawfully be amended after the expiration of such period; and, secondly, that the legal proceedings to establish and enforce the mortgage were a liquidation of the claim within the terms of the exception found in section 57n.

We will consider these points in the order in which they are presented by counsel.

Knapp presented a claim under the mortgage as the legal representative of the cestui que trust. He was within the Wisconsin statute a trustee of an express trust, and might conduct any necessary proceedings to enforce the mortgage in his own name, without joining the cestui que trust. St. Wis. 1898, § 2607. The essence of his claim was: That these bonds were subsisting indebtedness of the bankrupt. The amount of the bonds was proven and the bonds themselves filed. That by virtue of the mortgage he, as trustee, was entitled to a first lien on all the assets which should be sold and applied upon the debt. That the litigation was diligently prosecuted in good faith to the court of last resort, and that, until the contention of Knapp had been disposed of, there could be no general claim as an unsecured creditor on the bond. It would be idle to contend that this showing was sufficient as a "proof of claim" within section 57a and section 57b, but it put upon the record all the facts necessary to establish a bona fide indebtedness and the circumstances under which it was incurred. It seems to be settled that if the presentation of the bonds to the referee may be considered as a claim, although informal, it might be amended after the expiration of the year.

The Supreme Court in *Hutchinson v. Otis*, 190 U. S. 552, 555, 23 Sup. Ct. 778, 779, 47 L. Ed. 1179, have construed this section of the bankruptcy act as follows:

"It is argued that the allowance of the amendment is within section 57n, forbidding proof subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An example similar in principle is the allowance of an amendment setting up the same cause of

action after the statute of limitations has run when the original declaration was bad. The proceedings remain in the District Court notwithstanding the appeal and the amendment properly was allowed there."

In Buckingham v. Estes (6th Circuit) 128 Fed. 584, 586, 63 C. C. A. 20, 22, the court say:

"But if we assume that the formal proof of Mrs. Estes' claim for rents and profits filed January 15, 1903, was not made until more than one year after the date of adjudication, it does not appear, and it is not claimed, that her petition setting up her claim in the bankruptcy proceedings was not filed within one year after the adjudication. It would be a narrow construction of sections 57 and 57n which would not regard a claim so presented and litigated in the bankruptcy proceedings as 'proven' within the limitation of the section. A claim 'proven' within the year is amendable after the lapse of the year, and the court below probably regarded her petition as a statement under oath in writing signed by a creditor, setting forth the claim, etc., and therefore subject to amendment, to comply with the further formalities of section 57. In this the court did not err"—citing Hutchinson v. Otis, supra.

In Re J. M. Mertens & Co. (2d Circuit) 147 Fed. 177, 77 C. C. A. 473, the claimant two days before the expiration of one year from the date of adjudication filed a claim for certain woolens sold and delivered to said bankrupt because of certain false representations made by him touching his financial responsibility. At a meeting of the creditors held after the filing of the proof, the trustee demanded that the claimant state whether his claim was for the contract price of goods sold and delivered or for damages upon the implied contract, or whether it was in tort. Counsel for the claimant stated that his claim showed what it was for, and that it was not filed on the theory of goods sold and delivered. Thereupon the trustee filed objections to the claim on the ground that it must be construed either as a claim based on fraud or for damages arising out of an implied contract. If for fraud, it was not provable under the act. Being a claim for damages, it could not be filed until the damages were liquidated, and, as more than a year had elapsed since the adjudication, it was too late to liquidate them. This contention was sustained by the referee, and, on petition for review, the order of the referee was reversed, the court holding:

"The provisions of the statute must, of course, be followed, but in construing them the court should keep in mind the fact that one of the chief objects of the law is to secure a fair division of the bankrupt's estate among his creditors."

Thereupon the court proceeded to consider section 57 and its various subdivisions, and concludes:

"From these various sections we deduce the following propositions: That proof and allowance of claims are two separate and distinct steps; that a clear statement of a claim in writing duly verified and filed with the referee, if made within a year, is sufficient to take the claim out of the statutory limitation, even though it may be allowed, or liquidated and allowed, afterwards.

"We think that section 63b must be interpreted in the light of the other sections of the law, and that to construe it as meaning that no proof of unliquidated claims can be filed until the precise amount due thereon is established will in practical operation make the allowance of such claims impossible, for the reason that a hostile trustee or creditor can easily delay

the liquidation until after the expiration of the year. A more reasonable and sensible construction is that the filing of the proof, like the filing of a declaration at common law, if made within the time, takes the claim out of the statute of limitations, and that, after such proof is made, the claim is before the court to be dealt with as the interests of the bankrupt and the creditors may require."

The court proceeded:

"The practical situation then is this: The woolen company has a claim against the bankrupt for \$28,614, the amount being admitted alike by the bankrupts and the trustee. It also has a claim for the same amount against the trustee for conversion, growing out of the fraudulent representations of the bankrupts when the goods were ordered. Manifestly the woolen company is entitled to its goods, or the value thereof, or, failing to establish fraud, to its share in the bankrupt's estate."

Still more advanced ground is taken by the court in *Re Strobel* (D. C.) 163 Fed. 787, where the court hold, in substance, that a presentation of the facts before the court in bankruptcy amount to a sufficient compliance with section 57n, although no claim was specifically made or filed with the referee. Reference was made in the opinion to the *Roeber Case*, 127 Fed. 122, 62 C. C. A. 122. In that case before the year a document inartificially drawn being considered as a proof of claim, the amount due is set forth, and a lien was claimed on a certain special fund due the bankrupt. It was signed by the attorney, but not sworn to. This claim was litigated and decided adversely to the creditor. This document was permitted to be amended after the lapse of a year, so as to conform to the requirements of the bankruptcy act, and then allowed as a general claim.

Judge Lacombe, in deciding the case, said:

"Bankruptcy courts have the usual power of courts of justice upon motion and for good cause to allow amendments. All parties were advised of the claim within the year. There is no dispute that the amount claimed is justly owing from the bankrupt. The amendment was in furtherance of justice, and within a legitimate exercise of the power of amendment under the authorities."

In the instant case there was a large claim based on bonds secured by mortgage. The trustee under the mortgage made proof before the referee which was sufficient to enable him to insist upon the lien of the mortgage. Everybody interested in the estate was informed of the exact status of the claim. The amount due on the bonds was adjudicated by the referee; and there is no dispute that such amount was justly due from the bankrupt. A claim upon the bonds as an unsecured creditor was absolutely incompatible with the contention made by Knapp as trustee. When it had been determined in the courts that the mortgage was void ab initio under the Wisconsin statutes, then for the first time it becomes important for the present claimant to secure recognition as a general unsecured creditor.

Section 57n of the bankruptcy act reads as follows:

"(n) Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: Provided, that the right of infants and insane persons with-

out guardians, without notice of the proceedings, may continue six months longer."

[2] The second question raised by the record is whether the litigation to determine the validity of the mortgage lien was a liquidation within the meaning of the above section. Under the Knapp contention, the sole question was the validity of the mortgage lien. If such mortgage lien was held valid, there was no claim to be made by Mrs. Ainslee upon her bonds as an unsecured creditor. The contention that the term "liquidation" applied only to the amount due on the claim is too narrow a view. Worcester in his Unabridged Dictionary gives the first definition of this term, "To clear away, to clear or free from complication, confusion or obscurity," and the third definition, "To ascertain the kind and precise amount of, as of damages or a debt." To remove doubt as to the kind of a claim was as much a liquidation as to determine the exact amount thereof. The very point and the only point to be determined was whether the mortgage drew to itself all the assets, or whether a claim against general assets as a common unsecured creditor must be resorted to.

This litigation may justly be considered a process of liquidation within the meaning of section 57n. There was at one time a sharp conflict of authority on this point; but the later authorities seem to sustain the view adopted by the learned referee. Perhaps the leading case is Powell v. Leavitt, 150 Fed. 89, 80 C. C. A. 43, decided by the Circuit Court of Appeals of the First Circuit. It was there held that where a claim secured by a mortgage on the bankrupt's stock in trade was attached by the trustee as a preference, and the creditor sued in a state court to establish the validity of the mortgage, and the mortgage was held to be invalid as a preference, the creditor's claim was thereby liquidated by litigation and provable as an unsecured claim within 60 days after the rendition of the judgment in the state court, as provided by section 57n. In this case, on page 91, the court say:

"The phrase 'liquidated by litigation' is general, and the object of the exception which is made to the statutory limit of time is plainly to allow the proof of a claim after the expiration of a year by a creditor who during that time was engaged in litigation with the bankrupt's estate concerning its liability to him. In a sense the debt evidenced by the promissory notes held by Powell had already been liquidated. Apart from bankruptcy proceedings, Powell could have sued Noel at law for their face value. It may be that, pending the litigation he could have proved his claim in bankruptcy as a secured claim, leaving his proof to be amended in case his mortgage was avoided. Hutchinson v. Otis, *supra*. But to prove during litigation a claim which cannot be allowed unless the creditor fails in the litigation is but an empty formality. If the security is as large as the debt, it is a formality which can hardly be accomplished under the rules and with the forms which have been provided. Notice of the claim is given in effect by the litigation, and, if the preferred creditor is not to be deprived of his proof altogether, there seems no good reason why he should not offer it immediately after the litigation is ended. The substantial amount of Powell's claim, the amount for which he could seek allowance and upon which he could demand a dividend here, remained uncertain until the validity of the mortgage had been settled."

Re Baird (D. C.) 154 Fed. 215, is an instructive case. A creditor had an attachment before bankruptcy proceedings were instituted.

If it could be maintained, he would have collected his whole debt, and consequently would have had no claim against the estate. The result of the litigation was adverse to the creditor. It was held that he was not compelled to prove his claim until the close of the litigation, and that, if defeated, he might prove his claim after the expiration of the year because the claim was being liquidated by litigation within the meaning of section 57n. To the same effect, see *Re Landis* (D. C.) 156 Fed. 318; *Re Lange* (D. C.) 170 Fed. 114; *Re Keyes* (D. C.) 160 Fed. 763; *Re Clark* (D. C.) 176 Fed. 955, 960. It would seem to be a harsh conclusion that Mrs. Ainslee should be deprived of any recourse to the general assets because she had adhered tenaciously to her rights under the mortgage. It is urged that many of the cases cited involve unlawful preferences. We can see no difference in the principle whether the lien of the mortgage fails for one reason or another. When it is swept away by the mandate of the courts, the creditor for the first time needs to assert a claim as a general creditor. To determine this question the courts are resorted to, and the result may justly be considered a liquidation.

For these reasons, the findings and conclusions of the referee must be affirmed; and it is so ordered.

UNITED STATES v. AMERICAN NAVAL STORES CO. et al.

(Circuit Court, S. D. Georgia, E. D. April 17, 1909.)

1. MONOPOLIES (§ 10*)—FEDERAL ANTI-TRUST ACT—PENAL PROVISIONS—CONSTITUTIONALITY.

The penal provisions of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), making it a misdemeanor to engage in any combination or conspiracy in restraint of interstate commerce or to monopolize or attempt to monopolize any part of such commerce, are constitutional.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 10.*]

2. MONOPOLIES (§ 31*)—FEDERAL ANTI-TRUST ACT—INDICTMENT FOR VIOLATION—SUFFICIENCY.

Counts of an indictment charging conspiracy to restrain and monopolize interstate trade and commerce in violation of Sherman Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), considered, and *held* to sufficiently charge and describe the offense.

[Ed. Note.—For other cases, see *Monopolies*, Dec. Dig. § 31.*]

3. INDICTMENT AND INFORMATION (§ 125*)—DUPLICITY—VIOLATION OF FEDERAL ANTI-TRUST ACT.

Under Sherman Anti-Trust Act July 2, 1890, c. 647, § 2, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), which makes it a misdemeanor to "monopolize or attempt to monopolize * * * any part of the trade or commerce among the several states or with foreign nations," monopolizing and attempting to monopolize such commerce are separate offenses and cannot be included in one count of an indictment.

[Ed. Note.—For other cases, see *Indictment and Information*, Dec. Dig. § 125.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Criminal prosecution by the United States against the American Naval Stores Company, Edmund S. Nash, and others. On demurrer to indictment. Overruled.

See, also, 172 Fed. 455; 186 Fed. 31.

Alexander Akerman, Asst. U. S. Atty., W. M. Toomer, Asst. Atty. Gen., for the United States.

W. W. Mackall, Adams & Adams, and Garrard & Meldrim, for defendants.

SHEPPARD, District Judge (orally). The demurrer to the indictment in this case raises both the question of the validity of the penal provisions of the Sherman or anti-trust act and the sufficiency of the indictment under sections 1 and 2 of said act. Act July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200). The questions raised by the demurrer, and so exhaustively and comprehensively argued by counsel, orally and by brief, have caused anxious and earnest investigation by the court. The statute has been a vexatious one to the courts since it first came under judicial scrutiny, in *Re Greene* (C. C.) 52 Fed. 104.

Four times, so far as my investigation has disclosed, this statute has received judicial consideration in criminal cases, and in none of these, was the question of the uncertainty and indefiniteness of the penal provisions of the statutes brought squarely before a court as here. Not once has the Supreme Court passed upon this, perhaps, doubtful feature of the act; but a fair and reasonable interpretation of the decisions of that court from *United States v. E. C. Knight Co.*, in 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, as early as 1895, down to the Danbury Hat Case, 208 U. S. 274, 28 Sup. Ct. 301, 52 L. Ed. 488, will uphold the validity of the act. A brief summary of them all is that they hold "that the act prohibits any combination whatever to procure action which essentially obstructs the free flow of commerce between the states or obstructs in that regard the liberty of a trader to engage in business." It does not fail to interest the inquiring student, either, that, in all of the important cases involving the construction of this act by that great court, every section of it has been persistently assailed for uncertainty, ambiguity, absurdity, and unconstitutionality.

The wholesome purpose of the law, as remedial legislation, is I conceive, no longer open to question or cavil by the inferior federal courts, who must, of course, be guided by the construction of the Supreme Court. Said Justice Lacombe, speaking for the Circuit Court for the Southern District of New York, in *United States v. American Tobacco Co.*, 164 Fed. 700, referring to the Sherman act:

"Disregarding various dicta, and following the several propositions which have been approved by successive majorities of the Supreme Court, this language, as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small.

"As thus construed, the statute is revolutionary; by this it is not intended to imply that the construction is incorrect. When we remember the circumstances under which the act was passed, the popular prejudice against large aggregations of capital, and the loud outcry against combinations which

might in one way or another interfere to suppress or check the full, free, and wholly unrestrained competition which was assumed, rightly or wrongly, to be the very life of trade, it would not be surprising to find that Congress had responded to what seemed to be the wishes of a large part, if not a majority, of the community, and that it intended to secure such competition against the operation of natural laws."

It could accomplish no good purpose, as I see at this time, to enter upon a comprehensive review and comparison of the decisions of the inferior federal courts construing the penal provisions of the act. Suffice it to say, that the well-reasoned case decided by Judge Jackson (which I would be inclined to follow if the statute had not received construction by the Supreme Court), who undertook to define the scope of the act and what were criminal monopolies, and what constituted restraint of trade and the sufficiency of an indictment within the purview of the statute, was long prior to the decisions of the Supreme Court in the Swift Case, 196 U. S. 375, 25 Sup. Ct. 276, 49 L. Ed. 518, the Northern Securities Case, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, and the Joint Traffic Association Case, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259. In view of the interpretation of the statute made in these cases, it is not improbable that Judge Jackson's decision in *Re Greene* (C. C.) 52 Fed. 104, and Judge Nelson's decision in *United States v. Greenhut* (D. C.) 50 Fed. 469, and Judge Rick's in *Re Corning* (D. C.) 51 Fed. 205, would be different.

In so far as the application of the provisions of the statute denouncing as criminal combinations and conspiracies in restraint of trade and monopolies and attempts at monopolies and attempts to monopolize, I am impelled, after some hesitancy and much inquiry, to the ultimate conclusion that until that question is brought squarely before the Supreme Court it would be safer to follow the precedents established by *United States v. Patterson et al.* (C. C.) 55 Fed. 605, and *United States v. MacAndrews, Forbes Company* (C. C.) 149 Fed. 823.

Judge Hough of the Southern District of New York overruled a demurrer to an indictment, charging violation of sections 1 and 2 of the Sherman act, and held among other definitions of the act, that:

"Whether any given business scheme falls within the anti-trust law as a combination or conspiracy in restraint of trade, or an attempt at monopoly of a portion thereof, it is to be determined by its effect on interstate commerce, which need not be a total suppression of trade or interstate commerce, nor a monopoly; but it is sufficient if its necessary operation tends to restrain interstate commerce and to deprive the public of the advantages flowing from free competition."

Again, the criminal provisions of the statute received comprehensive treatment from Circuit Judge Putnam, in the case of *United States v. Patterson* (C. C.) 55 Fed. 605. This case was most exhaustively argued by counsel in which almost every conceivable objection that could be raised to the application of the first two sections of the act were insisted upon, yet the learned judge said:

"I do not think there is any constitutional question in this case, upon any view of this statute or upon the face of the indictment.

"The right of free commerce granted by the Constitution permits broad legislation; and in no sense is this statute as broad as the revised statute

section 5508 on the principal construction pleaded later in *United States v. Waddell* [112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673].

"There may be practical difficulties in applying the statute in such a way as to prevent conflicts with the state jurisdiction. Ordinarily a case cannot be made under the statute unless the means are shown to be illegal, and therefore it is necessary, ordinarily, to declare the means by which it is intended to engross or monopolize the market."

The court does not feel embarrassed by the use of the words "trade and commerce." The learned judge goes on to point out the specific offenses denounced by the first two sections of the act, and further on defines the purpose of Congress in this legislation.

Can it be said in view of these decisions that the act, as far as it applies to criminal combinations and conspiracies, should be lightly brushed aside because of its apparent unreasonableness and absurdity, or would it best comport with the due administration of justice to hold its penal provisions effective as against those conspiracies and combinations which are shown by requisite proof to be destructive of the public welfare? It has been asserted by text-writers to be incapable of enforcement because its application would destroy honest enterprise and thrift; perhaps this is an unfounded apprehension.

There are valid statutes impossible of application in all cases to the letter, notably the Trinity Church Case, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. Blackstone illustrates it, with the law of Bologna, which prohibited the shedding of blood in the streets of the city; but, when a man fell with a fit and had to be lanced as a remedy, no one ever thought by doing so, that the law was violated.

I have considered the indictment in the light of the constitutional requirement that the accused must be informed of the nature and cause of the accusation against him, and the indictment must impart to him, not only all the elements of the offense, but they must be stated in the indictment with clearness and certainty, so as to make the defendant reasonably to understand the act and particular transaction touching which he must be prepared with his proof. The rule is, in prosecutions for offenses against the laws of the United States, the indictment must charge more than the language of the statute upon which it is founded. However, it appears that to some extent this necessity must be governed by the particular facts and circumstances of each case.

It has been held that the test of the sufficiency of the charging or descriptive part of an indictment is not that it might be more specific and certain, but whether it charges enough to put the defendant on notice of what he may expect to meet in the proof. Without critically reviewing the indictment, the first count charges that the defendant conspired in the usual form of a conspiracy charge, and then proceeds to describe with some detail how they were engaged in interstate trade and commerce and the character of the trade points and places, the relation of the officers to the corporation, and then follows a description of the means and ways of effecting the conspiracy.

The second count charges a conspiracy to monopolize and describes in like manner how the monopoly was to be effected, and the general scheme of effecting the objects of that conspiracy. I am of the opinion that these counts charge sufficiently the offense of conspiracy to

put the defendant on notice of the nature of the accusation. The third count is a more difficult proposition. It is very doubtful whether by the use of the generic term "monopolize" and what follows as a description of the offense in this count is sufficient to meet the requirements as laid down in the familiar cases of Cruikshank (92 U. S. 542, 23 L. Ed. 588) and Hess (124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516). As may be seen, the statute intends to create two distinct and different offenses, viz., monopolizing and attempting to monopolize.

It is elementary that two separate offenses cannot be included in one count of an indictment. Besides, it is important that the defendant should know whether the government will proceed to prove that the defendants monopolized or attempted to monopolize. I think there is clearly a distinction between the two, and, although there is not different punishment provided, the count is bad for duplicity and for lack of certainty.

UNITED STATES v. ZUMWALT.

(District Court, D. Idaho, N. D. May 24, 1910.)

INDIANS (§ 34*)—OFFENSES—FURNISHING LIQUOR TO INDIANS—TREATY—CONSTRUCTION—"ALLOTTEE."

The Nez Perce treaty (Act Aug. 15, 1894, c. 290, 28 Stat. 326, 327, 328, 330) provided that the lands ceded by the agreement, those retained and those allotted to the Nez Perce Indians, should be subject for 25 years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, should for a like period be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians. *Held*, that the term "allottee," as used in such provision, was descriptive of the person, and not of the condition, and that a Nez Perce Indian to whom lands had been allotted was not thereby removed from the class described in the treaty as "Nez Perce Indian allottees" by the issuance to him of a patent conveying the absolute title to his allotment prior to the expiration of the specified 25 years, so that it was no defense to a prosecution for furnishing liquor to such an Indian that he was an allottee to whom the United States had conveyed the absolute title to his allotment by patent.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 34.*]

Nelson T. Zumwalt was indicted for furnishing liquor to a Nez Perce Indian. On demurrer to indictment. Overruled.

C. H. Lingenfelter, U. S. Atty.

Morgan & Morgan and John Nisbet, for defendant.

DIETRICH, District Judge. From the indictment, and from admissions made at the argument, it appears that the Indian named in the indictment, to whom the defendant is alleged to have furnished the intoxicating liquor, is a Nez Perce Indian, and was living upon the Nez Perce Indian reservation, and in charge of an agent, at the time of the treaty with the United States by which the lands were in part

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

distributed in severalty to the Indians and the balance thereof sold to the white people. Some time after the allotment was made to him, and prior to the acts charged in the indictment, the Secretary of the Interior, acting within his lawful discretion, issued to him a patent conveying to him the absolute title of the land allotted, and the defendant contends that by reason of the issuance of such patent the Indian was removed from the class of Nez Perce Indians to whom the law prohibits the sale of intoxicating liquor.

By the treaty with the Nez Perce Indians, above referred to (Act Aug. 15, 1894, 28 Stat. 326, 327, 328, 330), it was provided:

"That the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

In the case of *Dick v. United States*, 208 U. S. 340, 28 Sup. Ct. 399, 52 L. Ed. 520, this treaty provision was held to be valid and effective so far as it relates to the introduction of liquor into the Indian country, and no reason is apparent why, if it is valid and effective for that purpose, it should not also be held to operate in continuing the applicability to the Nez Perce Indians, of the laws of the United States prohibiting the sale of intoxicants to Indians under the care of an Indian agent.

It is, however, contended that by its terms it purports to continue such laws in force only as to "allottees," and it is argued that the Indian to whom the liquor was sold in this case, having received his final patent, and hence the absolute title to his allotment, is no longer to be considered an "allottee." By such a view it is assumed that the term "allottees" is used as descriptive of a status, rather than of a person or class of persons; that is, the law shall apply to Nez Perce Indians so long only as they hold their land by allotment, and not by patent. But the better view is thought to be that the term was used as descriptive of the person, and not of a condition or status, and that, amplified, it is to the effect that the liquor laws shall apply for the period of 25 years to all Indians to whom lands are allotted. Too great significance is by counsel for the defendant attached to the provision of the law authorizing the Secretary of the Interior, under certain conditions, to issue patents conveying the absolute title to Indian allottees. The mere modification of the status of property rights does not necessarily imply an intention on the part of Congress to alter the personal status of the grantee. It is clear that upon the allotment of their lands in severalty to the Nez Perce Indians they became vested with many of the rights of citizenship, notwithstanding the fact that the United States continued to hold the title to their lands in trust for the period of 25 years, and notwithstanding the prohibition against their use of intoxicants. Rights incident to citizenship and rights incident to ownership were conferred, but both the citizenship and the ownership were limited and qualified. It was entirely competent for Congress unreservedly and absolutely to transfer property to the In-

dians and pass no right of citizenship; and upon the other hand it was competent to confer upon them limited rights of citizenship and vest in them only qualified ownership. As was said in the Heff Case, 197 U. S. 509, 25 Sup. Ct. 512, 49 L. Ed. 848:

"The fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with a condition subsequent. A minor may not alienate his lands; and a proper tribunal may, at the instance of the rightful party, enforce all restraints upon alienation."

And, in speaking of the guardianship of the United States over the Indians, the court further said:

"It [the United States] may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress."

It follows that it is not only for Congress to determine when and how the relationship of guardianship shall be abandoned, but to what extent. It may abandon some of the rights and duties of such relation, and retain others. See, also, *United States v. Celestine* (decided by the Supreme Court of the United States December 13, 1909) 215 U. S. 278, 30 Sup. Ct. 93, 54 L. Ed. 195.

To recapitulate, the treaty provision with the Nez Perce Indians is valid, and avails to furnish to the Nez Perce Indian allottees the full protection of the law prohibiting the sale of liquor to Indians for the period of 25 years; that there is no vital or necessary relation between the political status and the property rights of an Indian; that the term "allottee" is descriptive of the person, and not of a condition; and that a Nez Perce Indian to whom lands have been allotted is not removed from the class described in the treaty as "Nez Perce Indian allottees" by the issuance to him of patent conveying the absolute title prior to the expiration of the specified period of 25 years.

VOLLMER v. PLAGE.

PLAGE v. PLAGE et al.

(District Court, E. D. New York. April 27, 1911.)

1. BANKRUPTCY (§§ 164, 181*)—PREFERENCES—PAYMENTS—TRANSFERS.

The father of one of the members of a bankrupt firm had made loans to it on notes, one of which was due March 1, 1909, and the other on the 16th following, or out of the next payment received by the bankrupts on a particular job of work. On March 3d, 13 days before bankruptcy, the firm paid such notes in cash, the holder having knowledge that the firm then was or had been for some time insolvent, and that they could not complete the work on which they were then engaged, unless some fortuitous or unexpected profitable contract of large proportions could be obtained. After such indebtedness had been paid, the son conveyed to his father an undivided one-third interest in real estate which was subject to a life estate of the father and also a right of dower, receiving therefor \$250; this sale being made to avoid a sale by payment of a judgment

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

against the son. *Held*, that the transfers, regarded as a single transaction, were both subject to vacation at the instance of the bankrupt's trustees as preferences, except that the transfer of the interest in the real estate would be regarded as security for the consideration paid.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 267, 259; Dec. Dig. §§ 164, 181.*]

2. BANKRUPTCY (§ 181*)—VALIDITY OF TRANSFER FOR VALUABLE CONSIDERATION—INTENT TO DEFRAUD.

A transfer by a member of a bankrupt firm for a valuable consideration, which becomes a part of the bankrupt's estate, is not void, unless made with intent to defraud other creditors.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 259; Dec. Dig. § 181.*]

Action by Henry Vollmer, as trustee in bankruptcy of Frederick Plage, individually and as a member of the firm of Young & Plage, and by Henry Plage as trustee in bankruptcy of Frederick Plage, individually and as a member of the firm of Young & Plage, against Henry and Frederick Plage. Decree for complainants.

Kiendl Bros. (James E. Smyth, of counsel), for complainants.

Simon Abrahamson (Ralph K. Jacobs, of counsel), for Henry Plage.
Ralph K. Jacobs, for Frederick Plage.

CHATFIELD, District Judge. Each of these actions is brought by the trustee in bankruptcy to recover property transferred by the co-partnership of Young & Plage, before the filing of a voluntary petition by that firm and its members individually, upon the 16th day of March, 1909.

[1] In the action against Henry Plage alone, an attempt is made to set aside as preferential a payment of \$1,640 by the two bankrupts to the defendant, the father of one of the bankrupts, upon the 3d day of March, 1909, or 13 days before the filing of the petition. This sum of \$1,640 took up a note dated December 1, 1908, for the sum of \$1,100, and another note for the sum of \$540, dated February 16, 1909, each of which notes was payable at the Twenty-Sixth Ward Branch of the Mechanics' Bank; the \$1,100 note being due March 1, 1909, and the \$540 note being due one month after date, or March 16, 1909, "or out of next payment on job Moffatt St. and Condit Ave." The second action was brought to set aside the transfer of an interest in real estate devised to the bankrupt Frederick Plage by the will of his mother, by which will he was given a one-third interest in the property, subject to the life estate of his father. Upon the 12th day of March, 1909, the bankrupt Frederick Plage delivered a deed covering his interest in said premises for the sum of \$250 to his father, one of the defendants, which was duly recorded upon the following day in the register's office of Kings county. At the time of making this transfer, this property belonging to Frederick Plage was subject to the dower right of his wife, and, according to the testimony introduced, no market existed in which a disposal of such an undivided interest, subject to both life estate and a right of dower, could bring forth any substantial offer whatever. The trustee in bankruptcy has introduced testimony showing that the firm of Young & Plage had

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

been in business for about a year, and had lost, as was shown by the testimony, some \$10,000 upon four or five contracting jobs, with the result that at the time of filing the petition in bankruptcy they remained in possession of substantially no assets, and had liabilities of approximately \$27,000.

The father, Henry Plage, is shown by the testimony to have advanced money to the firm, and evidently was interested in establishing his son in business. He was careful to arrange, as between himself and the partners, that his advances should be paid out of the proceeds of specific jobs or from expected payments upon those jobs, and he seems to have known not only the details as to when the firm would receive money, but to have been aware that, unless he obtained money before it was available for other creditors, he was not likely to get the payment which he expected. In fact, the payments sought to be set aside as preferential were made at a meeting under circumstances which of themselves arouse suspicion, and the payments were made in cash instead of through the firm's bank account. It would appear that the members of the firm, and also the defendant Henry Plage, were anticipating attempts on the part of other creditors to get hold of the funds which Mr. Plage did receive, and there is much evidence to support the claim that both the defendant Henry Plage and the two bankrupts were aware of the actual condition of the firm's finances, and knew that the firm was and had been for some time insolvent, and that they could not complete the work upon which they were engaged unless some fortuitous and unexpected profitable contract of large proportions might be obtained. The payment of the two notes in question disposed of Henry Plage's claims against the firm, and at the time the interest in the real estate was conveyed to him he was not a creditor, so far as the bankrupts were concerned. If the real estate in question had been transferred to an outsider for what would appear to be a genuine purchase price of \$250, it would be impossible to hold that the deed given upon the 12th of March was fraudulent. The consideration of \$250 was a present consideration. It was used by the bankrupts for the purpose of defraying the expenses of the bankruptcy proceeding, and also of paying off a creditor who was about to levy upon the real estate in question. Neither of the uses to which this money was put would be of a sort such as by itself to make it necessary to set aside the sale of the house.

[2] A transfer for a valid consideration, which consideration goes into the bankrupt estate, is not void, unless it be done with the intent to defraud other creditors.

According to the greatest estimate which is placed upon the value of this property, the bankrupt Plage's interest therein was worth to him only what he could get from one of his fellow owners, to avoid a sale on a judgment then threatened, or to effect a \$250 loan. To hold that a consideration of \$250 by one of the other parties interested in order to avoid the levy by the sheriff is of itself fraudulent would seem to be contrary to the opinion of the courts in similar cases, as well as to common knowledge. The only cloud that is thrown upon the bona fides of this transaction arises from the fact that the sale was made

to Henry Plage, the father, who must be held to have known at that time that he was buying in property which would shortly be claimed by other creditors, and that, if his purchase were shown to have been made in order to save the property for the bankrupt, the transfer would be palpably fraudulent, and hence void.

The whole question turns substantially upon the adequacy of the amount paid. It is natural to suppose that under such circumstances the parties would transfer the property for the smallest amount of cash which might pass scrutiny as an adequate consideration. If Henry Plage's other claims had not been paid prior to this time, the same question of adequacy of consideration would have to be disposed of in this suit, for the transfer of the real estate would then be open to attack as a preferential payment to a creditor. But, under all the circumstances, it would appear that, if put up at auction, no bid greater than the \$250 paid would probably be obtained, unless some creditor saw fit to bid the price up against the other joint owners of the premises. The success of such bidding is too doubtful to justify the court in directing that the transfer be set aside in order to have the interest of the bankrupt in the real estate offered for sale again. But the deed of this property to Henry Plage was undoubtedly taken by him in preference to accepting the interest of his son as security for a loan, and also with the idea on his part of protecting the property and avoiding loss from the possibility of a sale. His debt had been paid, and he must have had in mind the likelihood that the payment of the notes would be attacked. If the payment of the notes be considered fraudulent, then the sale of the interest in the real estate was in a sense an additional precaution, or an additional preference, in that it gave Henry Plage some security which he would not have otherwise had, and he acquired this security in return for the small expenditure of \$250.

Under these circumstances, it would seem that the two transactions and the two actions should in a sense be treated as one. In the action to set aside the payment of the notes as preferential, a decree should be granted to the trustee with the costs and disbursements. In the action to set aside the transfer of the real estate, the trustee may also have a decree, to the effect that the transfer was valid only to the extent of being security for a payment of \$250, and setting aside that transfer (except to the extent of that amount) with costs.

In the event, however, that the decree setting aside the \$1,640 payment be satisfied, and if no offer for more than \$250 can be obtained for the interest of the bankrupt Plage in the real estate concerned, then the action to set aside the transfer of his interest in that real estate will be dismissed without costs.

LOVELL v. LATHAM & CO. et al.

(Circuit Court, S. D. Alabama. March 21, 1911.)

No. 279.

1. EQUITY (§ 195*)—CROSS-BILL—SUBJECT-MATTER.

A cross-bill is merely auxiliary to and a part of the original suit, so that its subject-matter must be essentially connected with that of the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446–449; Dec. Dig. § 195.*]

2. BANKRUPTCY (§ 142*)—SUIT BY TRUSTEE—RECOVERY OF PREFERENCE—ADMINISTRATION OF FUND.

Where a suit in equity is instituted by a trustee in bankruptcy to recover property or a fund claimed to have been preferentially transferred to the defendants by the bankrupts in payment of an alleged indebtedness, the fund, if recovered, must be turned over to the bankruptcy court and administered by it as a part of the bankrupts' estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 222; Dec. Dig. § 142.*]

3. BANKRUPTCY (§ 302*)—CROSS-BILL—SUBJECT-MATTER.

Where a suit in equity was instituted by a bankrupts' trustee to avoid an alleged preferential transfer, and to recover a fund to be administered by the bankruptcy court, one claiming a lien on the fund if recovered could not intervene and enforce such lien by cross-bill, under the rule that the subject-matter of a cross-bill must be a defense to the original bill or essentially connected with and necessary to a complete determination of the original suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. § 302.*]

In Equity. Suit by Wm. S. Lovell, as trustee in bankruptcy of Knight, Yancey & Co., against Latham & Co. and others, in which Knauth, Nachod & Kuhne filed a cross-bill. On motion to strike cross-bill. Granted.

Percy, Benners & Burr and Rich & Hamilton, for complainant.
Briesen & Knauth and Stevens & Lyons, for cross-complainants.

TOULMIN, District Judge. A cross-bill is generally considered as a defense to the original bill, or as a proceeding necessary to a complete determination of a matter already in litigation. Story's Equity Pldg. § 399. "A bill of this kind is usually brought, either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties touching the matters of the original bill." Story's Equity Pldg. § 389. New and distinct matters are introduced by the cross-bill in this case which are not embraced in the original. The subject of the original and cross-bill is not the same.

[1] A cross-bill is merely auxiliary to, a dependency upon, and a part of, the original suit. Its subject-matter must be essentially connected with that of the original bill, and not extraneous thereto. Springfield Milling Co. v. Barnard et al., 81 Fed. 261, 26 C. C. A. 389; Bates' Fed. Prac. § 386. The court in that case said:

"The office of a cross-bill is either to warrant the grant of affirmative relief to the defendant in the original suit, to obtain a discovery in aid of the de-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

fense in that suit, to enable the defendant to interpose a more complete defense than that which he could present by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. * * * The issues raised by the cross-bill must be so closely connected with the cause of action in the original suit that the cross-suit is a mere auxiliary or dependency upon the original suit."

As I understand the cross-bill in this case, it seeks an accounting with Knight-Yancey & Co., the bankrupts, and claims that on such sum as may be recovered in this suit the complainants in said cross-bill have a lien, and that the same should be so decreed by this court. In my opinion said cross-bill cannot be considered as a defense to the original bill, or as a proceeding necessary to a complete determination of the matter in litigation in the original bill. It is not auxiliary to or a dependency upon this suit, and not essentially connected with the original bill therein. Springfield Milling Co. v. Barnard et al., 81 Fed. 261, 26 C. C. A. 389; Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co. (C. C.) 53 Fed. 850; Stonemetz Printers' Machinery Co. v. Brown Folding Machine Co. (C. C.) 46 Fed. 851.

[2] This suit is one in which the trustee in bankruptcy, representing all the creditors of the bankrupt's estate, seeks to recover property or a fund which it is claimed was preferentially transferred to the defendants, Latham & Co., by the bankrupts, Knight-Yancey & Co., in payment of an alleged indebtedness to said Latham & Co. The fund, if recovered, is not to be administered in this court, but in the bankrupt court.

[3] This suit is in the name of the trustee in bankruptcy, and he seeks to avoid the alleged preferential transfer, and to recover the said fund to be administered by the bankrupt court. If recovered in this court, it is to be turned over to that court as a part of the bankrupt estate. That court, being then in the actual possession of the fund for administration, will draw to it the right to decide upon conflicting claims thereto. If the alleged preferential transfer is avoided, and the trustee recovers the fund sued for, it then becomes a part of the assets of the bankrupt estate in the possession of and in the course of administration by the bankrupt court. All persons entitled to participate in said assets or claiming a lien thereon may come into that court, and under the jurisdiction acquired by the proceeding in bankruptcy have their rights adjudicated.

The motion to dismiss the said cross-bill is granted; and it is hereby ordered that said cross-bill be, and the same is hereby, stricken out.

UNITED STATES ex rel. RUIZ v. REDFERN, Commissioner of Immigration, et al.

(Circuit Court, E. D. Louisiana. April 22, 1911.)

No. 13,886.

1. ALIENS (§ 53*)—DEPORTATION—COUNTRY.

Under the immigration laws, providing for the deportation of aliens, not entitled to enter the United States, to the country whence they came

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

when they illegally entered the United States, regardless of their nativity, except aliens intending to enter the United States for the convenience of their voyage, the Secretary of Commerce and Labor has no discretion as to the place to which an alien must be deported; and hence a warrant attempting to deport the alien to a country other than that whence he came was illegal and void.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 53.*]

2. HABEAS CORPUS (§ 29*)—DEPORTATION OF ALIEN—IMPROPER DESTINATION—DISCHARGE.

Where an alien, not entitled to enter the United States, was held under an illegal warrant directing his deportation to a country other than that whence he came, he was entitled to release on habeas corpus, under the rule that a prisoner is entitled to his liberty where the sentence is illegal.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 24; Dec. Dig. § 29.*]

Habeas corpus by the United States, on the relation of Alfred Ruiz, against S. E. Redfern, as Commissioner of Immigration, and others, to obtain relator's release from the custody of the defendant under deportation warrant. Writ made absolute.

Jos. A. Morales and Henry J. Rhodes, for relator.

W. J. Waggespack, Asst. U. S. Atty., for defendant.

FOSTER, District Judge. In this case Alfred Ruiz, an alien, prays for a writ of habeas corpus to deliver him from the custody of the Commissioner of Immigration at New Orleans and the keeper of the parish prison, where he is incarcerated. It appears that the relator, a native of Spain, but now a citizen of the republic of Panama, came to the United States from Panama on the steamship Meltonian, and landed at Mobile on the 23d of December, 1909, bringing with him a prostitute, whose fare he paid, and who posed as his wife. He is now held by the Commissioner of Immigration under a warrant ordering his deportation to Spain.

[1] The immigration laws clearly contemplate the deportation of aliens to the country whence they came when they illegally entered the United States, regardless of their nativity. The only exception is when an alien, intending to enter the United States, for the convenience of his voyage lands first in foreign territory contiguous to the United States. I do not find that the Secretary of Commerce and Labor has any discretion whatever in the matter, and any warrant that attempts to exercise such discretion is necessarily illegal and void.

[2] Strictly speaking, the deportation of an alien is a civil proceeding; but it is criminal in its nature, or at least by analogy, and the general rule in habeas corpus is that, where a sentence is illegal, the relator is entitled to his liberty. The exception is that, when the lawful portion of the sentence can be separated from the illegal part, the relator will only be granted relief as to the unlawful detention. But how can a separation be effected in this case. If the relator remains in custody, he will be illegally deported, and it will then be too late to afford him the relief to which he is entitled.

The writ will be made absolute.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

PAINE v. STANDARD PLUNGER ELEVATOR CO.

(Circuit Court, E. D. Pennsylvania. April 1, 1911.)

No. 376.

1. REFERENCE (§ 89*)—REFEREE'S REPORT—FINDINGS OF FACT AND LAW.

Where a case is referred to the referee, merely to summarize conflicting testimony on material points is not a sufficient finding of the ultimate facts, under Acts Pa. 1874 (P. L. 109, 166), requiring a referee to state separately and distinctly the facts found, as distinguished from the evidence concerning such facts, the answers to such points as may be submitted, and his conclusions of law.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 135-140; Dec. Dig. § 89.*]

2. REFERENCE (§ 89*)—FINDINGS OF FACT—GENERAL AND SPECIAL FINDINGS.

Where a referee is not required to make specific findings of fact, general findings that are equivalent to specific statements are sufficient.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 135-140; Dec. Dig. § 89.*]

Suit by Leonard G. Paine against Standard Plunger Elevator Company. On exceptions to the referee's report. Report returned for findings of fact and law.

Henry Spalding and Joseph A. Slattery, for plaintiff.

James E. Hood and John G. Johnson, for defendant.

J. B. McPHERSON, District Judge. I regret very much that this report must be returned for further proceedings. In a case of this magnitude, with a record so voluminous, I feel at liberty to ask for as much help as can be reasonably obtained, and especially for definite and precise findings of fact upon controverted questions. [1] Merely to summarize the conflicting testimony upon an important point does not go far enough. There is, of course, no objection to such a summary, and it may often be very desirable; but in every instance the summary should be accompanied by a distinct finding of the ultimate facts. The Pennsylvania statutes of 1874 (P. L. 109, 166) require the referee to state separately and distinctly the facts found (not merely the evidence concerning such facts), the answers to such points as may be submitted, and his conclusions of law. Several cases on the subject are as follows: Marr v. Marr, 103 Pa. 463; Id., 110 Pa. 60, 20 Atl. 592; Sweigard v. Wilson, 106 Pa. 207; Harris v. Hay, 111 Pa. 562, 4 Atl. 715; Lewars v. Weaver, 121 Pa. 268, 15 Atl. 514; Commonwealth v. Equitable, etc., Assoc., 137 Pa. 412, 18 Atl. 1112; Smelting Co. v. Laverty, 159 Pa. 294, 28 Atl. 207; and Miller, etc., Co. v. Dunlap, 21 Wkly. Notes Cas. (Pa.) 285. [2] If no specific requests for findings of fact are made (and none appears to have been made in this case), general findings that are equivalent to a specific statement are sufficient. Philadelphia Co. v. U. G. I. Co., 180 Pa. 235, 36 Atl. 742. The Pennsylvania equity rules of 1894 (159 Pa. xxv, 28 Atl. vi) are similar in scope, and Fitzsimmons v. Robb, 173 Pa. 645, 34 Atl. 233, and Schmidt v. Baizley, 184 Pa. 527, 39 Atl. 406, may also be cited as describing the kind of findings that should be made. The

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serious difficulty I have found is in attempting to separate the findings of fact from the recital of the testimony and from the discussion concerning its weight and relevancy.

Under the supplement of 1889 (P. L. 80), the court has undoubtedly power to alter a referee's findings; but it should first appear clearly just what these findings are—especially because the referee has heard and seen the witnesses, and therefore his conclusions will naturally be given much weight. He also is entitled, I think, to the help that he may receive from written requests for specific findings. In the present case I shall therefore return his report with the following order:

On or before April 15, 1911, the plaintiff and the defendant are directed to submit to the referee written requests for findings of fact and conclusions of law, and within 15 days thereafter the referee is directed to consider and report thereon, stating separately and distinctly his findings of fact and conclusions of law, adding such discussion and argument (if any) as he may consider advisable. On or before May 10th the parties may file exceptions to this supplemental report, which shall be disposed of by the referee in accordance with the provisions of the act of 1889. The case will then be assigned for argument by the Circuit Court upon the application of either party.

In re SHAPIRO.

(Circuit Court, D. Oregon. April 17, 1911.)

ALIENS (§ 63*)—NATURALIZATION—DECLARATION OF INTENTION—MINORS.

Rev. St. § 2165 (U. S. Comp. St. 1901, p. 1329), prior to the adoption of Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477), provided that any alien might be admitted to become a citizen by first declaring on oath before certain courts, at least two years prior to his admission, that it was his bona fide intention to become a citizen and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. Held that, under such section, a minor who had reached years of discretion was authorized to make a declaration of intention.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 126; Dec. Dig. § 63.*]

Application of George Shapiro for naturalization. Granted.

David N. Mossessohn, for applicant.

Walter H. Evans, Asst. U. S. Atty.

BEAN, District Judge. George Shapiro, an alien, has applied to be admitted to citizenship. He was born November 4, 1885, emigrated to the United States in December, 1904, and made his declaration of intention on January 16, 1905. At that time he was but 19 years, 2 months, and 12 days old, and the point is made that the declaration was not authorized by the naturalization law then in force, and therefore Shapiro may not now be lawfully admitted to citizenship.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The declaration of intention was made under section 2165, Rev. St. (U. S. Comp. St. 1901, p. 1329) the law in force prior to Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477). There is nothing in it to indicate that the declarant must be of any particular age at the time of making his declaration, and the question whether a minor could lawfully make such declaration has been a frequent subject of discussion in the courts. It was assumed, rather than declared, by this court, soon after the act of 1906 became effective, that he could not; but all subsequent decisions of which I am aware, except that of Judge Landis, in *Re Spitzer* (C. C.) 160 Fed. 137, are that a minor who has reached years of discretion could make the necessary declaration required by section 2165, and that such declaration is a sufficient basis for a final adjudication under the provisions of the act of 1906. It was so held by the Court of Appeals of the Second Circuit in *U. S. v. George*, 164 Fed. 45, 90 C. C. A. 463; by Judge Van Fleet, in *Re Polsson* (C. C.) 159 Fed. 283; by Judge Sanborn, in *Re Symanowsski* (C. C.) 168 Fed. 978; and by Judge Chatfield, in *Re Gross* (D. C.) 160 Fed. 739.

The applicant's declaration of intention is therefore sufficient, and the evidence as to residence, character, and fitness being in all respects free from exception, and sufficient to satisfy the law as to his general qualifications, his petition should be granted; and it is so ordered.

In re VAN WERT MACH. CO.

(District Court, D. Massachusetts. March 18, 1910.)

No. 13,272.

BANKRUPTCY (§ 348*)—WAGES—APPLICATION OF PAYMENTS—PREFERENCE.

Claimant was employed by the bankrupt as a stenographer at weekly wages from January, 1907, to the date of bankruptcy, January 11, 1908, and earned during the period \$983, \$300 of which was earned within three months before the filing of the petition. She had received payments of various sums, beginning May 4, 1907, on different dates in each month thereafter, until January 11, 1908, amounting to \$638.45. No directions were given by the bankrupt as to the application of such payments. Held, that claimant was not required to credit payments within the last three months to reduce wages earned within that period, but was entitled to credit all the payments to the earlier items of the account, leaving \$300 earned within the last three months, for which she was entitled to a preference.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. § 536; *Dec. Dig.* § 348.*]

In the matter of bankruptcy proceedings of the Van Wert Machine Company. On petition for review of orders by a referee allowing the claim of Cora E. Wilson Fitz Gerald for wages as a claim having priority to the extent of \$300, and a similar claim of Ernest Fitz Gerald claiming priority to the extent of \$260. Orders affirmed.

A. C. Webber and Abram Hyman, for petitioning creditors.
Russell, Moore & Russell, for objecting creditor.

*For other cases see same topic & § NUMBER in *Dec. & Am. Digs.* 1907 to date, & Rep'r Indexes

DODGE, District Judge. It is not disputed that Cora E. Fitz Gerald was in the bankrupt's employ as a stenographer, at weekly wages, from January, 1907, to the date of the bankruptcy, January 11, 1908, or that the total of wages earned during that period was \$983, \$300 of which was earned within three months before the filing of the petition. Nor is it disputed that she received in payment from time to time, on account of wages due her, various sums ranging from 75 cents to \$53.70; the first of these payments being May 4, 1907, and the others on different dates in each month thereafter, the last payment being on January 11, 1908. The payments amounted in all to \$638.45. The referee holds that they have all been rightly applied upon the earlier items of the account, which will leave the \$300 earned within the last three months wholly unpaid. The objecting creditor contends that the payments within three months should go to reduce the wages earned within three months. I am unable to doubt that the referee's conclusion is right. The creditor has the right to claim that, as each payment was received, it extinguished, so far as it went, the indebtedness longest due. No directions regarding application of the payments were given by the debtor, so far as appears. It is not contended that the application which has been made results in a preference recoverable by the trustee, as in *Re King Co.* (D. C.) 113 Fed. 110.

The question arising upon the claim of Ernest Fitz Gerald is precisely similar. He was employed as a salesman at \$20 a week, earned \$500 in all, \$260 of which came within the last three months, and he was paid on account, and at various times within the last three months, \$110. I think his claim is entitled to priority to the amount of \$260.

The orders of the referee are, therefore, approved and affirmed.

JENKINS S. S. CO. v. PRESTON.

(Circuit Court of Appeals, Sixth Circuit. April 19, 1911.)

No. 2,093.

1. CORPORATIONS (§ 407*)—REPRESENTATION BY OFFICERS—CONTRACTS MADE BY GENERAL MANAGER.

The general manager of a steamship company, who was also secretary and treasurer and a large stockholder, and had full personal charge of the business which the company was organized to transact, was a general officer as to all such matters with *prima facie* authority to do any act which the directors could authorize or ratify, and a contract made by him for the employment of a master for two seasons, under which the master served during one season with the knowledge of the directors and without objection, is binding on the company, and cannot be repudiated by it thereafter as made without authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1615–1619; Dec. Dig. § 407.*]

2. CUSTOMS AND USAGES (§ 14*)—APPLICATION AND OPERATION—EXCLUSION BY TERMS OF CONTRACT.

Evidence of a custom is admissible only where it adds to the contract an incident which, by virtue of such custom, is tacitly contained therein, and not when it is inconsistent with the contract and its effect contradictory to the provisions thereof.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. § 29; Dec. Dig. § 14.*]

3. CONTRACTS (§ 95*)—VALIDITY OF ASSENT—DURESS.

A written contract by which the manager of respondent steamship company employed libelant as master for two years, signed on board the vessel where libelant had gone to take charge, but pursuant to a prior agreement, cannot be avoided for duress on the manager's testimony that the vessel was surrounded by strikers in tugs who had imperiled his life, and that he signed in order to get the vessel in commission, upon libelant's refusal to accept the employment without such contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 431–440; Dec. Dig. § 95.*]

4. SHIPPING (§ 69*)—MASTER—ACTIONS FOR WAGES—DEFENSES—DISCHARGE FOR INCOMPETENCY.

Allegations of incompetency, inefficiency, and disobedience of orders against the master of a vessel considered, and *held* not sustained by sufficient evidence to justify the master's discharge before the expiration of his contract term or to defeat his recovery of wages for the remainder of the term.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 293–307; Dec. Dig. § 69.*]

5. ADMIRALTY (§ 118*)—MATTERS REVIEWABLE ON APPEAL—DISCRETION OF TRIAL COURT.

In an action by the master of a vessel who had been discharged before the expiration of his contract term of service to recover damages for breach of the contract, it was within the discretion of the court to determine whether a reference was necessary to determine the damages, and his action in refusing such reference is not reviewable on appeal.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 758–775; Dec. Dig. § 118.*]

Appeal from the District Court of the United States for the Northern District of Ohio.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action in admiralty by John R. Preston against the Jenkins Steamship Company. Decree for libelant, and respondent appeals. Affirmed.

Lawrence, Russell & Eichelberger, for appellant.

Goulder, Day, White & Garry and Holding, Marten, Duncan & Leckie, for appellee.

Before SEVERENS and KNAPPEN, Circuit Judges, and SATER, District Judge.

SATER, District Judge. The appellant, whose corporate name prior to 1906 was the Mack Steamship Company, seeks the reversal of the decree awarding the appellee his salary, with interest, as master of one of its steamships for the season of 1905.

In the spring of 1904 the American Association of Masters and Pilots on the Great Lakes struck to enforce certain demands made on the Lake Carriers' Association, of which the Mack Steamship Company was a member. That company and also the Pittsburgh Steamship Company were each seeking the services of appellee. As the result of a conference held at Cleveland, Ohio, by a representative of the last-named company, a representative of such association, and appellee, and of a telephone communication carried on in his presence by such representatives with the manager of the Mack Steamship Company, the appellee went to Buffalo, N. Y., to accept from that company a two years' employment as master of the William H. Mack, a prior engagement for a single season's service as such master having recently been canceled. On boarding the vessel in the Buffalo harbor, he asked for a written contract evidencing his employment for two seasons, whereupon the following instrument was executed and delivered to him by such manager:

"Buffalo, May 27, 1904.

"It is hereby agreed between J. R. Preston and the Mack Steamship Company that J. R. Preston is engaged by said company at a salary of \$1,980.00 a season for two seasons.

"[Signed] Chas. O. Jenkins, Mgr."

The appellee immediately took command of the vessel, and on the same evening set sail. At the close of the season, about December 29th, he laid the vessel up in the port of Milwaukee, and on reporting at Cleveland was paid what was due him. His uncontradicted evidence is that he was then told by Jenkins that, although he had in the early part of the season caused some trouble in not submitting reports, he had overcome that, and should take charge of the vessel the following year. On January 16, 1905, in anticipation of his own re-election as manager at the coming annual meeting of the board of directors, Jenkins wrote to appellee expressing his great respect for him "as a gentleman of splendid principles," but notifying him that he need not expect reappointment as master. The reasons assigned for this action were the excessive size of appellee's bills for tugs, provisions, and wages, the stranding of his vessel three times, and his failure to report dock situations, although in this last respect he stated that, in consequence of vigorous instructions, there had been considerable improvement as the season advanced. The appellee conferred with Jenkins at

Cleveland about January 28th, and was then discharged. At that time the steamship company had five masters and but three boats. As most of the masters for the season of 1905 had been then engaged, the appellee was unable to obtain a position as master, pilot, or mate, or other profitable employment, and earned but a trifling sum within that year. He therefore sued for his salary.

The defenses are want of authority on the part of Jenkins, who was himself employed as manager from year to year only, to engage the appellee for more than a single season, the existence of a custom, well known to the appellee, to engage masters for a single season only, absence of a ratification of the contract by the company's board of directors, duress arising out of the serious strike situation in extorting a contract for two seasons, incompetency, inefficiency, and continual disobedience of orders, on account of which the company was caused great loss and expense.

[1] The directors of the steamship company had the power to authorize or ratify the employment of the appellee for two seasons. Jenkins was not only its general manager, but was also its secretary and treasurer, one of its large stockholders, and in 1904 a member of its board of directors. He testified that during that and the following season in everything that pertained to the boats owned by the company and to the company itself he was the company. He and another stockholder, for whom he acted, owned a majority of the corporate stock, and that person and the company's counsel, both of whom were directors, knew, as did Jenkins, that the appellee was in the company's service as a master. So exclusive was the manager's authority that during the season of 1904, notwithstanding the existence of a troublesome strike, no meeting of the board of directors, in so far as the record discloses, was held. He had full personal charge of the business which the company was organized to transact, with power to enter into and terminate contracts in respect thereto, and was a general officer of the corporation as to all such matters. It follows, therefore, that as such representative of the corporation he had power *prima facie* to do any act which the directors of the corporation could authorize or ratify, and consequently to employ the appellee. *Sun Printing & Pub. Co. v. Moore*, 183 U. S. 642, 651, 22 Sup. Ct. 240, 46 L. Ed. 366; *Oaks v. Cattaraugus Water Co.*, 143 N. Y. 430, 436, 38 N. E. 461, 26 L. R. A. 544; *Great Lakes Towing Co. v. Mill Transp. Co.*, 155 Fed. 11, 21, 83 C. C. A. 607, 22 L. R. A. (N. S.) 769. The company did not disavow his authority, nor did its manager or any other of its representatives, at any time prior to the coming in of the answer, question or repudiate the contract as to any of its provisions, but, on the contrary, accepted the appellee's services and their fruits. It would be inequitable to allow the principal to stand by and make no inquiries and thus avail itself of a contract made in its behalf, and after part performance repudiate the contract as one made without authority. *Story on Agency* (4th Ed.) § 256; *The Mary Elizabeth* (C. C.) 24 Fed. 397; *Martin v. Webb*, 110 U. S. 7, 15, 3 Sup. Ct. 428, 28 L. Ed. 49. The manager, who was himself a lawyer and who must be presumed to have known the extent of his powers and the effect of their exercise, acted within the scope of his authority in employing the appellee. It

is also reasonable to assume, on the facts shown, that the directors knew that the contract of employment was for two seasons.

[2] Regarding the existence of a custom to engage masters for a single season only, it appears that at the time the contract was made there was a desire on the part of the company to break the strike. The manager is authority for the statement that masters were scarce, and that he was willing to take them on almost any terms. Some of the masters, on account of the unusual conditions induced by the strike, insisted on employment for more than a single season, through fear of the loss of their positions should the masters and pilots win in their strike, and were in consequence given contracts by their employers for a longer period. But, aside from this fact, this defense is without merit. Evidence to establish a custom is admissible only where it adds to the contract an incident which, by virtue of such custom, is tacitly contained therein, and not when it is inconsistent with the contract and its effect contradictory to the provisions thereof. The contract in question is not ambiguous or uncertain, and evidence of a custom to destroy, contradict, or modify it is irrelevant and unavailing. *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579; *National Bank v. Burkhardt*, 100 U. S. 686, 25 L. Ed. 766; *Quarry Co. v. Clements*, 38 Ohio St. 587; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Gibney v. Curtis*, 61 Md. 201; *Page on Contracts*, § 604.

[3] The defense of duress in obtaining the contract rests wholly on the manager's testimony. He first denied, but subsequently admitted, having conversed with the representatives of the Lake Carriers' Association and Pittsburgh Steamship Company over the telephone prior to appellee's going to Buffalo to assume command of the vessel. He testified that the vessel, at the time the written instrument was prepared and delivered, was surrounded by strikers in tugs; that his life shortly before had been imperiled by them; and that, on appellee's refusal to take the boat out unless given a two-season contract, he prepared and delivered the instrument under protest. The appellee's version is that the instrument was prepared and delivered to him promptly, freely, and for the asking. The defense fails not only for want of preponderance of the evidence as to what occurred at that time, but because the manager's evidence, if accepted as true, does not make out a case of duress. The situation was not so critical as to interfere with appellee's reaching and boarding the vessel, although his attitude was that of a strike breaker, or with Jenkins' returning to the shore in safety after the appellee took command. The appellee was not responsible for the condition resulting from the strike, nor did he do any unlawful act or compel the manager to do what he acknowledges he did do, which was to yield to a demand which might properly be made and to which he had apparently previously assented, in order to get his vessel in commission at a time when, by so doing, he would contribute to the defeat of the strikers and advance the interests of his company. His declaration at the December settlement that the appellee should have charge of the boat for the coming year, his assignment of other reasons for the appellee's discharge, and his failure to allude to the circumstances under which the contract was executed, until the defense came in, are suggestive that the charge of duress is

an afterthought. In view of what constitutes duress which will avoid a contract, as defined in well-considered cases, this defense falls short. U. S. v. Huckabee, 16 Wall. 414, 21 L. Ed. 457; French v. Shoemaker, 14 Wall. 314, 20 L. Ed. 852; Radich v. Hutchins, 95 U. S. 210, 213, 24 L. Ed. 409; Cleaveland v. Richardson, 132 U. S. 318, 333, 10 Sup. Ct. 100, 33 L. Ed. 384; Mays v. Cincinnati, 1 Ohio St. 268; Domenico v. Alaska Packers' Ass'n (D. C.) 112 Fed. 554.

[4] The defenses of incompetency, inefficiency, and disobedience of orders may be considered together. They go to the size of his bills for tugs, provisions, and wages, the strandings and strikings of his vessel, collision of his vessel with two others, failure to report his whereabouts and dock situations, imperfect reports and records, lack of speed in moving his vessel, and the approval of a bill for goods which had not been delivered.

His expenditures for towage and provisions were greater than those of the company's other vessel, the Squire, which was larger than the William H. Mack. The tug bills were, of course, increased somewhat by strandings. However, the price paid for towage service and for a considerable part of the provisions used was that fixed by contracts made by the manager. As the appellee's vessel carried several cargoes of wheat, while the Squire carried none, his relative cost of towage was necessarily greater on account of the required movement of his vessel to a series of elevators in unloading a single cargo. There was also some expense incurred for tugs to break the ice. When in ports at which the company had no contracts for provisions, he was required to purchase on such terms as he could make. The wages paid were less than those paid for the sailing of the Squire. As reflecting on the cost of towage, provisions, and wages, it is further noted that the Squire was in commission from only about June 20th until December 10th or 12th. The stranding and striking of the vessel occurred where such accidents are most usual, in shallow water where silt and sand accumulate through deposits from small streams or shifting currents, and through the lowering of the waters of the lakes by winds. In some instances not only he, but the owners of the tugs who were to tow him into the harbors in question, believed he could safely enter. It is reasonably clear that he did not report all the occasions on which his vessel grounded or struck, but there is no satisfactory proof that his vessel was injured by any such mishaps, and it is conceded that he made protest in every known instance in which a loss was sustained which constituted the basis of a claim; but neither his failure so to report, nor a mere error of seamanship on his part, is sufficient to work a forfeiture of his wages. The Camilla, Swabay's Admiralty, Rep. 312. Two collisions, causing some injury to his boat, occurred by other vessels striking his while it was moored to the dock, but it is not shown that he was at fault or that the injury was of consequence. His reports as regards his whereabouts and dock situations were not made as frequently as ordered, and as regards other matters were somewhat crude and imperfect. There does not appear, however, to have been any substantial loss of time due to his failure to give greater information, or any loss of cargoes or any injury resulting from imperfect accounts or from his approval of a bill for goods which were not deliv-

ered. The cause of the needed repairs of the vessel is based on a process of reasoning rather than affirmative proof, the force of which is impaired by the fact that at the close of the season at Milwaukee, Jenkins, in connection with the appellee, inspected the vessel, except as to its bottom, and then entered no complaint as to its management or condition.

The appellee was not a stranger to Jenkins. He had been a licensed master for 28 years. He had at the time of his employment served in that capacity for eight seasons, and as mate for about ten years. The residue of his time he had worked as a ship carpenter. He had applied to Jenkins for employment for several seasons and produced references as to his skill as a navigator. Two days prior to the execution of the contract Jenkins had solicited his services. He gave the appellee no instructions before the vessel sailed as to the frequency of reporting his whereabouts and doings or of the course to be pursued in transacting the company's business. Instructions in these respects were imparted later by telegrams and letters, and were not always understood. The appellee was not a master of the highest skill, but he was a conscientious and reasonably efficient servant, and the steamship company had the opportunity of knowing and must have known of his standing as such at the time of his employment. Clear and satisfactory evidence is necessary to sustain the charge of incompetency; the onus probandi being on the shipowner. Lombard S. S. Co. v. Anderson, 134 Fed. 568, 67 C. C. A. 432. The evidence is not of such a character as to justify his discharge.

[5] Complaint is made that a reference to ascertain the damages suffered by appellee was denied. The record discloses an offer on his part to perform, reasonable diligence and some expense incurred to obtain other employment, a failure to procure it, the loss of his cost of living for the season, and earnings of an inconsequential amount. It was for the trial judge to say whether a reference should be made to ascertain and report the amount of recovery, or whether he would determine it himself. The Lopez (D. C.) 43 Fed. 95. The rule is well settled that, where the action of an inferior tribunal is discretionary, its decision is final. Earnshaw v. U. S., 146 U. S. 60, 68, 13 Sup. Ct. 14, 36 L. Ed. 887; Cape Fear Towing & Transp. Co. v. Pearsall, 90 Fed. 435, 437, 33 C. C. A. 161; Loveland's App. Proc. § 51.

The trial court committed no error, and the decree is affirmed.

DYAR et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1911.)

No. 2,100.

1. INDICTMENT AND INFORMATION (§ 93*)—SUFFICIENCY.

An indictment will not be held insufficient on an objection first made after going to trial, on the ground that the facts were stated more by way of recital than directly; all the elements of the offense being set out.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 266; Dec. Dig. § 93.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. INDICTMENT AND INFORMATION (§ 196*)—USING MAILS TO DEFRAUD—INDICTMENT—SUFFICIENCY.

As against objection to testimony or motion in arrest, an indictment for using the mails to defraud sufficiently charged that a letter was intended to be sent or delivered by the post office department, where it stated that accused deposited and caused to be deposited in a particular post office a certain envelope, duly stamped and sealed, and addressed to certain persons.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. § 196.*]

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

3. CRIMINAL LAW (§ 369*)—EVIDENCE OF OTHER OFFENSES—ADMISSIBILITY.

In a trial for using the mails to defraud, it was error to admit evidence of one of the defendant's conviction of other offenses, where his character was not put in issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

4. FINES (§ 17½*)—ABATEMENT—DEATH OF ACCUSED.

A fine for an offense abated with accused's death, especially where the judgment was reversed for error, entitling his estate to a fund deposited to secure its payment.

[Ed. Note.—For other cases, see Fines, Dec. Dig. § 17½.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Alexander S. Dyar and another were convicted of fraud, and they bring error. Reversed and remanded for new trial.

Benj. Rice Forman, Chandler C. Luzenberg, and W. Knox Haynes, for plaintiffs in error.

W. J. Waggespack and Charlton R. Beattie, for the United States.

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. Plaintiffs in error, Alexander S. Dyar and W. H. Hale, were convicted in the Circuit Court of the United States for the Eastern District of Louisiana under an indictment for violation of section 5480, Revised Statutes of the United States, as amended by the act of March 2, 1889 (25 Stat. 273, c. 393 [U. S. Comp. St. 1901, p. 3696]), although the second count in the indictment charged a conspiracy between Dyar and Hale to commit the offense named in section 5480.

The first indictment, No. 2,576, charged that A. S. Dyar and W. H. Hale did knowingly, willfully, unlawfully, and feloniously devise a scheme and artifice to defraud; that is to say, by divers false pretenses and representations to obtain and acquire for themselves of and from one Simon Vercher, of Bayou Current, state of Louisiana, and from each of various other persons to the grand jurors unknown, a large sum of money, to wit, \$100, and to convert and appropriate said sums of money to the use and benefit of themselves, without giving or rendering an equivalent therefor, the said scheme

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and artifice to defraud to be effected by inducing and enticing said Simon Vercher and the various other persons to the grand jurors unknown to open communication by means of the post office establishment of the United States with them, the said Dyar and Hale, and by opening communication by means of the post office establishment of the United States with the said Simon Vercher and the said various other persons to the grand jurors unknown which said use and mis-use of the post office establishment of the United States was then and there part of the said scheme and artifice to defraud by falsely pretending in and through certain advertisements, letters, and circulars sent and to be sent through and by the mails of the United States that they, the said Dyar and Hale, were physicians of eminence, and skilled specialists in the treatment of various diseases, and were able to effect a complete cure of certain diseases commonly known and supposed to be incurable, and that the said Hale was one of the greatest living specialists in nervous, chronic, and special diseases; that he was of London, England, and a noted expert in genito-urinary diseases, and would only consent to grant a consultation to the said Simon Vercher, and the various other persons to the grand jurors unknown, by reason of his personal friendship for the said Dyar, and that a visit to said Dyar and Hale and a consultation with the said Hale would be of great benefit to the said Simon Vercher, and the various other persons to the grand jurors unknown, and that the said Hale would give the said Simon Vercher and others a consultation and all necessary advice, free of charge, whereas, in truth and in fact, the said Dyar and Hale well knew they were neither of them physicians of eminence nor skilled specialists in the treatment of various diseases; they were not able to effect a complete cure of certain diseases commonly known and supposed to be incurable, and that said Hale was not of London, England, and on a visit to the United States; he was not a noted expert in genito-urinary diseases; was not regarded as one of the greatest living specialists in nervous, chronic, and special diseases, and had not consented to grant a consultation to the said Simon Vercher and the others because of his personal friendship for the said Dyar, and did not intend to, and would not, give a consultation and all necessary advice to the said Simon Vercher and others free of charge, but, on the contrary, by means of said false and fraudulent pretenses and representations the said Dyar and Hale did knowingly, willfully, unlawfully, and feloniously intend to obtain the aforesaid sums of money, to wit, \$100 each from the said Simon Vercher and the other persons to the grand jurors unknown, and to knowingly, willfully, unlawfully, and feloniously convert the same to their own use and benefit.

It is further charged that the said Dyar and Hale did deposit in the post office establishment of the United States, in the post office at New Orleans, state of Louisiana, a certain envelope, duly stamped and sealed, and addressed to Simon Vercher, Atchafalaya, La., which said envelope was intended to be, and was, delivered to the said Simon Vercher, at Atchafalaya, state of Louisiana, and contained a certain letter which was set out as follows:

"[Photograph of Dr. A. S. Dyar, marked 'Dr. A. S. Dyar, Principal of the Staff of Physicians and Surgeons of A. S. Dyar.]

"Dr. A. S. Dyar.

"Physician, Surgeon and Specialist.

"Office and Laboratory, No. 619 Canal Street.

"(Corner Exchange Place.)

"Office Hours: Daily and Sunday from 9 A. M. to 8 P. M.

"Private Office: No. 110 Exchange Place.

"New Orleans, February 27th, 1908.

"Mr. Simon Vircher, Atchafalaya, La.—Dear Sir: I hope that you will pardon this letter, but when you have read it I know you will. It is natural that I feel a deep interest in those consulting me regarding their physical condition and especially in those I have treated and also in those I am still treating. I feel that you know that I have been perfectly sincere and honest in everything I have done and said, that I have always studied your case carefully, and earnestly endeavored to deserve your confidence and friendship—in other words I have tried to act out the Golden Rule.

"The fear that I have not cured you has been causing me some worry. Meeting Professor W. H. Hale, M. D., of London, England, the noted expert in genito-urinary diseases, who is just now on a visit to the United States, and with whom some years ago I had a very close acquaintance, I took the liberty of consulting this noted gentleman about your case. He gave me much light and assured me that there was a safe and permanent cure for your trouble.

"So delighted was I, that I have, after much persuasion, secured Professor Hale's promise to spend next Thursday, Friday, Saturday and Sunday, March 5th, 6th, 7th and 8th, with me, on which occasion he will meet you, give you a consultation and whatever advice is necessary, for which there will be no charge whatever to you.

"When you stop to think that, as a rule, Professor Hale charges from \$100 to \$1000 for consultation alone, you can possibly understand what it means to you to get the benefit of his valuable services without any charge whatever, and because of his personal friendship for me he has consented to see a limited number of my patients, of whom you are one.

"Professor Hale is regarded as one of the greatest living specialists in nervous, chronic and special diseases. I therefore ask you to call at my office on either of the days mentioned: namely, Thursday, Friday, Saturday or Sunday, March 5th, 6th, 7th and 8th, at any hour that suits your convenience between 9 a. m. and 8 p. m., as the doctor will be with me each day during those hours.

"I can hardly express to you the pleasure and satisfaction I experience in having Professor Hale visit me, and I hope that you will avail yourself of my efforts in your behalf.

"Yours in the Cause of Health,

A. D. Dyar, M. D."

Later, on the 25th day of May, 1910, another indictment was obtained against Dyar and Hale, the first count in which set out that Dyar and Hale devised a scheme to defraud one Joseph C. Burke and various other persons to the grand jurors unknown, and then set out at some length what substantially was a scheme to write to Burke and others that Dyar regretted that he had been unable to effect a cure in their cases before, but that he had interested Professor W. H. Hale, a noted specialist in nervous, chronic, and special diseases, of London, England, and that Hale was a noted expert in genito-urinary diseases, and was just then on a visit to the United States, and him Dyar had consulted about the cases of Burke and others to the grand jurors unknown, and after much persuasion had induced

Hale to give a consultation, free of charge, to Burke and the other persons, and Hale had consented to see a limited number of his, Dyar's patients, that Hale usually charged for such services from \$100 to \$1,000, and that the said Dyar and Hale did unlawfully and feloniously intend to obtain from the said Burke and various other persons to the grand jurors unknown the sum of \$300 each, and to knowingly, willfully, unlawfully, and feloniously convert the same to their own use, without then and there intending to render therefor either to the said Burke or any of the various other persons to the grand jurors unknown advice, service, or other consideration of the kind, character, quality, and value that the false and fraudulent pretenses, representations, and inducements were calculated and intended by Dyar and Hale to lead the said Burke and others to believe that they would receive; that is the services, and the cure resulting therefrom, of truly eminent physicians and specialists.

Copy of letter written by Dyar to Burke is set out in the indictment. It is then charged that with a view to executing and in the execution of the scheme and artifice to defraud, through and by means of the post office establishment of the United States, Dyar and Hale did deposit and cause to be deposited in the post office of the United States at the city of New Orleans, state of Louisiana, a certain envelope, duly stamped and sealed, and addressed to Joseph C. Burke, and each of the various other persons to the grand jurors unknown, and containing the letter which is set out in the indictment.

The second count charges conspiracy, under section 5440, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3676), to commit the offense named in section 5480, and, after the charge of unlawful conspiracy, confederation, and agreement, sets out substantially what is set out in the first count in the indictment. The case made by these indictments coming on for trial, the cases were consolidated and were afterwards tried together; the result being that the verdict of guilty was rendered against both defendants. A number of exceptions were taken in the court below, which are now presented by the record here.

[1] The first exception is to the sufficiency of the indictments. There was no demurrer to either of the indictments, and they were only attacked by objections to the admission of testimony during the trial and subsequently by a motion in arrest of judgment. The objection to the indictment was not, and could not very well be, placed upon the ground that the indictment failed in its entirety to set out an offense against the defendants under section 5480 and a conspiracy under section 5440 to commit the offense under the former section. The objections made during the trial to the introduction of evidence upon the ground of the insufficiency of the indictments, while they state in general terms that the indictments failed to set out an offense under the statute, we judge the real objection to be more upon the ground that the facts necessary to constitute the offense were stated more by way of recital than a direct charge in the charging part of the indictment. Whatever might have been the merit of this exception to the sufficiency of the indictment, if it had been made in proper time, by demurrer or motion to quash, we think it

came too late after defendants had pleaded not guilty and gone to trial, or, after trial, by motion in arrest of judgment. The only just criticism of these indictments was merely in matter of form, because it is clear that all the elements of the offenses were set out considering the indictments as a whole. That this objection came too late is settled, we think, by the decision of the Supreme Court in *Dunbar v. United States*, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. In one of the headnotes of that case it is said:

"A defendant who waits till after verdict before making objection to the sufficiency of the indictment waives all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is inartificially drawn."

In the body of the opinion, by Mr. Justice Brewer, it is said:

"Further, no objection was made to the sufficiency of the indictments by demurrer, motion to quash, or in any other manner until after the verdict. While it may be true that a defendant by waiting until that time does not waive the objection that some substantial element of the crime is omitted, yet he does waive all objections which run to the mere form in which the various elements of the crime are stated, or to the fact that the indictment is artificially drawn. If, for instance, the description of the property does not so clearly identify it as to enable him to prepare his defense, he should raise the question by some preliminary motion, or perhaps by a demand for a bill of particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise property in respect to which he is charged to have violated the law. In this connection, also, reference may be made to section 1025, Revised Statutes [U. S. Comp. St. 1901, p. 720], which provides that 'no indictment * * * shall be deemed insufficient * * * by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' This, of course, is not to be construed as permitting the omission of any matter of substance (*United States v. Carl*, 105 U. S. 611 [26 L. Ed. 1135]), but is applicable where the only defect complained of is that some element of the offense is stated loosely and without technical accuracy."

While in the above case a verdict had been rendered and objection was made by motion in arrest, we think the rule applies where there is no demurrer or motion to quash and the sufficiency of the indictment is questioned by objections to the introduction of testimony on the trial.

In *Nurnberger v. United States*, 156 Fed. 721, 725, 84 C. C. A. 377, 381, decided by the Circuit Court of Appeals for the Eighth Circuit, it is said in the opinion:

"The defendant did not, either by motion to quash or demurrer, invite the court's attention to any defect in the indictment; but on the trial objected to the introduction of any evidence by the Government because of the claimed defects. This practice is not recognized in criminal procedure. *United States v. Harmon* (D. C.) 45 Fed. 414."

If the indictments wholly failed to state an offense or a substantial element of the crime charged, the rule would be different. *Dunbar v. United States*, *supra*.

[2] Another objection to the indictment is that it failed to charge in sufficient terms that the letter was intended "to be sent or delivered by the Post Office Department." The language of the indictment on this subject shown in the synopsis of the indictments as stated above is:

"The said A. S. Dyar and the said W. H. Hale did knowingly, willfully, unlawfully, and feloniously and with a view of executing and in the execu-

tion of said scheme and artifice to defraud through and by means of the post office establishment of the United States deposit and cause to be deposited in the post office of the United States, at the city of New Orleans, state of Louisiana, a certain envelope, duly stamped and sealed, and addressed to each of the various other persons to the grand jurors unknown, in the words and figures identical, with the exception of the addresses, with the words and figures of the letter just recited in full, and addressed and mailed to the said Joseph C. Burke."

We think this charge in the indictment sufficient as against exception to the same made by objection to testimony or by motion in arrest. It clearly put the defendant on notice as to the charge that as a part of the offense he mailed a letter to Vercher and Burke and others unknown to the grand jurors, necessarily intending to say thereby that the same was to be delivered by mail.

[3] The next and the most important exception taken by the defendants was to the action of the court on the trial in admitting evidence of the conviction of Hale of certain offenses before the communications and transactions referred to in the indictment in this case. The government was allowed to prove, over objection, that the defendant W. H. Hale had been convicted in the United States District Court in Colorado and served a sentence of 18 months in the Illinois Penitentiary at Joliet, and the government was also allowed to put in evidence the entire record of conviction. The government was further allowed to prove that Hale was a prisoner, serving a term in the New York County Penitentiary, and was also allowed to place in evidence a certified copy of the indictment and minute of conviction of the Court of General Sessions of the Peace in the case of the People of the State of New York v. William H. Hale. The government was also allowed to prove by one E. L. Kincaid that he found Hale in New York going under the name of Dr. B. L. Kirk, and that he told Hale that he had seen records from the police headquarters where Hale had been in jail in Liverpool, England, and, further, that he had police records showing that Hale had been in the penitentiary at Joliet, Ill., and in the penitentiary in New York and in jail in Liverpool, England; all of this over objections, and all of which the defendant moved the court to exclude, which motion was denied. As the defense had not put Hale's character in issue, we think that this was manifest error, both against Dyar and Hale. The evidence was admitted by the court, as we understand from the record, for the purpose of showing the intent with which the letters named in the indictment were sent out. The authorities upon this question are numerous, and all, we think, which bear directly upon the question, to the same effect. In Wigmore on Evidence, § 192, it is said:

"This principle has long been accepted in our law. That 'the doing of one act is in itself no evidence that the same or a like act was again done by the same person' has been so often judicially repeated that it is a commonplace."

One of the leading cases on the subject of the admission of such testimony is *State v. La. Page*, 57 N. H. 245, 24 Am. Rep. 69. In that case the controlling legal propositions are stated in the opinion of Cushing, C. J., on page 289 of 57 N. H., as follows:

"(1) It is not permitted to the prosecution to attack the character of the prisoner, unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit a crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing on the issue on trial other than such as is expressed in the foregoing three propositions."

In the same case, on page 290 of 57 N. H., there is a quotation from Wharton's American Criminal Law, as follows:

"It is here, however, that the fundamental distinction begins, for, while particular acts may be proved to show malice or scienter, it is inadmissible to prove either in this or any other way that the defendant had a tendency to the crime charged. Thus in England it has been held that upon the trial of a person charged with an unnatural crime it was not permitted to prove that the defendant had admitted that he had a tendency to such practices."

And again, on page 291 of 57 N. H., the court quotes with approval from Lord Campbell, in *Regina v. Oddy*, 2 Den. Cr. C. 264, as follows:

"I am of the opinion that the evidence objected to was as admissible under the first two counts as it was under the third, for it was evidence which went to show that the prisoner was a very bad man and a likely person to commit such offenses as those charged in the indictment. But the law of England does not allow one crime to be proved in order to raise a probability that another crime has been committed by the perpetrator of the first. Evidence which was received in the case does not tend to show that the prisoner knew that these particular goods were stolen at the time he received them. The rule which has prevailed in the case of indictments for uttering forged bank notes of allowing evidence to be given of the uttering of other forged notes to different persons has gone great lengths, and I should be unwilling to see that rule applied generally in the administration of the criminal law. We are all of the opinion that the evidence admitted in this case with regard to the scienter was improperly admitted, as it afforded no ground for any legitimate inference in respect of it. The conviction therefore must be quashed."

In *Kansas v. Adams*, 20 Kan. 311, in the opinion of Mr. Justice Brewer, it is said:

"The rule of law applicable to questions of this kind is well settled. It is clear that the commission of one offense cannot be proved on the trial of a party for another merely for the purpose of inducing the jury to believe that he is guilty of the latter, because he committed the former. You cannot prejudice a defendant before a jury by proof of general bad character, or particular acts of crime other than the one for which he is being tried."

In *Commonwealth v. Jackson*, 132 Mass. 16, the syllabus pertinent to this question is as follows:

"At the trial of an indictment, under the Gen. Sts. c. 161, § 54, for obtaining the property of another by false pretenses in the sale of a horse, evidence of similar pretenses made by the defendant in sales to other persons a short time previously to the sale in question is inadmissible for the purpose of showing the intent with which the defendant made the sale of the horse."

In *State v. Saunders*, 14 Or. 300, 12 Pac. 441, in the opinion by Thayer, J., this is said:

"Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs (no

matter what explanation of them he attempts to make), it will be more damaging evidence against him and conduce more to his conviction than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this—knows that juries are inclined to act from impulse, and to convict parties accused, upon general principles. An ordinary juror is not liable to care about a party's guilt or innocence in the particular case, if they think him a scamp or vagabond. That is human nature."

See, also, Booth v. United States, 139 Fed. 252, 71 C. C. A. 378; People, etc., v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193. The whole subject is thoroughly discussed in 1 Wigmore on Evidence, § 192 et seq., and the authorities fully cited.

Of course, there are many instances in which evidence of the commission of other offenses is necessarily admissible. One instance often referred to in the books is where the commission of one offense is a circumstance tending to show the commission of the offense for which the defendant is on trial. The fact that the defendant charged with homicide stole an axe or a gun with which the killing was done, the stealing of the weapon, though a distinct offense, would necessarily be in the very nature of the case competent evidence against him on his trial for homicide. The passing of other counterfeit money of the same character as that which the defendant is charged with passing in the case on trial would be admissible to show guilty knowledge or intent. Many other instances might be cited which are exceptions to the general rule. One of the former convictions of the defendant which was put in evidence was 14 years before this offense is alleged to have been committed. We think the admission of these former convictions and former imprisonments in the penitentiary was error as against Hale, and also very clearly error as against Dyar.

Judgement must be reversed and the case remanded, with directions to grant a new trial.

The United States attorney has brought to the attention of this court the fact that a fine of \$1,000 was imposed on A. S. Dyar as a part of the penalty in this case. Thereafter Dyar desiring to dispose of certain real estate in the city of New Orleans, and the fact of this fine standing against him prevented him from getting a clerk's certificate that his property was free from incumbrance, the matter was brought to the attention of the Circuit Court by Dyar, and the United States attorney was directed to show cause why he should not be permitted to deposit in the registry of the court the sum of \$1,000, without prejudice to his writ of error, and to be returned to him if the sentence and judgment be reversed.

After hearing, the court made the following order:

"Whereupon and, on due consideration thereof, and the law and evidence being in favor of plaintiff in rule and against defendant in rule, it is ordered, adjudged, and decreed that the defendant, Alexander S. Dyar, be permitted to deposit in the registry of the court the sum of one thousand (\$1,000.00) dollars as the fine which he was condemned and sentenced to pay on the 10th day of June, 1910, in this cause, without prejudice to his writ of error which he has obtained and which has been allowed. said amount to be returned to him in case his said judgment is reversed, and it is further ordered, upon said amount being deposited in the registry of the court, that Henry J. Carter, clerk, do issue to him a clear certificate that there is no judgment

of this court operating as a lien or judicial mortgage on his property, any ultimate rights which the United States may have in this case to attach to the said one thousand (\$1,000.00) dollars so deposited."

The sum of \$1,000 was deposited in the registry of the court in pursuance of the above order, and has since remained there.

It is further represented to this court by the United States attorney that since the judgment of the court in this case, and since the above order allowing Dyar to make the deposit as stated, Dyar has died, and this court is asked to give some direction as to the disposition of the \$1,000 so deposited. We are of the opinion that the penalty abated with the death of the defendant. This would be true whether the judgment here had been reversed or affirmed. The judgment being reversed certainly strengthens this view of the matter.

In the case of United States v. Pomeroy (C. C.) 152 Fed. 279, Judge Holt in the United States Circuit Court for the Southern District of New York had a similar question before him, and he took the view of it which we have indicated above.

In concluding his opinion in that case, Judge Holt said:

"In this case the defendant was fined \$6,000. That money was not awarded as compensation to the United States. No harm has been done to the United States. It was imposed as a punishment of the defendant for his offense. If while he lived it had been collected, he would have been punished by the deprivation of that amount of his estate; but upon his death there is no justice in punishing his family for his offense. It may be said, of course, that there is very little difference between the loss which his family would have sustained if the money had been collected before his death and the loss of which it will now sustain if it is collected from his estate. But, if the money had been collected before his death, he would have been punished. If it is collected now, his family will be punished, and he will not be punished. In my opinion, therefore, this prosecution should be deemed ended and this judgment abated by the defendant's death.

"I have some doubt whether this court should make an order declaring the judgment and the proceedings abated, or whether it should leave the matter to be determined in some other court if an attempt should be made to collect the judgment. But it is certainly just to the representatives of the estate that the question should be determined, and I think it may as properly be determined by the court which rendered the judgment as by some other tribunal. The government has had notice of this motion, and has been heard upon it, and in my opinion this court has power to declare that all the proceedings in this case and the judgment entered therein against the defendant were abated by his death.

"My conclusion is that an order should be entered declaring that the proceedings and the judgment have abated, and are no longer of any validity."

The foregoing from the opinion of Judge Holt expresses very clearly the view we have as to what should be done in the present case. Perhaps it might be more properly determined by the Circuit Court after the mandate of this court is returned; but, inasmuch as the United States attorney has asked our consideration of the matter, we express the foregoing opinion. The \$1,000 we think should be paid over at once to the proper representative of Dyar's estate.

REGISTER v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. April 4, 1911.)

No. 2,102.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Roland Register was convicted of offenses, and he brings error. Reversed and remanded.

J. W. Woods and Guy Graham, for plaintiff in error.

Charlton R. Beattie, for defendant in error.

McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

NEWMAN, District Judge. Only a few facts differentiate this case from the case of A. S. Dyar and W. H. Hale, 186 Fed. 614, just decided. In this case Roland Register and W. H. Hale were jointly indicted on May 16, 1908, under section 5480, Revised Statutes, Indictment No. 2578, and were again jointly indicted on May 26, 1910, under sections 5480 and 5440, Revised Statutes (U. S. Comp. St. 1901, pp. 3696, 3676), Indictment No. 2692, which two indictments were consolidated before trial. One of the counts in the second indictment, as in the case of A. S. Dyar and W. H. Hale, was for conspiracy to commit the offense named in section 5480, Revised Statutes.

The testimony as to Hale's former conviction and imprisonment was admitted in evidence in this case, as it was in the case of Dyar and Hale, and all this testimony was admitted over the defendant's objections. Transcripts of the record in the New York case and the Colorado case were also admitted in evidence, all over defendant's objections, and exceptions being properly taken. The court, at the close of the evidence in this case, directed a verdict in favor of Hale, and, as one of the counts in the second indictment was for conspiracy between Register and Hale, necessarily, as Register could not conspire with himself, a verdict of not guilty was also directed as to Register on that count. The jury found Register guilty on the first indictment, No. 2578, and also on the first count of the second indictment, No. 2692. It is conceded that there was no direct testimony of any kind to show that Register had any knowledge of Hale's former convictions and imprisonments.

We think for the reasons more fully set forth in the case of Dyar and Hale the judgment of the court in this case should be reversed and the case remanded, with directions to grant a new trial.

COLT'S PATENT FIREARMS MFG. CO. et al. v. NEW YORK SPORTING GOODS CO. (two cases).

VICTOR TALKING MACH. CO. et al. v. HOSCHKE et al.

(Circuit Court of Appeals, Second Circuit. March 15, 1911.)

Nos. 251, 252, 257.

CLERKS OF COURTS (§ 48*)—CLERKS OF CIRCUIT COURTS OF APPEALS—DUTIES AND FEES.

Act Feb. 13, 1911, c. 47 (36 Stat. 901) relating to transcripts on appeal to or writ of error from the Circuit Courts of Appeals, and authorizing the use of a printed transcript certified by the court below, makes no provision for an index; and in view of the importance of having the indexes of all records comprehensive and uniform, they should be prepared by the clerk of the Circuit Court of Appeals, and since his fee for preparing and indexing the record under the fee bill in force is fixed at a stated sum per page of the whole, and is indivisible, until such fee bill is changed or further legislation enacted, parties will be required to pay the full fee thereby prescribed, to be held by the clerk until its return is authorized.

[Ed. Note.—For other cases, see Clerks of Courts, Dec. Dig. § 48.*]

Appeals from the Circuit Court of the United States for the Southern District of New York.

Suits in equity by Colt's Patent Firearms Manufacturing Company and John M. Browning against the New York Sporting Goods Company (two cases), and by the Victor Talking Machine Company and another against William H. Hoschke and the Sonora Phonograph Company. On motions by complainants in each case, who are appellants, to be relieved from payment of clerk's supervision fee. Motions denied.

See, also, 180 Fed. 777.

W. G. McKnight, for the motion.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. In each of these cases appellant has filed 25 printed transcripts of the record of the Circuit Court, one of which has been certified by the clerk of that court as prescribed by the recent act of February 13, 1911. Appellant asks that the cause be heard thereon without payment of any fee to the clerk of this court for supervision of the record. In conformity with the provisions of the act, this court will hear argument upon such transcript of record. The certification of the clerk of the court below is sufficient guaranty that the printed book is a correct transcription of the record in his court, or of so much thereof as the parties have agreed to take up. There is no necessity, therefore, for any further examination thereof by the clerk of this court. Experience has shown, however, that it is very important to have the indexes of all records on appeal comprehensive and uniform. Therefore the preparation of all indexes will continue under the supervision of the clerk.

The fee bill prescribed February 28, 1898, by the Supreme Court,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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under Act, Feb. 19, 1897, c. 263, 29 Stat. 536 (U. S. Comp. St. 1901, p. 557), now provides as a fee for—

"preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index, twenty-five (25) cents." 150 Fed. cxxxix, 79 C. C. A. cxxxix.

It would seem that, when the only thing which the clerk does is to prepare or supervise the preparation of the index, the only fee charged should be 25 cents for each page of such index. But in Bean v. Patterson, 110 U. S. 401, 4 Sup. Ct. 23, 28 L. Ed. 190, it was held that the fee was indivisible, and that the whole must be charged if any part of the work is done. Under this decision it would not be safe for the clerk to collect merely the fee per page of index. No regulation of this court could relieve him from the obligation to account to the Treasury Department for the full amount. It is, however, so plainly the intention of Congress that these fees should be reduced that the proper course would seem to be for the clerk to receive the full amount of fees now, and hold them as a special deposit until the proper authority shall have distributed the "indivisible fee" prescribed by the Supreme Court fee bill. The language of the act of February 19, 1897, is such that there may be some doubt as to the power of the Supreme Court to change the fee bill which it prescribed before May 19, 1898.

The second section of the new act apparently gives the Supreme Court power to fix new fees only in cases when a final judgment or decree is sought to be reviewed in that court. If further legislation be necessary to make the recent act effective, it can no doubt be secured at the next session. If such change is made, and is made applicable to appeals or writs of error now pending, so that the clerk may safely take a fee on the page rate for index only, the balance of each deposit will be returned.

CHICAGO, R. I. & P. RY. CO. v. HALE.

(Circuit Court of Appeals, Eighth Circuit. April 7, 1911.)

No. 3,093.

(*Syllabus by the Court.*)

1. DAMAGES (§§ 38, 40*)—PERSONAL INJURY—EVIDENCE OF PERSONAL EARNINGS ADMISSIBLE—PROFITS OF LABOR AND CAPITAL COMBINED INADMISSIBLE.

In action for damages for personal injury, the profits of a business or of the performance of a contract derived from the combination of capital and labor do not constitute a sound basis for estimating the earning capacity of the injured person, who furnishes a part of the labor.

But one whose earnings are derived from the use of his labor, skill, or knowledge, without the use of substantial capital, may prove the amount of such earnings at and for a reasonable time before the occasion of his wrongful injury, and a decrease thereof caused by the injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 72-88, 237-241; Dec. Dig. §§ 38, 40.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. DAMAGES (§ 172*)—PERSONAL INJURY—FACTS—CONCLUSION.

H. made a contract with a railroad company to load cars with gravel for a specified amount per cubic yard, and to furnish at his own expense all the teams, tools, scrapers, equipment, labor, powder, and other explosives necessary to do the work. He was injured while he was engaged in the performance of this contract, and over the objection of the defendant below he was asked and answered the question: "What were your earnings at the time of the accident?"

Held, there was error in admitting this evidence as a basis for estimating his personal earnings, because the answer necessarily included the profits from his contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 490-492; Dec. Dig. § 172.*]

On rehearing. Reversed and remanded.

For former opinion, see 176 Fed. 71, 99 C. C. A. 379.

Before SANBORN and ADAMS, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. On the motion of the railway company this case has been reheard. Hale, the plaintiff below, had recovered a judgment against the company, and it had complained that at the trial he had been permitted over its objections to answer this question: "I will ask you to state to the jury what you were earning?" The contention of counsel for the company was that the question and the answer, which was, "About \$12 a day," were irrelevant and immaterial, because they included both the value of the personal services of the plaintiff and the profits of a business enterprise combining skill and labor, and that contention was overruled at the former hearing, on the ground that the record at the time the question was asked did not disclose—

"that the plaintiff had combined any substantial capital with his labor in loading the cars. The contract that he was engaged in performing and the fact that other workmen were assisting him were the only pertinent facts in the record, and the case as it then stood fell fairly within the rule that one whose earnings are derived from his labor, skill, or knowledge, without the use of substantial capital, may prove the amount of those earnings at and for a reasonable time anterior to the occasion of his wrongful injury, and the decrease of these earnings necessarily affected by the injury." Chicago, R. I. & Pac. Ry. Co. v. Hale, 99 C. C. A. 379, 382, 176 Fed. 71, 74.

[1] A re-examination, in the light of the argument of counsel upon the rehearing, of the contract and of the testimony that had been produced in evidence when the question challenged was answered, has convinced us that the former conclusion that there was at that time no substantial evidence before the court that the plaintiff had combined any substantial capital with his labor in loading the cars was erroneous. The plaintiff had testified that at the time of the accident, on September 25, 1905, the time to which the question and answer refer, he was engaged in loading cars under his contract with the company, which was in evidence, and that he had been so engaged since some time in August, so that the question, "What were your earnings?" was, in effect, "What profits were you deriving from the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

performance of your contract?" Now that contract was that the plaintiff, for 15 cents per cubic yard, should load with gravel the full number of cars required by the company, not exceeding 30 each day; that, for 10 cents per cubic yard, he should remove the dirt and earth upon the gravel; and that he should employ and furnish at his own expense all the teams, tools, scrapers, equipment, labor, powder, and other explosives necessary to do this work. It is obvious that this agreement could not be and was not being performed, and the profits from it were not being derived, without the combination of substantial capital with the personal labor or services of the plaintiff, and, therefore, the amount he was earning in the performance of the contract was not the true measure of his earning capacity. The profits of a business enterprise or of the performance of a contract combining capital and labor do not constitute a legitimate basis for estimating the earning power of one personally contributing the element of labor, where he has been wrongfully injured, so as to be unable to furnish that element. *Boston & Albany R. R. Co. v. O'Reilly*, 158 U. S. 334, 336, 15 Sup. Ct. 830, 39 L. Ed. 1006; *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 208, 211, 11 N. W. 514, 41 Am. Rep. 19; *Johnson v. Manhattan Ry. Co.*, 52 Hun, 111, 114, 4 N. Y. Supp. 848; *Leeds v. Metropolitan Gaslight Co.*, 90 N. Y. 26, 29; *Masterton v. Village of Mt. Vernon*, 58 N. Y. 391, 396.

[2] Counsel for the plaintiff below insist now, as they did at the first hearing of this case, that the error which has been considered should be disregarded, because the company failed in its assignment thereof to set out the substance of the answer to the question challenged, as required by rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii). But the answer to that question is the entire evidence which this record contains of the value of the services or of the earning power of the plaintiff below. If there is an error in the admission of the answer to that question, to which the company duly objected, it is fundamental, and when the evidence is rightly apprehended it is plain. It conditions a verdict of over \$8,000. The same rule which requires a plaintiff in error to set forth the full substance of the objectionable evidence admitted provides that the court at its option may notice a plain error not assigned. It was for these reasons that this alleged error was noted at the former hearing, and they are not less cogent now.

The order affirming the judgment below must be vacated, the judgment must be reversed, and the case must be remanded to the court below, with instructions to grant a new trial; and it is so ordered.

In re W. A. PATERSON CO.

(Circuit Court of Appeals, Eighth Circuit. April 20, 1911.)

No. 107, Original.

(Syllabus by the Court.)

1. SALES (§ 296*)—STOPPAGE IN TRANSITU—RIGHT OF CEASES WHEN TRANSIT BETWEEN VENDOR AND VENDEE ENDS.

A vendor has no right of stoppage in transitu after his vendee, to whom he has invoiced and billed his goods, has surrendered the bill of lading to the railroad company at the destination named therein, has rebilled them to his vendee at another place, and they have gone on to that destination.

It is only while goods are in transit between the vendor and his purchaser that the right of stoppage in transitu exists in the former.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 837-847; Dec. Dig. § 296.*]

2. BANKRUPTCY (§ 342*)—COURT—JURISDICTION SUMMARY TO EXPUNGE CLAIM ON ACCOUNT OF CLAIMANT'S CONVERSION OF BANKRUPT'S PROPERTY.

A court of bankruptcy has jurisdiction by a summary proceeding to diminish or expunge an allowed claim, unless the claimant pays to the trustee the value of the property of the bankrupt which he has taken and converted to his own use, without any prior claim to it, after the petition in bankruptcy was filed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 342.*]

In the matter of the estate of William C. Manley, bankrupt. Petition by the W. A. Paterson Company to revise an order affirming an order of the referee expunging petitioner's claim. Petition dismissed.

R. P. & C. B. Williams, for petitioner.

Clarence T. Case, for trustee.

Before SANBORN and ADAMS, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. This case is presented by a petition to revise an order of the District Judge, which affirmed an order of the referee that the claim of W. A. Paterson Company, a corporation, for \$17,017.45, which had been allowed, be expunged unless the Paterson Company should pay to the trustee \$1,004.45, the adjudged value of certain vehicles of William C. Manley, the bankrupt, which the company had seized and converted to its own use after the Paterson Company and others had filed a petition in bankruptcy against Manley upon which he was subsequently adjudged a bankrupt. The Paterson Company was a manufacturer of vehicles at Flint, Mich. Manley was engaged in selling vehicles at St. Louis, Mo. Elder & Wood, who were engaged in a like business at Mammoth Springs, Ark., ordered a car load of vehicles from Manley in September, 1908. Manley thereupon ordered these vehicles from the Paterson Company, and directed it to ship them to Elder & Wood at Mammoth Springs, Ark. Afterwards, on September 17, 1908, Manley directed the Paterson Company to ship these vehicles to him at St. Louis, Mo. On October 3, 1908,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the Paterson Company shipped the vehicles from Flint, Mich., by rail to Manley at St. Louis. The company procured a bill of lading, in which it was named as consignor and Manley's company at St. Louis as consignee. Tags had been placed on the vehicles by the Paterson Company, bearing the name of the bankrupt and the words "Elder & Wood, Mammoth Springs, Arkansas," and these tags had been previously furnished by Manley to the Paterson Company. The Paterson Company sent this bill of lading to Manley, together with an invoice of the goods which indicated that they were sold to him for \$1,018.75. On the arrival of the vehicles at St. Louis on October 7, 1908, Manley sent his clerk to the office of the St. Louis & San Francisco Railroad Company at St. Louis and he, by direction of Manley, surrendered the bill of lading to the railroad company, which issued, by direction of Manley, a bill of lading wherein Manley was named as consignor and Elder & Wood, Mammoth Springs, Ark., as consignees. Under this bill of lading the goods were forwarded to Mammoth Springs, and Manley sent an invoice of the vehicles to Elder & Wood, which indicated that they were sold by Manley to them for \$1,304.25.

On October 10, 1908, Manley made a general assignment for the benefit of his creditors. On October 13, 1908, the Paterson Company and other creditors of Manley filed an involuntary petition in bankruptcy against him upon which he was subsequently adjudged a bankrupt. On the same day the Paterson Company telegraphed from Flint, Mich., to the agent of the St. Louis & San Francisco Railroad Company at Detroit, Mich., to hold the car of vehicles for it, and at some time after October 14, 1908, the railroad company returned the vehicles to that company. The Paterson Company filed a claim against the bankrupt for \$17,017.45 for the purchase price of the vehicles which it had sold to Manley prior to the transaction which has been detailed, and this claim was allowed. Thereafter a motion was made by the trustee to expunge this claim, unless the Paterson Company would pay back to the trustee the value of this car load of vehicles, which it obtained after the petition in bankruptcy was filed. The referee and the court below were of the opinion that this motion should be granted. Counsel for the Paterson Company insist that their view of the law was erroneous: (1) Because the Paterson Company had the right of stoppage in transitu on October 13, 1908, when it gave the railroad company, which was in possession of the goods at Mammoth Springs, notice of their recall; (2) because the purchase of the goods by Manley was made with the intent never to pay for them; and (3) because the court below was without jurisdiction summarily to hear the motion to expunge the claim, on the ground that the Paterson Company had taken the vehicles without right after the filing of the petition in bankruptcy.

[1] But the right of stoppage in transitu ceases when the transit between the vendor and purchaser ends. The Paterson Company sold the vehicles to Manley. It sent to Manley the bill of lading which named him as consignee, and thereby gave him dominion and control over the goods, and it invoiced them to him as the purchaser. It never

sold the goods to Elder & Wood, and was not in any way in privity with them. Therefore, when Manley's clerk by his direction surrendered the bill of lading to the St. Louis & San Francisco Railroad Company at St. Louis, the destination named in the bill, and reshipped and rebilled them to Manley's purchaser, Elder & Wood, the transit between the Paterson Company and its vendee, Manley, ended and the right of stoppage in transitu ceased. Neimeyer Lumber Co. v. Burlington & M. R. R. Co., 54 Neb. 321, 341, 342, 74 N. W. 670, 40 L. R. A. 534; Eaton v. Cook, 32 Vt. 59, 61; Rowley v. Bigelow, 12 Pick. (Mass.) 307, 313, 314, 23 Am. Dec. 607; Memphis & L. R. R. Co. v. Freed, 38 Ark. 614, 622; Treadwell v. Aydlett, 9 Heisk. (Tenn.) 388.

Whether or not Manley intended to pay for the vehicles when he bought them of the Paterson Company is a question of fact, and the evidence upon this issue is not presented by the petition to revise. The referee has reported a summary of the evidence; but both he and the court below have failed to find that Manley intended not to pay for the vehicles when he bought them, and there was no evidence of any fraudulent misrepresentation of his financial standing, or of any other facts to induce the Paterson Company to make the sale. Under these circumstances, we cannot find that the sale was fraudulent or voidable.

[2] The District Court sitting in bankruptcy has jurisdiction to "reconsider allowed or disallowed claims and allow or disallow them against the bankrupt estates." 30 Stat. 545, 560, c. 541, §§ 2 (2), 57k (U. S. Comp. St. 1901, pp. 3420, 3444); General Orders in Bankruptcy XXI, 6 (89 Fed. x, 32 C. C. A. xxiii). Under these provisions of the bankruptcy law the court below had ample jurisdiction to reconsider the allowed claim of the Paterson Company, and to diminish or expunge it, unless the company paid back to the trustee the value of the vehicles which it had seized and converted without right. Neither the referee nor the court below made any affirmative order or rendered any affirmative decree or judgment for the payment of any damages or any amount on account of the taking of this property. The order assailed is limited to the diminishing or expunging of the claim unless the moneys due the estate on account of the seizure of the vehicles by the Paterson Company is paid. That order is justified by the bankruptcy law and by the facts of the case, and the petition to revise must be dismissed.

It is so ordered.

STEVENS v. RODGERS BOILER & BURNER CO.

(Circuit Court of Appeals, Sixth Circuit. April 25, 1911.)

No. 2,049.

1. PATENTS (§ 328*)—INVENTION—REFUSE BURNING FURNACE.

The Stevens patent, No. 843,971, for a refuse burner to consume the waste product of sawmills, having a water jacket formed by an outer and inner cylindrical iron shell, discloses but a single novel feature over those of the prior art, which is in employing braces between the two

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

shells having a slot at the inner end through which the connecting bolt passes to secure them to a radial circumferential flange on the inner shell, which gives a slideable connection and allows for the expansion and contraction of the inner shell, and such feature does not involve invention, especially in view of the use of similar connections in the construction of boilers, which is an analogous art.

2. PATENTS (§ 311*)—SUITS FOR INFRINGEMENT—EVIDENCE.

Evidence of anticipation by prior devices and of prior use is admissible in a patent suit to show the prior state of the art, although no notice of it was given in the answer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 542; Dec. Dig. § 311.*]

Appeal from the Circuit Court of the United States for the Western District of Michigan.

Suit in equity by Clifton D. Stevens against the Rodgers Boiler & Burner Company. Decree for defendant, and complainant appeals. Affirmed.

Brown & Hopkins (Francis A. Hopkins, of counsel), for appellant. Stephen H. Clink, for appellee.

Before SEVERENS, Circuit Judge, and COCHRAN and SATER, District Judges.

SATER, District Judge. [1] The complainant charges that the defendant infringes the first and second claims of his patent, issued February 12, 1907, on his application of November 24, 1905, for improvements in refuse burners to consume the waste products of sawmills. The claims are as follows:

"1. An incinerating furnace comprising inner and outer spaced walls, a radially projecting circumferential flange secured to the periphery of the inner wall and provided with a plurality of apertures, braces secured to the inner face of the outer wall, said braces being provided with a slot in the free end thereof, each of said slots being adapted to register with an aperture in the flange, and a bolt passing through the registering apertures.

"2. An incinerating furnace comprising inner and outer spaced walls, a radially projecting circumferential flange secured to the periphery of one wall, and braces secured to the inner face of the other wall, the free ends of said braces being slidably connected with the flange."

According to the terms of the patent, the complainant's primary object was to construct an improved furnace comprising a water jacket into which water is fed in such a manner as not to be sprayed directly against its walls. His further or secondary objects were to provide an improved manner of spacing and firmly bracing the walls of the water jacket and the construction of an improved apparatus of the character named which will be simple and strong in construction, cheap to manufacture, and efficient in operation. His burner, like others of the water space type, has an outer and an inner cylindrical iron shell with an annular space between them to contain water to protect the inner shell from burning and loss of rigidity. The braces employed are about one-half inch in thickness, and two and a quarter or more inches in width, the outer ends of which are upturned at an angle, and are bolted or riveted to the outer cylinder. Near the inner or

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

free end of each brace is an elongated slot or hole, which, in the burners thus far constructed, is fifteen-sixteenths of an inch in length and thirteen-sixteenths of an inch in width. Three-quarter inch bolts of the kind in commercial use are driven through apertures thirteen-sixteenths of an inch in diameter in radially projecting circumferential flanges surrounding the inner shell at appropriate points to strengthen it, and thence through the elongated slots of the braces. The shells, which are composed of comparatively thin boiler plate, the sectional sheets of which are prepared at the shop and are segments of a circle, are by the above-mentioned method of securing the ends of the braces spaced and firmly held, excepting that the slidable connection given by the slotted braces permits a play in all of a half inch, which is the amount of expansion in a burner 30 feet in diameter. To that extent such connection cares for expansion due to heat caused by the burning refuse within the inner shell, for the inward pressure of the water column, whose height is frequently from 50 to 60 feet, and for the contraction of the cylinders caused by cold. The circular hole, thirteen-sixteenths of an inch in diameter, used in all braces, prior to 1904, to receive the three-quarter inch bolt, permitted a slight slidable connection, but it was supplanted, in 1904, by complainant's adoption of an elongated slot. The outward expansive force is greatest when the burner is first fired, because the inner shell, being in immediate contact with the fire, heats more quickly than the water and the outer shell. In practice it was found that the effect of these outward and inward pressing forces, especially if an inadequate number of braces was used, was to cause the inner shell to bulge and even to collapse, and both shells to leak, on account of the pulling of rivets or bolts through the cylinders. In assembling the sections of the shells difficulty was also encountered in making the cylinders true circles, and in causing the equal sized apertures or holes in the flanges and braces so to align or register that the bolt which passes through both could be easily and quickly driven. This interfered with speed and economy in construction, and a method of remedying this difficulty was therefore desirable and is covered by the patent, which provides for a slotted or slidable connection on the free end of the braces.

In October, 1904, the defendant engaged in the business of manufacturing boilers and refuse burners, and, in ignorance of any claim on complainant's part of an exclusive right to use an elongated hole in refuse burners, or of his intending to apply or of his having applied for a patent, erected a number of burners whose braces were like his, excepting that the hole in them was not elongated, but was fifteen-sixteenths of an inch in diameter. For this reason the charge of infringement is made, to which are interposed the defenses of noninfringement, anticipation, prior use, and lack of invention.

The first refuse burner of the water space type was constructed at Bay City, Mich., some time prior to 1895. The firm of which complainant was a member also began, in that year, the erection of such burners and used angle iron bands to reinforce the upper portion of the inner shell. Flat iron braces, whose ends were upturned at an angle, were employed to space and stay the shells. Six years later his firm extended the use of the angle iron bands to the lower portion of

the burner, and bolted the inner end of the braces to the horizontally-projecting flange. A year later the Langford Bros. erected a burner at Eureka, Cal., which differs in the manner of construction from those built under the complainant's patent only in that they used a smaller number of braces and a circular hole thirteen-sixteenths of an inch in diameter instead of an elongated slot.

In view of the contents of the letters patent and the proceedings had in the Patent Office, as disclosed by the file wrapper, the learned trial judge with much reason held that the second claim, whose fourth element is "the free ends of said braces being slidably connected," is no broader than the first. Assuming, without deciding, that, as contended by the complainant, the second claim is broader than the first, it is then sufficiently so to cover a round as well as an elongated opening in the braces.

Its use of a larger hole in the braces than in the flange, the defendant asserts, is to facilitate erection and obviate the difficulty and expense in aligning or registering the two holes. The complainant contends that his purpose in employing a slotted hole is to compensate for the expansion and contraction of the shells. It is manifest, however, that the use of either hole operates not only to speed and cheapen construction, but to care for the expansion and contraction of the cylinders. The complainant in his patent describes with minuteness the means of feeding the water jacket with water, the obvious purpose of which, as regards the inner shell, is to avoid sudden contraction from the spraying of cold water directly against it. He also details the method of feeding the refuse into the furnace, and holds that it is clear that the walls of the furnace are entirely free from the continuous jarring of the hopper and chute in the feeding process. There is no allusion, however, within the folds of his letters patent to the bulging from any cause of the inner shell, or the leaking and collapsing of burners, or the tearing out of rivets or bolts which secure the braces, nor is there any declaration of a purpose to provide means whereby his apparatus will adjust itself to expansion, or contraction, or water pressure, except as it appears inferentially in his specification that in the upper sections of the water jacket the pressure caused by the water and steam is considerably less, and that the radial flange, carried by the periphery of the inner wall, and the adjustable brace-bars may there be dispensed with and double-end brace-bars used instead. This suggestion is also in harmony with cheapness of construction. The only portion of the description of his device which mentions the slot proceeds as follows, omitting the numerical references:

"Spacing, or brace-bars, or ribs, provided with an angular portion (the upturned end), and having a slot in one (the free) end, are secured to the inner face of the outer wall by means of bolts or rivets engaging the angular ends, and in such a position that the slot in each bar or brace will register with one of the apertures in the radial flange. A bolt or rivet passes through the registering apertures and slot and serves as a means whereby the walls may be adjusted and braced in relation to each other."

The "spacing" braces gauge and maintain the intervals between the concentric shells. This accords with his purpose to "provide an improved manner of spacing and firmly bracing the walls of the water

jacket." The means whereby "the walls may be adjusted and braced in relation to each other" is the bolt passing through the flange aperture and the slot. The adjustment referred to relates to the time of the erection of the burner, and not to the time when expansion or contraction is present. Ease in registering and economy in construction are thus obtained by the use of the slotted or elongated hole. Considering the declared objects to be accomplished by the improvement, and the absence in the patent of any allusion to any injurious effect to the concentric shells due to heat or cold, and that there is but a doubtful inferential suggestion of any provision to care for expansion or contraction, it must be held that the purpose of his specified form of braces, of the slotted or elongated opening in them, and the mode of securing their free ends, was to insure ease, economy, and solidity in construction, equal spacing of the shells, and protection against the inward pressure caused by water and steam, rather than to provide for the expansion and contraction of the cylinders.

But conceding that the complainant is entitled to all the uses and advantages which may arise from the slot, whether he conceived the idea of all of them or not (*Roberts v. Ryer*, 91 U. S. 150, 23 L. Ed. 267), the fact still remains that the only feature of his device not found in the prior art is the slot or slidable connection of the braces. All else is old. That an enlargement of the hole in the braces by elongation, or by an increase of its diameter, would compensate for expansion and contraction in the shells and secure greater ease and economy in construction through the speedy alignment of such hole with the aperture in the flange, if either or both of these results were desired, was so obvious that the patentee only saw and did what any mechanic skilled in the art of refuse burner construction must have seen and would have done. His application of the slot or slidable connection did not involve patentable invention. *Smyth Mfg. Co. v. Sheridan*, 149 Fed. 208, 79 C. C. A. 166. Even complainant's expert would not positively say that a mechanic ordinarily skilled in the art of boiler making would not be able, without invention or suggestion, to apply the slidable connection found in boiler construction to that of the refuse burner.

The record does not support the claim that the art of boiler construction is not analogous to that under consideration. The business of manufacturing both refuse burners and boilers has been conducted by the same persons in the same shops. No one has engaged exclusively in the manufacture of refuse burners. For more than 25 years prior to his application for a patent, the complainant had been connected, in one capacity or another, with a plant which manufactured, repaired, and sold not only burners, but marine and other boilers. A portion of the time he had been its part owner, a part of the time its sole proprietor. He had been associated with and had employed in his business skilled mechanics, some of whom were familiar with the construction and repair of locomotive boilers. Witnesses, voluntarily as well as in answer to inquiries, instituted comparisons between the construction of refuse burners and boilers. The file wrapper discloses that during the pendency of complainant's application both his counsel and the examiner treated the water space feature of his device

as boiler construction. Complainant's knowledge of the art of boiler making must be held to have been such that the use of sliding connections, slotted holes, and jaw braces, used in such art, not in precisely the same way, it is true, yet used for the purpose of compensating for the expansion and contraction caused by heat and cold, respectively, would naturally suggest itself to him.

The long-continued use of elongated holes in the art of boiler making is sufficiently established. One witness, a boiler maker of 16 years experience in railroad shops, testified that, when a fire is first started in a locomotive, the crown sheet of the fire box, being directly in contact with the fire, expands more rapidly than the wagon top, which is more distant and protected by the cooling action of the water in the boiler. The expansive force operating on the stay bolts extending between the crown sheet and the wagon top creates a pressure against the latter. The condition described is like that developed by the firing of a refuse burner and by the continued pressure of heat acting on its inner shell. When, however, the engine becomes hot and steam pressure is developed, or when it cools off, a counter force is created which presses towards the crown sheet, just as the water between the two shells and the contraction due to cold produce an inward pressure in refuse burners. To care for the expansion and contraction thus caused in engine boilers, it appears that as early as 1899, according to the evidence given by a foreman boiler maker of a railway company, the two front braces running from the crown sheet to the wagon top were made with an elongated hole in one end. Blue prints showing boilers thus constructed, in 1899, and in use since 1901, and a brace having an elongated hole, taken in the course of repairs from one of such boilers built in the last-named year, were produced at the hearing, identified by witnesses, and offered as exhibits. One of such witnesses further testified that the use of braces of that character, in boiler making, for the purpose of greater ease in bringing the parts together in the process of construction, has been common practice for about 33 years. Another witness, who has been a manufacturer of boilers for 25 years, and who builds tubular, marine, vertical, and water tube boilers, stated that the most usual method of bracing between the crown sheet and the wagon top of boilers is by means of what is termed a jaw brace, pin, or bolt, the holes in the jaw brace being elongated to allow for the expansion and contraction which takes place between the crown sheet and the wagon top, and that this method of construction has been in use ever since he can remember.

In patent No. 770,651, which was issued to Peters and Coleman, September 20, 1904, for an improvement in boiler stay bolts connecting the crown sheet of the fire box with the outside shell of the boiler, the stay bolt shown and described is so constructed and so combined with the crown sheet and boiler shell as to secure a strong connection of those parts, which connection compensates for expansion and contraction and is capable of adjustment. The bolt consists of two parts. The upper part has a two-branched yoke, whose upper end is formed with a screw-threaded stem which is screwed into the boiler shell. In the lower end of the yoke is an opening large enough freely to admit the screw-threaded or upper end of the lower part of the stay bolt.

The lower end of such part of the bolt extends through and is fastened to the crown sheet. Its upper or screw-threaded end passes through and projects above the opening in the lower end of the yoke. A half-round nut, larger than the opening, is screwed on such screw-threaded end so projecting between the branches of the yoke. This nut rests in a seat in the lower end of such yoke and forms a sort of ball and socket joint. The play allowed by the ball and socket like joint facilitates the work of construction, because it obviates the necessity of absolutely accurate alignment between the hole in the boiler sheet and that in the crown sheet, and also adapts the stay bolt to lateral expansion. As the crown sheet expands from heat, the upper end of the lower part of the bolt pushes through the opening in the yoke between its two branches. The boiler shell is thus relieved of the outward strain of expansion due to heat. As the crown sheet contracts, the upper end of the lower part of the bolt may slide through the opening in the yoke towards the fire box, until the half-round nut rests above the opening and on the lower part of the yoke. In both the complainant's and the Peters and Coleman patent, there is a stay or brace with a slid able connection which secures ease and economy in construction and cares for the strains due to expansion and contraction. The two-branched yoke in the Peters and Coleman device is the mechanical equivalent of complainant's elongated slot, and each device attains the same result in substantially the same way as the other.

[2] Objection is made to certain testimony of anticipation and prior use, because notice was not given of it in the answer. It was admissible to show the state of the art, to show what was old, to distinguish what is new, and to aid the court in the construction of the patent. Dunbar v. Myers, 94 U. S. 187, 24 L. Ed. 34; May v. Juneau County, 137 U. S. 408, 11 Sup. Ct. 102, 34 L. Ed. 729.

In view of the conclusion reached, other questions discussed need not be considered.

The decree of the court below dismissing the bill is affirmed.

GENERAL ELECTRIC CO. v. SUTTER et al.

(Circuit Court, W. D. Pennsylvania. February 20, 1911.)

No. 26.

PATENTS (§ 259*)—"CONTRIBUTORY INFRINGEMENT"—WHAT CONSTITUTES.

"Contributory infringement" exists when one knowingly concert s or acts with another in an unlawful invasion of a patentee's rights. If such assistance is given by furnishing an essential part of an infringing combination and the part furnished is adapted to no other use than an infringing use, such contribution makes him a contributory infringer; but, if the part furnished is adapted to other and lawful uses, in addition to infringing uses, then an intent to furnish for infringing use must be established before the furnisher can be held a contributory infringer.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400-402; Dec. Dig. § 259.*

For other definitions, see Words and Phrases, vol. 2, p. 1540.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

In Equity. Suit by the General Electric Company against Fred-
eric C. Sutter, Robert V. Bingay, and Harry G. Steele, trading as the
Pittsburgh Transformer Company. Decree for defendants.

Charles Neave and William G. McKnight, for complainant.
Edwards, Sager & Wooster, for defendants.

BUFFINGTON, Circuit Judge. In this case the General Electric Company, the owner of patents No. 809,996 and No. 630,418, granted to C. P. Steinmetz for electrical distribution, charge the Pittsburgh Transformer Company with infringement thereof. It is not contended the latter company has itself infringed, but it is averred the Allegheny County Light Company has done so in a certain electrical plant operated by it, and that the Transformer Company has contributed to that infringement by making four transformers therefor. The Light Company is not a party to the bill; and, as the transformers in question constituted a single order and the Transformer Company have never made or contemplated making any like transformers, it will be seen the case turns primarily on the question whether that company bears the relation of a contributory infringer. An examination of the proofs satisfies us it does not, and therefore on the other questions involved we express no opinion.

The legal principles governing contributory infringement are clear. Contributory infringement exists where one knowingly concerta or acts with another in an unlawful invasion of a patentee's rights. If such assistance is given by furnishing an essential part of an infringing combination and the part furnished is adapted to no other than an infringing use, such contribution makes him a contributory infringer. On the other hand, if the part furnished is adapted to other and lawful uses, in addition to infringing uses, then an intent to furnish for infringing use must be established before the furnisher can be held a contributory infringer. In the present case the transformers were adapted to other and lawful uses besides the use the Light Company made of them. The burden is therefore on complainant to show a knowledge or intent on the part of the Transformer Company that the transformers were to be used for infringing purposes. That burden, we think, the complainant has not met. In the first place, the Transformer Company never made such transformers before this order, and does not contend for a right to do so. It only undertook to build them to aid in the rapid installation of an amusement park. It knew of the existence of these patents, and the complainant itself by its proofs showed a noninfringing intent on the part of the respondents. Thus complainant's witness Sutter, who was a partner in the respondents' firm, testified:

"A. The question of three-phase-two-phase operation came up, and I told the purchaser's engineer that we would not supply transformers to him to use in such a manner as to infringe any patents for such a system of operation, and my recollection is that he advised us that the transformers would not be used in a manner to infringe any patents. I may say here that it was of the utmost importance to the purchaser to secure these transformers as quickly as possible, as they had contracted to light the park or supply them current by a certain date, and we were the only company which could make delivery in time to enable the purchaser to carry out the contract. We did no busi-

ness with this purchaser for a number of years prior to this time, and we felt that they came to us for these transformers by virtue of necessity, as their purchases in this line heretofore, I believe, were made almost exclusively from the General Electric Company and occasionally from the Westinghouse Company."

Its proofs further showed that the transformers could have been used on the Light Company's plant in a noninfringing way. Standing alone, these proofs of the complainant would relieve the respondents of the charge of contributory infringement. But it is contended an intent to infringe by contribution is made out by the blue print accompanying the Light Company's order, and the requirement of the letter transmitting the order, viz., "Any combination of high tension taps other than shown by the blue print can be used at your discretion, provided, however, the transformer will operate either as a main or teaser transformer on 11,000 or 10,500 rolls"; for it is alleged, and we will assume such to be the fact, that the "main and teaser" requirement made it possible to use the transformer in an infringing way. But what, in effect, was this but showing that the transformer was capable of both an infringing and a noninfringing use? And in such case the burden still rests on complainant to show an infringing intent on the part of respondents and by their own proof, as we have seen, they have shown a contrary one existed.

In the absence of proof of such unlawful purpose and of any other than good faith on respondents' part, we are constrained to hold the charge of contributory infringement has not been made out, and the bill must be dismissed.

JEWELL v. CITY OF PHILADELPHIA et al.

(Circuit Court, E. D. Pennsylvania. March 25, 1911.)

No. 609

PATENTS (§ 310*)—SUIT FOR INFRINGEMENT—MULTIFARIOUSNESS OF BILL.

A bill for infringement of a patent against three defendants, alleging past and completed acts of infringement against two, a second cause of action against one of such two for continuing infringement by use of the infringing article, and a third cause of action against all the defendants, growing out of a different and uncompleted transaction, is demurrable for multifariousness.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 518; Dec. Dig. § 310.*]

In Equity. Suit by Ira H. Jewell against the City of Philadelphia, the Keystone State Construction Company, and James P. McNichol. On demurrer to bill. Demurrer sustained.

Cyrus N. Anderson, for complainant.

Samuel K. Loughheim, for defendant Keystone State Const. Co.

Samuel M. Clement, Jr., for defendant McNichol.

J. Ashton Devereaux, Owen B. Jenkins, Andrew Wright Crawford, and James Alcorn, City Sol., for defendant city of Philadelphia.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

J. B. McPHERSON, District Judge. This bill charges the defendants with infringing patent No. 649,410, for improvement in filters. It avers that after March 17, 1906, and before December 13, 1910, the date of filing the bill, the Keystone Construction Company entered into a contract with the city which provided that the Construction Company should build, for public use as a part of the municipal waterworks, "certain filters" according to a design furnished by the city, this design embodying the invention of the patent; that the Construction Company built the filters; and that the city now possesses and uses them, and intends to use them in the future. Thus far the bill charges a completed infringing act, with which it is not averred that McNichol had anything to do, and a threat to infringe hereafter, with which neither McNichol nor the company is connected. Paragraph 9, which declares that McNichol, as treasurer of the Construction Company, directs, controls, and manages its business, and "is actively engaged in infringing, and directing and causing infringement, of the claims of your orator's said patent," evidently cannot refer to a transaction that is not in the present, but in the past; and especially in the face of the contradictory averment that the city itself has taken possession of the filters, is now using them, and intends to continue such use. This certainly excludes the idea of continued control upon the part of the Construction Company and McNichol.

Paragraph 9, therefore, must refer to what immediately follows, namely, a charge that the Construction Company and McNichol—"are now jointly engaged in and threatening to continue the construction and building of additional filters, which filters, when completed, will embody the means illustrated and claimed in your orator's letters patent No. 649,410, and which filters are being constructed, or rather threatened to be constructed, for the use and benefit of the said city of Philadelphia."

Then follows a blanket averment in paragraph 12 that:

"The said defendants [meaning all of them] * * * acting in conjunction and conspiracy with others, and within and during the period subsequent to the 17th day of March, 1906, and prior to the filing of this bill of complaint, * * * have conjointly constructed or caused to be constructed, and used or caused to be used, filters constructed according to and containing the invention or improvement described," etc.

To this is added a further averment that:

"The said defendants [again meaning all of them] threaten to continue their infringing acts, and are prepared and ready so to do, to the great and irreparable injury of your orator."

For present purposes this is the substance of the bill, and I think it is clearly demurrable. For one thing, it lacks reasonable precision and detail, and these could readily have been supplied from easily accessible sources of information. As a matter of common knowledge, of which I think the court may take some notice, there are several filter plants in different parts of the city, distinguished by different names. Some are finished, and at least one of them is still in process of construction, or about to be constructed. Certainly the plaintiff should specify what plants and what contracts he refers to in the different paragraphs of the bill, instead of contenting himself with vague and general averments. But the chief objection is its multifarious character. Only two

of the defendants—the city and the company—are specifically charged with infringement, so far as the completed plants are concerned; and only one of them—the city—is charged with the purpose to continue the infringing acts. But, so far as concerns the uncompleted plant or plants, all the defendants are charged with present infringement, and the purpose to continue such acts. I am aware that some general language in paragraph 12 charges all the defendants with having “conjointly constructed or caused to be constructed, and used or caused to be used,” the offending filters; but this language is in conflict with the specific averments of the bill, already referred to, concerning the completed plants, and should be subordinated, I think, to these averments. The total result, therefore, is that the plaintiff claims to have one cause of action against two of the defendants—the city and the Construction Company—for past and completed acts which could be adequately redressed by a suit at law; a second cause of action against one of these two—the city—which may require relief by injunction; and a third cause of action against all the defendants, growing out of a different and uncompleted transaction, in which relief by injunction is asked, and may perhaps be justified. The bill also asks in general terms for an account of “all such gains and profits as have accrued or arisen to or been earned or received by the said defendants” (again meaning all of them), and a decree for treble damages.

In my opinion these disputes—some with one defendant, one with a second, and another with all three—cannot be tried in a single action against the three, and the bill as it stands must be dismissed. But no decree to that effect will be entered until the plaintiff has had an opportunity to recast his bill, if he shall be so advised, and he is hereby given leave to take such action and to file an amended bill on or before April 10th.

MOTION PICTURE PATENTS CO. v. LAEMMLE et al.

(Circuit Court, S. D. New York. February 23, 1911.)

PATENTS (§ 326*)—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION—CONTRIBUTORY INFRINGEMENT.

Defendants had been enjoined from infringing complainant's patent for a moving picture machine. An applicant for employment by them as stage director of the taking of moving pictures, in order to demonstrate his efficiency, arranged to take a series of pictures on two occasions, employing the actors and camera man, who used one of the infringing machines. The films were delivered to defendants, who also paid all the expenses of the taking. *Held*, that the man in charge acted as their agent, and that they were chargeable as contributory infringers, and subject to punishment for contempt for violation of the injunction.

[Ed. Note.—For other cases, see Patents, Dec. Dig. § 326.*]

In Equity. Suit by the Motion Picture Patents Company against Carl Laemmle and the Independent Moving Pictures Company. On motion to punish defendants for contempt. Motion sustained.

Dyer, Dyer & Taylor (J. Edgar Bull and John Robert Taylor, of counsel), for complainant.

Kenyon & Kenyon (Wm. J. Wallace, of counsel), for defendants.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes
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LACOMBE, Circuit Judge. Upon the argument so much of the motion was withdrawn as sought to hold defendants for any use of the Gaumont camera. The only matter left is the use on two occasions of a camera by Smallwood in connection with Powers, prior to the latter's permanent employment by defendant company. There seems to be little doubt that the camera used by Smallwood was of the infringing Warwick type. The real controversy is whether his use of it in connection with Powers was of such a character that defendant corporation, for whom the pictures were taken and to whom the negatives were delivered, cannot be held as infringer, or as a contributory infringer, under the authorities. The leading case is *Keplinger v. De Young*, 10 Wheat. 358, 6 L. Ed. 341, where defendant had a contract with H. & K., whereby the latter were to manufacture and deliver to him watch chains of a certain type, and the watch chains were with defendant's knowledge in fact made on a machine which infringed complainant's patent. The court held that these facts alone would not warrant a finding that defendant had infringed, if the contract were real and not colorable. It further held that there was sufficient evidence in the case to warrant a jury in finding that the contract was a colorable device and that the infringing machine was really hired by defendant.

In the case at bar the facts are peculiar. Powers had been employed by defendant corporation in one matter, and, that having terminated, sought further employment as stage director of the taking of moving pictures. On the two occasions referred to Powers acted as stage director, securing actors, accessories, camera man, etc., and took pictures "experimentally," as defendants say, in order to demonstrate how efficient a man he was. His work was so satisfactory that he secured employment with defendant. But defendant did not merely buy the films taken on these two days from Powers. They paid all the expenses of the experiment, the charges of actors, camera man, etc., and supplied the accessories. It does not seem to me that Powers was an independent contractor in the sense that H. & K. were in the case cited, *supra*. Such a holding would make it easy to infringe without responsibility. The pictures were taken for defendants, at their expense, through Powers as their agent, and if, through his failure to examine the camera used by the man he hired to operate it, an infringing machine was used to take the pictures, defendant is responsible.

The court, however, is not disposed to discredit the affidavits submitted by defendants, which show that the occurrence was a sporadic one, not likely to occur again, and not planned by defendants as a cover for deliberate, or even careless, infringement. Of course, if the same thing should happen again, that circumstance might indicate design; but on the record as it stands the penalty for violation of the order should be nominal only—\$10 payable to the United States, and \$100 to complainant for the cost of procuring and preparing the affidavits, which deal with this branch of the case.

These penalties are imposed on the defendant corporation only.

JACKSON v. WOLVERINE COPPER MINING CO.

(Circuit Court, S. D. New York. May 1, 1911.)

DEPOSITIONS (§ 55*)—TIME FOR TAKING—EXTENSION—PRESUMPTIONS.

Equity rule 69, providing that 3 months, and no more, shall be allowed for taking testimony, unless the time shall be enlarged by the court, and that no testimony taken after that period shall be allowed to be read in evidence, does not prevent the court, either on stipulation or for cause, from enlarging the time on motion, and it would be presumed that an enlargement of the time during the 90 days had been agreed on, where neither party completed his proof within the time, or where testimony is taken without objection after the time has expired, and neither party has moved to apportion the time, or to set the cause down for final hearing on bill and answer, or to dismiss.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 120-124; Dec. Dig. § 55.*]

Action by John G. Jackson against the Wolverine Copper Mining Company. On motion to suppress deposition. Denied.

George C. Beach, for plaintiff.

Abbott & Coyne, for defendant.

LACOMBE, Circuit Judge. The deposition was taken in Chicago November 1, 1910, and the notice of motion to suppress was not served till April 24, 1911. This delay would be sufficient ground for denying the motion, but it may be well to dispose of it on the merits.

Defendant refers to the sixty-ninth equity rule, which provides that 3 months, and no more, shall be allowed for taking testimony, unless the time shall be enlarged by the court, and that no testimony taken after that period shall be allowed to be read in evidence. He also cites *Wooster v. Clark* (C. C.) 9 Fed. 854, and *Matthews v. Spangenburg* (C. C.) 19 Fed. 823. These opinions were rendered very long ago. Whatever may be the condition elsewhere, it became apparent long since that in this district it is very rarely that either side desires or expects to complete its proofs within 90 days. Very often it is not physically possible for them to do so. Of course, the court has always been willing to entertain a motion to enlarge the time, and to grant it, if both sides agree, or if good cause be shown.

In order to avoid a multiplicity of such motions, it gradually became the settled practice here to assume that both sides had agreed to an enlargement when, during the 90 days, neither completed their proof, but testimony was taken without objection after the 90 days expired, or when neither side put in any evidence at all within the time limited, and neither side had moved to apportion the time, and defendant had not moved either to set the cause down for final hearing on bill and answer or to dismiss it for failure to prosecute. This ruling has been made many times, but apparently the brief memoranda have not got into the reports, since defendant says he has not found any such statement of the practice.

The motion is denied.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

BOUVIER-IAEGER COAL LAND CO. v. SYPHER et al.

(Circuit Court, S. D. West Virginia. December 20, 1910.)

1. ACKNOWLEDGMENT (§ 62*)—PAROL EVIDENCE AFFECTING DEEDS.

Parol evidence is admissible to show that the parties to an alleged deed did not appear before the officer purporting to have taken their acknowledgment.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 345-347; Dec. Dig. § 62.*]

2. DEEDS (§ 194*)—DELIVERY—PRESUMPTION FROM RECORDING AFTER DEATH OF PARTIES.

There is no presumption of the delivery of a deed, where it was not presented for record until 19 years after its date, and after the death of all the parties and the officer before whom it purported to have been acknowledged, and by some person unknown, and not shown to have any connection with the grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583; Dec. Dig. § 194.*]

3. DEEDS (§ 207*)—VALIDITY—EVIDENCE OF EXECUTION AND DELIVERY.

A deed, recorded in 1877, purported to have been executed in 1858 by three grantors and the wife of one, to have been acknowledged in a small town in the interior of Kentucky, 12 miles from a railroad, and to convey undivided interests in a large tract of land in Virginia. Two of the grantors had sold their interests more than 10 years before, and the land had been partitioned by agreement between their grantees, their cocrantor in the deed, and other owners, one of whom was the grantee. One grantor resided in Baltimore and the others in Philadelphia, and four children of the one whose wife joined, who lived with their parents at the time, testified that their parents were not absent from home and had never been in Kentucky. Their father, who then owned two of the several tracts into which the land had been subdivided, afterward sold and conveyed one of them with the knowledge of the grantee in such deed, and paid taxes on the other until his death, 16 years later. The grantee never made any claim under the deed, nor did any of his heirs, until 40 years after his death, and it was not shown to ever have been in his possession, or that of any one representing him. It was recorded after the death of all of the parties, and of the officer before whom it purported to have been acknowledged, at the instance of some one unknown, and was never seen by any of the living parties in interest. The names of the principal grantor and his wife were both misspelled in the deed, although he was an intelligent business man. Held, that such evidence was sufficient to establish that the deed was a forgery, and to entitle an adverse claimant of a part of the land, under a conveyance from the heirs of the principal grantor named therein, to its cancellation as a cloud on his title.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 614-624; Dec. Dig. § 207.*]

In Equity. Suit by the Bouvier-Iaeger Coal Land Company against Howard H. Sypher and others. Decree for complainant.

On March 4, 1795, Robert Morris obtained from the commonwealth of Virginia a patent for a tract of 320,000 acres of land then lying in the counties of Wythe and Russell, now lying mainly in McDowell and Wyoming counties, W. Va. And 19 days thereafterwards, namely, on March 23, 1795, said Robert Morris obtained a patent for another tract of 480,000 acres adjoining the tract of 320,000 above mentioned, so that by these patents, granted almost simultaneously, and, in fact, surveyed practically at the same time, Robert

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Morris apparently acquired title to 800,000 acres of land. Adjoining these lands on the west, Robert Morris, as assignee of Wilson Cary Nicholas, on the 23d of June, 1795, obtained a patent for 500,000 acres. This is the tract involved in the litigation known as the "Henry C. King Cases" lately pending in this and other courts. As will hereafter appear, instead of there being 800,000 acres in the two patents of 320,000 and 480,000 acres to Robert Morris above mentioned, it was found upon actual survey that there were only 207,500 acres.

The record shows that on March 13, 1797, Robert Morris and wife conveyed the whole of these two tracts of land to William Cramond, and on October 28, 1814, William Cramond and wife conveyed them to Thomas Astley. Astley's heirs conveyed the two tracts to Henry Cramond December 10, 1840. The two tracts became forfeited for nonpayment of taxes prior to 1842, and in that year George W. G. Browne, commissioner of forfeited and delinquent lands for Tazewell county, Va., under decree of the court, sold the two tracts to William Cramond, and after his death conveyed them to his widow and heirs, and on November 5, 1846, the other heirs conveyed these lands to Henry Cramond. On the same date, November 5, 1846, Henry Cramond conveyed the two tracts to Charles Feinour, Jr. Up to this time the two tracts of 320,000 and 480,000 acres had been kept together, unbroken, in the same person.

On November 22, 1846, Charles Feinour, Jr., conveyed to Thomas Beck, by metes and bounds, 50,000 acres out of the 320,000-acre tract; and on March 1, 1847, Feinour and wife conveyed to John Herman the two tracts of 480,000 and 320,000 acres, excepting the Beck 50,000 acres. This is the first time that John Herman appears in connection with these lands, and, as will be seen by the agreement between him and Cameron of August 11, 1847, hereafter mentioned, whilst the conveyance to Herman was apparently in fee, yet in fact he was a mere trustee for various persons and various trusts, among others to secure to himself the payment of \$40,000. On April 27, 1847, John Herman and wife conveyed 175,000 acres, undivided, of the two tracts of 320,000 and 480,000 acres, to Michael Bouvier. This is the first time that Mr. Bouvier appears in connection with these lands. This conveyance to Bouvier was also in the nature of a mortgage to secure the payment of \$22,000. On July 13, 1847, Herman and wife conveyed to David S. Hollister, of Philadelphia, 150,000 acres, undivided, out of the two tracts. This deed was not recorded until November 8, 1847.

On August 11, 1847, a trust agreement was made between Herman and S. Cameron, showing the trusts on which the said Herman and S. Cameron held the legal title to these lands. On October 16, 1847, Herman and wife conveyed to Thomas Rawlings and Michael Bouvier the 750,000 acres, in trust to sell for not less than 50 cents an acre, and from the proceeds to pay to Herman and Eustache Bouvier \$62,000 and to David S. Hollister \$13,000. On October 18, 1847, Michael Bouvier and wife conveyed to Eustache Bouvier the 175,000 acres, which had been conveyed to Michael by Herman. Afterwards all this indebtedness was adjusted, and on April 27, 1848, Herman, Hollister, and Eustache Bouvier release Rawlings and Michael Bouvier from all former trusts, and declare that said trustees are to stand seised of said property to secure to John W. Tilford the sum of \$6,000.

On July 20, 1848, Tilford assigned this indebtedness to Michael Bouvier. On September 9, 1848; David S. Hollister and wife conveyed all his interest in these lands to Silas M. Hamilton, subject to the deed of trust to Rawlings and Bouvier. On February 28, 1849, Hamilton and wife conveyed the Hollister interest to Edwin C. Searles, and Searles, by mortgage dated October 8, 1849, conveyed his interest to secure the payment of \$25,000 to Emery H. Penniman. Oakes Terrill and William A. Bull acquired interests in these lands by conveyances which need not be set out. All the interests were undivided, and were all subject to the \$6,000 lien, originally in favor of Tilford, but which had been assigned to Michael Bouvier.

In this situation, on the 7th day of December, 1850, Michael Bouvier, as the owner of the said \$6,000 lien, entered into the following agreement with Oakes Terrill, Jr., Edwin C. Searles, and William A. Bull, of the city of

New York, and John Herman and Eustache Bouvier, of the city of Philadelphia:

"Agreement, made this seventh day of December, Anno Domini one thousand eight hundred and fifty, between Michael Bouvier, of the city of Philadelphia, of the first part, and Oakes Terrill, Jr., Edwin C. Searles, and William A. Bull, of the city of New York, and John Herman and Eustache Bouvier, of said city of Philadelphia, of the second part.

"Whereas, the parties of the second part are tenants in common of certain lands, situated in the counties of Tazewell and Logan, in the state of Virginia, estimated to contain in the whole seven hundred and fifty thousand acres, in the following proportions, namely: The said John Herman to seventy-seven parts, the whole into one hundred and fifty parts being divided, or equal three hundred and eighty-five thousand acres. The said Eustache Bouvier to thirty-five parts, the whole into one hundred and fifty parts being divided, or equal to one hundred and seventy-five thousand acres. The said Oakes Terrill, Jr., to fifteen parts, the whole into one hundred and fifty parts being divided, or equal to seventy-five thousand acres. The said Edwin C. Searles to fifteen parts, the whole into one hundred and fifty parts being divided, or equal to seventy-five thousand acres. The said William A. Bull to eight parts, the whole into one hundred and fifty parts being divided, or equal to forty thousand acres.

"And, whereas, the said Michael Bouvier is the assignee of a mortgage, made to secure to him the payment of six thousand dollars, with interest for the same (as by reference to the said mortgage and assignment thereof will fully appear), upon all the above-mentioned premises, which mortgage he is about to foreclose, and it is the interest of all parties that he should buy the lands so mortgaged for the purpose hereinafter mentioned, when sold under the said mortgage and the said parties of the second part have each for himself, but not for the others, agreed to give their respective promissory notes to the said Michael Bouvier, for his share of said mortgage, with interest from its date, each deducting from his own note the amount of interest, if any, which he has paid to the said Michael Bouvier on account of said mortgage; that is to say: The said John Herman for three thousand and eighty dollars; the said Eustache Bouvier for fourteen hundred dollars, the said Oakes Terrill, Jr., six hundred dollars; the said Edwin C. Searles, six hundred dollars; and the said William A. Bull for three hundred and twenty dollars, each with interest from the date of said mortgage—the deductions to be made for what interest has been paid as aforesaid, the said notes to be made payable in ninety days from the first day of December, one thousand eight hundred and fifty:

"Now, this agreement witnesseth that the parties have agreed, and by these presents do agree as follows, to wit:

"(1) For and on consideration of said promissory notes, to be given as aforesaid, and also in consideration of a power of attorney, to be given by the said parties of the said part to the said Michael Bouvier, to authorize him to buy the said lands, at any price he may choose to give for the same, and that he shall not be accountable to them for the difference between the amount of his said mortgage and the amount he shall so bid, but that he or his attorney shall have the power to give the sheriff, or other officer who shall make the said sale, a receipt for such difference without any accountability whatever to the parties of the second part, the said Michael Bouvier promises and agrees with the parties of the second part, that he will author Jacob Stras, Esquire, or some other person, to procure the sale of the said land, and to buy in the said lands for him.

"(2) The said Michael Bouvier further promises the parties of the second part that after he shall have obtained a deed for the said lands that he will convey to each of the persons above mentioned, of the second part, who shall have paid the notes aforesaid, which he shall have given to the said Michael Bouvier, his share of the lands each, to his heirs and assigns, for the same title which he may acquire by the sale to be made to him, under the said mortgage, and for no other title; that is to say: To the said John Herman, eighty-five thousand acres, to be surveyed in as near a square lot as may be, next to and adjoining the lands of H. Styles or J. A. Huber; to Oakes Ter-

rill, Jr., seventy-five thousand acres, next adjoining the above lot of John Herman; to Edwin C. Searles, seventy-five thousand acres, next adjoining the land or lot of Oakes Terrill, Jr.; to William A. Bull forty thousand acres, next adjoining the lands or lot of Edwin C. Searles; to Eustache Bouvier one hundred and seventy-five thousand acres, next adjoining the lands of William A. Bull; and to the said John Herman three hundred thousand acres, being the remainder or balance of the said large tract of seven hundred and fifty thousand acres.

"(3) In case upon a survey it should be found that the quantity of land shall not be sufficient to give each of the parties the above-mentioned number of acres, then there shall be a *portionate* abatement or deduction from the shares of the parties, and if the whole should exceed seven hundred and fifty thousand acres, then the surplus shall be conveyed to the parties of the second part in their just proportions.

"(4) Each of the persons comprising the parties of the second part binds himself severally to the said Michael Bouvier to perform his part of this agreement, and also to pay a proportionate share, according to his interest in the said lands, of the money he has already laid out or disbursed, or which he may hereafter lay out or disburse, for or on account of said land, either by paying taxes, or counsel fees, both in the city of Philadelphia, in Virginia, or elsewhere, or for any other expenses he may have to bear or be put on account of the said lands, or the purchase or the sale thereof.

"(5) It is agreed, further, that if either of said parties of the second part, who shall have given his note as aforesaid, to the said Michael Bouvier, shall fail to pay the same when due, this agreement on the part of the said Michael Bouvier to convey the land aforesaid shall be null and void, and the said Michael Bouvier shall be at liberty to sell such land, upon such failure to any one he shall choose, or to keep the same for himself.

"(6) It is agreed that the said Michael Bouvier shall direct his attorney to request the sheriff, or other officer who shall sell the said lands (under the said lands) under the said mortgage, to require ten per centum on the amount of the bid he may make.

"(7) And the parties of the second do hereby agree that after the said Michael Bouvier shall have conveyed to them aforesaid, that they will release to each other, so as to make their titles complete.

"In witness whereof, the said parties have hereunto set their hands and seals this seventh day of December, Anno Domini one thousand eight hundred and fifty.

M. Bouvier.	[Seal.]
"Oakes Terrill, Jr.	[Seal.]
"E. C. Searles.	[Seal.]
"Wm. A. Bull.	[Seal.]
"Eustache Bouvier.	[Seal.]
"John Herman.	[Seal.]

This agreement was recorded in Tazewell county December 8, 1853. It will be seen by this agreement the interests of all these parties in what was supposed to be 750,000 acres of land is fixed as tenants in common as follows:

John Herman.....	77/150
Eustache Bouvier.....	35/150
Oakes Terrill.....	15/150
Edwin C. Searles.....	15/150
William A. Bull.....	8/150

Michael Bouvier is about to foreclose his mortgage, and it is agreed that he shall proceed to do so and buy in the property at the sale, and that each of the parties named shall give to him his note for his proportionate part of the debt and the costs and expenses of sale; said notes payable 90 days from December 1, 1850, with the agreement on the part of Michael Bouvier that he would convey to each of the parties, who paid his note, his proportionate part of the land, to be laid off according to a plan set forth in the agreement. Estimating the land at 750,000 acres, the exact number of acres to be conveyed to each is set forth, but in the third paragraph it is provided that if, on the survey, the quantity falls short, then there should be a pro-

portionate abatement or reduction from the shares of the parties. In the fifth paragraph it is expressly provided that, if either of said parties shall fail to pay his note when due," this agreement on the part of the said Michael Bouvier to convey the land aforesaid shall be null and void, and the said Michael Bouvier shall be at liberty to sell such land, upon such failure, to any one he shall choose, or to keep the same for himself.

It will be noticed that in this agreement it is provided that John Herman's 85,000 acres shall be surveyed in as near a square lot as may be next to and adjoining the lands of H. Stiles or J. A. Huber. This Stiles or Huber land is the Beck 50,000 acres, showing that prior to this time Beck had conveyed away his 50,000 acres to Stiles and Huber. We have seen that David S. Hollister's interest had been conveyed to Hamilton September 9, 1848, and by Hamilton to Searles in 1849. *Therefore at the date of this agreement, December 7, 1850, neither Thomas Beck nor David S. Hollister had any interest in these lands, nor did they ever afterwards acquire any interest, and this fact was known to both John Herman and Michael Bouvier.* In accordance with said agreement of December 7, 1850, Michael Bouvier brought suit in the circuit court of Tazewell county, Va., to foreclose his mortgage, and obtained a decree of sale May 14, 1851. The land was sold by Joseph Stras, commissioner, and purchased by Michael Bouvier. The sale was confirmed October 6, 1851; but the deed to Michael Bouvier was not made by Stras, commissioner, until October 16, 1852. By this deed he conveys the two tracts of 320,000 and 480,000 acres to Michael Bouvier, reserving the Beck 50,000 acres.

It is worth noticing that the persons most largely interested in these lands at this time all lived in Philadelphia—Mr. Bouvier, a merchant or manufacturer; Mr. Herman, a druggist; and Eustache Bouvier was a resident of that city, although it does not appear in what business he was engaged. David S. Hollister was also a resident of Philadelphia. This agreement of October 16, 1847, was acknowledged by them in Philadelphia before the same justice of the peace, and the agreement of April 27, 1848, was acknowledged by them in Philadelphia before a commissioner, together with their wives.

Between the time of the sale to Bouvier under the foreclosure proceeding in May, 1851, and the making of the deed to him by Stras, commissioner, October 16, 1852, a survey was made of these two tracts of land by Henry B. Harman, surveyor; that is, the 320,000 acres and the 480,000 acres. It is clearly shown by correspondence between John Herman and Henry B. Harman that this survey was made under the direction of John Herman. It was made in order to carry out the agreement of December 7, 1850, to ascertain whether there was more or less than 750,000 acres to be divided under that agreement, and to enable them to make the division called for in that agreement. According to this correspondence, John Herman had Mr. Harman survey, first, the 320,000 acres, and he was greatly astonished when it developed that it contained only 40,000 acres. He then had him survey the 480,000-acre tract, and it was found to contain only something like 80,000 acres. Then in a letter from Herman to Harman, dated March 24, 1852, Herman directs Harman how to lay off the 157,500 acres remaining after the Beck 50,000 acres had been laid off. He says:

"But as there is but 157,500 in all, this is to be divided into 150 parts, of 1,050 acres each; that is to say:

To the owner of 60 parts.....	63,000 acres
To the owner of 35 parts.....	36,750 acres
To the owner of 17 parts.....	17,850 acres
To the owner of 15 parts.....	15,750 acres
To the owner of 15 parts.....	15,750 acres
To the owner of 8 parts.....	8,400 acres

150 157,500 acres

"Which, according to agreement, is to be divided thus:

* * * * *

"You can see that I have not gone into any exact calculation with the above diagram, but merely to show where the several lines are to run and

the number of acres each parcel is to contain. I have no desire to hurry you, but we would very much like to have the survey by the beginning of May, as by that time Mr. Bouvier expects to receive the deeds which are to be confirmed by your court at the May session.

"In order that you may make *sare*, doubly *sare*, I wish you would begin your survey at your beginning corner—that is, the N. W. corner of the large tract—and run all around the 63,000 acres, then around the 36,750-acre tract, then the 8,400, and so on to all. In giving the bounds, please note the exact points of distances at which rivers and creeks are crossed, and, if not too much trouble, please note about the location of the different settlers, thus (x) within the survey, the kind of general quality of timber, soil, or land, whether hilly, stony, barren, or good along the different lines, of such information as you may easily obtain and that would be interesting to the owners, *and that would be interesting to the owners*, as the location of large or small water powers and of any good locations for mining coal along the rivers or creeks, please note the place."

In a letter which he had written to Harman on February 27, 1852, in speaking of the division which he wanted made, he says:

"In a former letter I wrote you that some of the parties interested had not and did not seem willing to pay me their proportion of the expense of your survey, and I think I requested you not to give any one a copy of the survey which was made at my expense, which I fear some one would be mean enough to try to get of you. However, the several owners have agreed to have the land surveyed and divided into these several proportions; but you say that you will not make a survey, without some one authorized to go with you. The resurvey I wish you to make is not upon the field, but from your field notes of the former survey, that was made in detached parts."

Harman made this survey and laid off the several parts actually on the ground, as appears from the deeds which were afterwards made by Bouvier, as they show the character of the country and the objects which he passed in laying out these different parcels. There was a delay on the part of Michael Bouvier in making deeds to the various parties in accordance with the agreement of December 7, 1850, after he had received the deed for all the land from Stras, commissioner. This delay is explained in a letter from Herman to Henry B. Harman, dated April 22, 1853, as follows:

"At long last I received by deed from Mr. B. for any portion of the land, he had refused to sign one without signing all, and the New York parties had refused to acknowledge your survey, and insisted upon having *there* deeds for their proportion part of the 750,000 acres, as they only wanted to sell, such a deed would answer *there* purpose better."

But evidently all parties finally acquiesced in the survey, and, on the 9th day of March, 1853, Michael Bouvier made deeds to all of the parties interested, except Eustache Bouvier and William A. Bull. These deeds from Mr. Bouvier were as follows: March 9, 1853, to John Herman, for 63,000 acres; March 9, 1853, to John Herman, for 17,850 acres; March 9, 1853, to Oakes Terrill, for 15,750 acres; March 9, 1853, to Richard Warren, assignee of Edwin C. Searles, for 15,750 acres.

After these deeds were made there remained in Michael Bouvier the tract of 36,750 acres, originally assigned to Eustache Bouvier, and the 8,400 acres assigned to William A. Bull. It clearly follows from this transaction that William A. Bull failed to make settlement for his interest in the time allowed, or at any time, and that Michael Bouvier retained the legal title to the Eustache Bouvier 36,750 acres and the Bull 8,400 acres in himself, for his own use and benefit, as he had the right to do under the agreement of December 7, 1850, and this is admitted, and not denied, by any one in this cause.

These deeds from Michael Bouvier to these various parties, Richard Warren, John Herman, and Oakes Terrill, are set forth in full as exhibits with the original answer of Howard H. Sypher. (Pages 19 to 40 of his printed answer.) They all contain similar language, and show that they are based upon this survey made by Henry B. Harman. The language used is this in the Herman deed, for instance:

"All that certain tract or piece or parcel of land, situate in the county of Tazewell, in the state of Virginia, bounded and described agreeably to a

recent survey made thereof by Henry B. Harman, surveyor, October, 1852, as follows, to wit: "Beginning," etc., referring to the different divisions, and concluding, after the courses and distances, as follows: "Containing by estimation according to said Harman's survey of 1852 seventeen thousand eight hundred and fifty acres of land (being part of 750,000 acres of land, which 750,000 is part of two certain tracts of land, one of them containing 480,000 acres patented to Robert *Robert Morris* by the commonwealth of Virginia by patent dated the 23d day of March, 1795, and recorded in said county, and the other of them for 320,000 acres patented to Robert Morris aforesaid by patent dated the 4th day of March, 1795, and recorded in said county, and the said two tracts of land as aforesaid contain by the original patents 800,000 acres, 50,000 acres hereof by actual survey, having heretofore been conveyed, according to the above survey by Henry B. Harman the 750,000 acres are found to contain only 157,500 acres. It being intended hereby to convey to the said John Herman, his heirs and assigns, $\frac{17}{150}$ parts of the said 750,000 acres, he the number of acres more or less, whichever survey be correct, which said last survey of Henry B. Harman (if the same be correct) contains as above computed 157,500 acres, and being part of the same premises which Joseph Stras, commissioner, by the circuit court of Tazewell, by indenture dated the sixteenth day of October, 1852, recorded in Tazewell county in Deed Book No. 10, page 448, etc., granted and conveyed unto the said Michael Bouvier in fee."

The correspondence between John Herman and Henry B. Harman shows that, after he received his deeds for the 63,000 acres and the 17,850 acres, John Herman took possession of and visited these tracts of land, and that at least on one occasion Michael Bouvier went with him, and he speaks of Mr. Bouvier's lands, his interest in and ownership of these lands over there. It also appears that Herman sent his deed to Harman and requested him to place it on record, and he afterwards complains that the clerk had not sent his deed back to him, and he is uneasy about it. These deeds from Michael Bouvier constitute the foundation for the present title of the holders of the several tracts of lands which were conveyed by them. Dr. William R. Iaeger testifies that he is the present owner of the 17,850-acre tract, being the tract known as the "Burkhardt tract," and one of the tracts originally conveyed to John Herman. He is also the owner of the 15,750-acre tract originally conveyed to Oakes Terrill, and that he for a number of years lived on this tract of land. These two tracts now belong to the Iaeger estate. It is shown that the 50,000 acres originally conveyed to Beck is the tract known as the "Buck and Kimes" tract.

On the 7th day of January, 1865, Michael Bouvier and wife conveyed to Patterson, Ridgeway, and Bolton the tract of 36,750 acres originally assigned to Eustache Bouvier. This is stated to be in consideration of the sum of \$65,000 lawful money to them in hand well and truly paid. This tract of land, as shown by the evidence, is the tract known as the "Lasher land," at present held by Lasher, Whelen, and others, successors in trust to Patterson, Ridgeway, and Bolton. This left the 8,400 acres, which was set apart for William A. Bull, still in the hands of Michael Bouvier.

Let us trace the history of these several tracts of land after 1853. From the year 1859 to 1870, both inclusive, Michael Bouvier, of Philadelphia, was assessed with 45,150 acres in McDowell and Wyoming counties. This is exactly the aggregate of the Eustache Bouvier tract of 36,750 acres and the William A. Bull tract of 8,400 acres. The deed from Bouvier to Patterson, Ridgeway, and Bolton, which is dated January 7, 1865, was probably not recorded until 1869. From the year 1871 to 1876, Michael Bouvier is assessed with 8,400 acres, and Patterson, Ridgeway, and Bolton with 36,750 acres. For the years 1875 and 1876 the 8,400 acres was delinquent in the name of Michael Bouvier, was sold to the state, and subsequently redeemed in 1893, and restored to the land books in 1894, with back taxes for two years, and the taxes have been regularly paid on it since that time in the name of Bouvier's heirs up to 1907. The 36,750 acres was assessed to and taxes paid on it by Patterson, Ridgeway, and Bolton and their successors in trust from 1871 to the present time.

Michael Bouvier died June 9, 1874. On August 31, 1865, Michael Bouvier wrote a letter to John Herman, filed with the deposition of M. C. Bouvier, telling Herman that certain parties were coming to look at his land in West Virginia and asking Herman to give them such information as he could. This letter was found among the papers of Col. G. W. G. Iaeger, and the proof is sufficient to show that Col. Iaeger got this letter, with a large number of other papers relating to the title to these lands, from Henry B. Harman, with whom John Herman was in communication at this time, and it is a fair inference that Herman sent this letter with the persons mentioned by Mr. Bouvier to Henry B. Harman, and necessarily that it related to the 8,400 acres in McDowell county. Michael Bouvier had lived in Philadelphia with his wife and three daughters up to the time of his death.

On June 20, 1890, a letter was written in the name of Josiah R. Sypher, an attorney at Philadelphia, to M. C. Bouvier, manifestly in the handwriting of the defendant, Howard H. Sypher, stating that he had important papers in his possession, showing that the estate of Michael Bouvier had the title to this 8,400 acres, and in a letter from Josiah R. Sypher to M. C. Bouvier, dated July 2, 1890, he says: "I have found, upon examination of the records and papers, that your father still owned the tract of 8,400 acres in West Virginia at the time of his death." And he says that proceedings are under way to sell the land for the benefit of the school fund, but that it can yet be redeemed, and he advised Mr. Bouvier to redeem the land for the benefit of his father's estate, and in subsequent letters, dated August 4, 1890, and October 13, 1890, he shows the progress made in proceedings for redemption. In a letter dated December 26, 1890, he shows that the deed from Michael Bouvier to Patterson, Ridgeway, and Bolton did not affect the title to the 8,400 acres, but that that property still stood in the name of Michael Bouvier. In a letter dated June 20, 1891, in the handwriting of Howard H. Sypher, Josiah R. Sypher says that he has in his possession papers which he thinks will show title in Michael Bouvier at the time of his death to the 8,400 acres in West Virginia. And in a letter dated October 14, 1891, also in the handwriting of Howard H. Sypher, he notified Mr. Bouvier that the land had been redeemed. And in a letter dated May 5, 1894, to John Vernou Bouvier, from Sypher & Sypher, they give an account of the survey of the 36,750 acres and of the running of the common lines between that tract and the 8,400 acres, and that they had notified Col. Iaeger that they intended to survey the 8,400 acres in a short time, and that there is no doubt that it will overlap the Iaeger tract, and that such overlapping would be subject for adjustment in an amicable negotiation, etc.

P. W. Strother, one of the counsel for the defendants in this suit, was employed by Sypher to conduct the redemption proceedings and in other ways in connection with these lands, and Mr. Bouvier paid him a fee of \$500 for the services rendered, as shown by the letter of Josiah R. Sypher, dated May 20, 1895. On October 1, 1895, Mr. Sypher writes to Mr. Bouvier that one Ritter, who has a sawmill on Elk Horn, is cutting and removing timber from his tract in McDowell county, and advises that an injunction be gotten to restrain him in his depredations. The heirs of Michael Bouvier brought suit in ejectment against Edward Hopkins, W. G. S. Jones, and others in the Circuit Court of the United States for the District of West Virginia, at Charleston, on the _____ day of _____, 189_____, to recover portions of this 8,400 acres claimed by the defendants. (See Exhibit Smith No. 15, filed with the deposition of Harrison B. Smith). Suit was brought by the firm of Couch, Flournoy & Price, of Charleston, W. Va., and Sypher & Sypher, of Philadelphia; the defendant Howard H. Sypher being one member of the latter firm.

It is shown that there was a conflict, or an apparent conflict, between the boundaries of the Iaeger 150,000-acre tract and this Bouvier 8,400 acres, and that Mr. S. L. Flournoy had been counsel for both of these parties in other matters, and through him a compromise was effected, by which the southern portion of the 8,400 acres was conveyed by the Bouviers and Iaeger to S. L. Flournoy, trustee, and by him conveyed to a corporation under the name of the Bouvier-Iaeger Coal Land Company, the plaintiff in this case; one-half of the stock being taken by the Bouviers and one-half by Iaeger.

This transaction took place in the years 1902 and 1903. Ever since that time the Bouvier-Iaeger Coal Land Company has exercised control over the portion of the said 8,400 acres conveyed to it, and leased portions of it for coal mining purposes, has sold and disposed of other portions, has exchanged some portions for other lands, has sold timber upon it, and the same has been cut and the purchase money paid. It has been assessed on the land books of McDowell to the plaintiff, and in a great many other ways it has exercised full ownership and control of it. It is therefore clear from these facts that from 1853, when Michael Bouvier made deeds to the other claimants, to the present time, he and those claiming under him have claimed title, paid taxes, and exercised acts of ownership in almost every way conceivable over the lands affected in this suit—that is, the 8,400 acres—and his title has been recognized by John Herman, by the defendant Sypher and his father, and by the heirs of Mr. John Herman, including the defendant, Cornelia M. Herman, at all times up to the year 1906. This is shown by the correspondence between Herman and Bouvier, between Herman and Harman, between Sypher and Bouvier, and by the deeds made by Herman and his heirs.

History of the Herman Tracts.

It seems that at the time Michael Bouvier conveyed to Herman the two tracts, one of 63,000 acres and the other of 17,850 acres, Herman gave his notes, and to secure the payment of the same gave mortgages on each of these tracts to Mr. Bouvier. The mortgage on the 63,000-acre tract was for \$2,421. Bouvier assigned this mortgage to Theodore S. Williams in November, 1855, and Williams assigned it to Crosby S. Noyes January 1, 1867, and after John Herman's death, which occurred in 1866, said Crosby S. Noyes brought suit against the heirs of John Herman, Michael Bouvier, and others on the 15th day of January, 1869, for the foreclosure of his mortgage, and on March 26, 1870, in this proceeding, a decree of sale was entered, and the land was subsequently sold under this decree and purchased by Crosby S. Noyes, and by him the title has passed to the present owners. Herman also gave a mortgage to Bouvier on the 17,850 acres, and Bouvier assigned this mortgage to George J. Burkhardt. Herman, in the meantime, had conveyed the land to his son, Theodore A. Herman, subject to the mortgage. George L. Burkhardt brought suit in 1867 to foreclose this mortgage, and on the 8th day of May, 1867, a decree of sale was entered, and the land was sold to said Burkhardt, and a deed made to him, dated February 8, 1868, by the special commissioner. This land has been known as the "Burkhardt tract" of land ever since, and was involved in the suit of Sayers v. Burkhardt, 85 Fed. 246, 29 C. C. A. 137, in which the Burkhardt title was established as against certain third parties.

The tract of 36,750 acres, which was sold by Mr. Bouvier to Patterson, Ridgeway, and others for \$65,000 in 1865, was also the subject of litigation in the case of Boulton, Lasher and Others v. McCreary and Others, 66 Fed. 834, which went to the United States Circuit Court of Appeals from this court. Certain portions of these lands had been sold by the commissioner of school lands by a proceeding against the original title, and the court, in this suit, set aside these deeds and proceedings, and established the title of Boulton, Lasher, and others derived from Bouvier. In this suit Josiah R. Sypher appeared as counsel for the Lasher trustees, along with the firm of Flournoy, Price & Smith, and it appears from the testimony of Mr. Smith that these attorneys obtained an interest in the lands, and that he is collecting funds on account of that interest, and is still paying them over to the widow and heirs of Josiah R. Sypher, one of whom is the defendant Howard H. Sypher.

As we have seen, the Oakes Terrill tract passed to Col. Iaeger, and is now owned by his heirs. The Thomas Beck tract of 50,000 acres passed to Max Lansburg.

So far as the records of McDowell county disclosed, there was no claim of any kind on the part of John Herman, or his heirs, or any one else, except certain adverse claimants, squatters, or others to this 8,400 acres, as against the Bouvier title, until the year 1877. On the 24th day of May, 1877, the deed, which is claimed to be a forgery in plaintiff's bill in this case, was

recorded in the county court clerk's office of McDowell county. The original of that deed has not been produced and cannot be found, and never has been seen by any of the parties interested in this cause. According to the record, it is a deed dated the 10th day of November in the year of our Lord 1858, between Michael Bouvier and Louwesa C., wife, and Thomas Beck, widower, and David S. Hollister, unmarried, parties of the first part, and John Herman, party of the second part, purporting, in consideration of \$1 and other valuable considerations, and in order to invest the title to the land in the said John Herman, party of the second part, in order that he may sell and dispose of the same to a better advantage, to convey all the interest of the said parties of the first part in the two tracts of 480,000 acres and 320,000 acres. And it contains the following warranty: "And the said parties of the first part does hereby covenant and agree to and with the said party of the second part that at the time of the delivery hereof the said parties of the first part are the lawful owners of the premises above granted, and seized thereof in fee simple, absolute, and that they will warrant and defend the above granted premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever." It purports to be signed by *M. Bouvier and Louwesa C. Bouvier and David S. Hollister*, and purports to have been acknowledged by *Michael Bouvier and Louisa C. Bouvier*, his wife, and by Thomas Beck and David S. Hollister, before S. C. Perrin, clerk Kenton county court, Kentucky.

On the margin of the deed book is this memorandum: "This deed was mailed to S. S. Marsh, care H. T. Basford, P. O. Box 3476, New York, June 29/77." There is no evidence to show who presented this alleged deed for record, unless the inference is to be drawn that it had been sent by S. S. Marsh, to whom it is returned. No attempt was made on the part of the defendants to account for the recording of this deed, or for the original, or to give any account of Marsh or Basford in any way. The plaintiffs made diligent search and inquiry for these people, and were informed by a man in New York that Basford was a lawyer and Marsh was a clerk, but nothing was found in regard to this deed, though the informant had heard something said about some claim to West Virginia lands.

It appears that S. C. Perrin was elected clerk of the county court of Kenton county, Ky., in August, 1858. *He died on the 24th day of May, 1876*, before this deed was recorded. At the time, therefore, this alleged deed was recorded, both Michael Bouvier and his wife were dead, John Herman and his son, Theodore A. Herman, were dead, and S. C. Perrin, the clerk before whom it is claimed to have been acknowledged, is also dead. Beck had parted with all his interest in these lands in 1847, and Hollister had conveyed his interest away to Hamilton, and it had passed to Searles before 1853. Bouvier had conveyed all these lands, except the 8,400 acres, and Herman had, in his lifetime, conveyed his two large tracts of 63,000 acres and 17,850 acres to a corporation of which he probably held the stock, and his heirs had permitted them to be sold under his mortgages, which he gave to Bouvier in 1853. No claim of any kind had ever been asserted by Herman or his heirs to this 8,400 acres, or to any part of the original tracts, except the two tracts of 63,000 and 17,850 acres. After this deed was put on record, the 8,400 acres was not assessed to Herman, or his heirs or devisees. No attempt was made to take possession of it, or assert title to it, in any way. Nothing was done about it, except merely to record the deed, until 1906. On the contrary, there is evidence in the record, which cannot be disputed by either Cornelia M. Herman or Howard H. Sypher, that the heirs of John Herman did not claim title to this 8,400 acres, but admitted that the title to it was in the devisees of Michael Bouvier.

The evidence shows that in a suit, known as the "King suit," the location of the boundaries of the King tract adjoining the 480,000-acre tract, was involved. King was seeking to get the court to hold that the bounds of his tract extended beyond the limits fixed in the H. B. Harman survey of the 480,000 acres. And the idea in bringing this suit for Cornelia Herman was that, if the King tract was thus extended, the adjoining line of the 480,000 acres would be extended with it, as they were coterminous, and it would thus embrace a large body of land which had not been included in the Har-

man survey, and Miss Herman would be entitled to $\frac{77}{150}$ of such additional land. It will be remembered that in the deeds made by Michael Bouvier to the various persons, after the Harman survey, it was provided that they should have a certain percentage of whatever lands were embraced in these two large surveys, if it should turn out that there was more than 207,500 acres. In order that the heirs of John Herman might get the benefit of such an extension of the boundaries, if it should be made, his daughter, Cornelia M. Herman, one of the defendants in this cause, employed Josiah R. Sypher, the father of the other defendant, Howard H. Sypher, and Flournoy & Mollohan to bring such suits as might be necessary to establish her rights to any such excess, on a contingent fee, and Josiah R. Sypher, in July, 1895, wrote to S. L. Flournoy the following letter:

"Your letter of the 1st received, and contents noted. John Herman died some 25 years ago, leaving surviving him his widow, one son, and two daughters. The son and one of the daughters have since died unmarried, leaving the widow and one daughter, Cornelia M. Herman, the only heirs at law. I have the consent of these to bring the suit in their names; that is, Mary Ann Herman, widow and executrix of the estate of John Herman, deceased, and Cornelia M. Herman, daughter of John Herman and Mary Ann, his wife, citizens and residents of Philadelphia. You or Mr. Meloney may sign the bill as attorney for the complainants. You perceive that it makes no difference whether the father deeded the property to the son, as the death of the father and son reunited the inheritance in the mother and daughter. The father deeded the 17,850-acre tract to the son, Theodore Herman; but the larger tract of 63,000 acres remained in the father until the time of his death.

"Michael Bouvier died in 1874 (?), having appointed Francis A. Drexel, John V. Bouvier, Michael C. Bouvier, and Zenaide S. Bouvier, executors and trustees of his estate. Francis A. Drexel has since died, leaving his successors to administer the estate. The heirs now living, in New York, are John V. Bouvier, Michael C. Bouvier, Miss Zenaide S. Bouvier, Miss A. E. Bouvier, Miss M. H. Bouvier, in Philadelphia, Mrs. Theresa E. Patterson, widow, Mrs. Mary L. Walsh, wife of Charles Walsh, Mrs. Louisa B. Ewing, wife of Bernard N. Ewing, and Miss Elizabeth C. B. Dixon.

"The Oakes Terrill, Jr., tract of 15,750 acres now belongs to Dr. Wm. R. Iaeger. I have not been able to learn as yet whether Terrill conveyed the excess to his grantees or not. Oakes Terrill is still living and resides in New York City. Richard Warren I find conveyed to Lissack H. Simpson one-half the tract of 15,750 acres, including the provisions for the larger survey, and Simpson sold to McCormick, and it is quite possible that he included the outlying tract. I should say that Lissack H. Simpson died, and S. L. Simpson conveyed the lands to McCormick. If the extra allotment was conveyed to McCormick, it will give us a substantial party in the suit. I will endeavor to see him and advise you by telegraph.

"This includes the entire list of the original grantees. The tract of 8,400 acres was to have been conveyed to Wm. A. Bull; but he failed to comply with the terms of the agreement, and it remained in Michael Bouvier. I enclose you copies of an abstract of Irwin's title, and also a brief from Michael Bouvier to Henry I. Morris, which is the beginning of the fraudulent conveyance.

"Very truly,

J. R. Sypher."

And on the 29th day of July, 1895, Sypher procured Mary Ann Herman and Cornelia M. Herman to make a deed to him and Wesley Mollohan and S. L. Flournoy for an undivided one-half interest in the 320,000 and 480,000 acre tracts, stating:

"The interests now vested in the parties of the first part in the said two tracts of land are seventy-seven one hundred and fiftieths ($\frac{77}{150}$) undivided parts, or the portions thereof which were not conveyed away by the said John Herman in his lifetime to persons other than the said Theodore Herman; and it is the object and intent of the parties of the first part to convey, and they do hereby grant and convey, unto the said parties of the second part, one-half undivided of all their right, title, interest, and claim, of every kind and however derived, in, of, and to said two tracts of land, to be held and owned by said parties of the second part equally as between themselves.

Reference is here had, for further description of said lands and of the interests hereby intended to be conveyed, to two certain deeds from Michael Bouvier and wife to John Herman, bearing date on the 9th day of March, 1853, and recorded in the county court clerk's offices of Tazewell county, Virginia, and Wyoming county, West Virginia, respectively."

The signatures of Cornelia M. Herman and Mary Ann Herman to this deed were witnessed by William H. Burkhart, who subsequently figures as the attorney in fact, by whom, in 1906, a deed was made to Howard H. Sypher, and under which he now claims title through this alleged deed of 1858. It will be noticed that in this deed the foundation of the title of the widow and heirs of John Herman is stated to be the two deeds which Michael Bouvier made in 1853 to John Herman. No mention is made of the alleged deed of 1858, which had been recorded in 1877, and it will be noted that they only claim $\frac{77}{150}$ of the two tracts, which is the original proportion allotted to them on the division after the purchase by Bouvier, and therefore does not include the Bull interest of $\frac{8}{150}$. In other words, if at this time they were claiming the 8,400 acres, they would have stated their interest to be $\frac{85}{150}$, instead of $\frac{77}{150}$.

In pursuance of their employment above mentioned, a bill was filed by the attorneys mentioned, in the name of Mary Ann Herman and Cornelia M. Herman, in the circuit court of McDowell county, against Jesse R. Irwin, the Bouviers, Simpsons, Pattersons, and a number of other people, in which a claim is made to $\frac{77}{150}$ parts of the surplus over and above what was conveyed to them under the Harman survey. The history of this title is fully set out in this bill. It is stated that William A. Bull and Eustache Bouvier had failed to pay their respective portions of the debt and costs to Michael Bouvier, and that "the said Michael Bouvier elected, as he had the right to do under the agreement, to keep the same, the shares of said land allotted to said Bull and Eustache Bouvier, for himself, and therefore made no conveyance of said shares until many years afterwards," etc.

The bill further contains this language: "And the plaintiff says that upon the execution of the deeds aforesaid the said John Herman became the owner in severalty of the two tracts of 63,000 acres and 17,850 acres, the said Oakes Terrill, Jr., the owner in severalty of the tract of 15,750 acres conveyed to him, the said Richard Warren the owner in severalty of the tract of 15,750 acres, and the said Michael Bouvier the owner in severalty of the two tracts of 36,750 acres and 8,400 acres, and all the rest and residue of said 480,000 acres not embraced or included in the boundaries of the said six several tracts, or either of them, remained unpartitioned and in common, and title thereto vested in the said John Herman, Oakes Terrill, Jr., Richard Warren, and Michael Bouvier, as tenants in common, the same being owned by them in the following proportions, to wit: John Herman, $\frac{77}{150}$ thereof; Oakes Terrill, $\frac{15}{150}$ thereof; Richard Warren, $\frac{15}{150}$ thereof; and Michael Bouvier, $\frac{43}{150}$ thereof."

And it is set out in various ways that these heirs of John Herman were tenants in common with the heirs of Michael Bouvier and the other parties mentioned in any surplus that might be found over and above the Harman survey. And then the bill contains this statement: "Michael Bouvier departed this life in the year 1881, in the city of Philadelphia, leaving as his heirs at law and devisees John V. Bouvier, Michael C. Bouvier, Zenaide S. Bouvier, Louise A. Bouvier, A. E. Bouvier, M. H. Bouvier, Theresa Patterson, Mary L. Walsh, Louise B. Ewing, and Elizabeth B. Dixon, and as the executors and trustees of his estate the said John V. Bouvier, Michael C. Bouvier, and Zenaide S. Bouvier, and all the rights, titles, and interests of the said Michael Bouvier in said lands are now vested in said parties as the heirs at law of the said Michael Bouvier, or as devisees and executors under his will, which has been recorded in said county of McDowell."

The attorneys' names signed to this bill are Couch, Flournoy & Price, Molohan & McClintic, and Sypher & Sypher; the defendant Howard H. Sypher being a member of the last-named firm.

In addition to this suit a petition was filed in the chancery cause pending in this court of State of West Virginia v. Alexander McClintic and others, by Cornelia M. Herman, in which the title to a part of the 480,000-acre tract

would be involved if the boundaries were extended as above mentioned, and in this case the same facts are related and the same claim and theory asserted.

The deed to Sypher, Mollohan and Flournoy, for a one-half interest, made by Mary Ann Herman and Cornelia M. Herman, was never recorded, being held to await the result of the King litigation. King failed to establish the boundaries he claimed, and the suit and partition above mentioned, it seems, were therefore not pressed; but the original deed is still held by the attorneys above mentioned for a one-half interest.

In the course of time it seems that Josiah R. Sypher died, and that after his death in 1906 his son and late partner, Howard H. Sypher, had the following papers recorded in McDowell county, namely:

A power of attorney from Cornelia M. Herman to William Henry Burkhardt, authorizing him to collect moneys, execute notes, bonds, and other instruments, sell any real estate of which she is now seised, execute and acknowledge any deeds, leases, or other assurances that he may deem expedient in her name, and to compromise any litigation, disputed claims, etc. This power of attorney is dated October 25, 1905, and was recorded April 27, 1906.

The next paper is an agreement, dated June 27, 1906, between Cornelia M. Herman, acting by William Henry Burkhardt, her attorney, and Howard H. Sypher, by which she employs said Sypher to take the necessary steps to perfect her title for the undisputed possession of certain lands in McDowell, Raleigh, Wyoming, and Boone counties, W. Va., and agrees to convey him a one-half interest in said lands for his services.

The next paper is a deed, dated June 27, 1906, from Cornelia M. Herman, by William Henry Burkhardt, her attorney, to Howard H. Sypher, conveying, in consideration of \$1 and other good and valuable considerations, an undivided half interest in the two tracts of 480,000 and 320,000 acres, describing them at great length by metes and bounds, and giving the manner in which she claims under her father, John Herman, and her deceased mother and brothers and sisters. This is the same William Henry Burkhardt who witnessed the deed made by Cornelia M. Herman and Mary Ann Herman to Flournoy, Mollohan and Sypher for a one-half interest in these lands.

The next paper is a contract, by which Howard H. Sypher employs Judge P. W. Strother, in consideration of a contingent fee of \$15,000, to attempt to recover these lands. After these papers were recorded, Howard H. Sypher attempted to and took steps to get into possession of this 8,400 acres, and as soon as this was done the present suit was brought by the plaintiffs, the object of which is to set aside and declare the alleged deed of 1858 from Michael Bouvier to John Herman to be a forgery.

In this connection it is proper to call attention to a deed, dated February 12, 1866, from Josiah R. Sypher and wife to Theodore A. Herman, by which, in consideration of the sum of \$15,000, Sypher and wife convey to Theodore A. Herman an equal undivided half in the tract of 17,850 acres, which was conveyed to John Herman by Michael Bouvier by deed of 1853, and which, as stated in this deed, was conveyed to the said Josiah R. Sypher by John Herman and wife, by deed dated April 7, 1865, and intended to be forthwith recorded. This last-mentioned deed does not seem to have been recorded. This fact is mentioned as showing that Sypher represented John Herman with reference to these lands before his death, as this deed shows a conveyance by John Herman to Sypher in 1865; whereas, John Herman did not die until January 1866. Michael Bouvier died in 1874, and his wife in 1872.

It is proper to call attention to certain features of the alleged deed of November 10, 1858, which is attacked in this case as a forgery. The first is that it is dated in 1858, but not recorded until 1877, 19 years after its alleged date, and no explanation is found as to why it was not recorded, if it were in existence. The names of Michael Bouvier and his wife are misspelled throughout, and there are a great many other words misspelled, the same word being spelled differently in different places in the deed. In the caption, the grantors are given as Michael Bovier and Louisa C., his wife, and Thomas Beck, widower, and David S. Hollister, unmarried. The deed does not profess to be signed by Thomas Beck, but purports to have been acknowledged by him. It is signed by David S. Hollister, and also acknowl-

edged by him. It would be inferred from this caption that David S. Hollister was never married, because, if he had been and had lost his wife, he would have been spoken of as a widower, just as Thomas Beck was. The fact is, as the deeds filed in this case show, David S. Hollister had been a married man; his wife being named Mary Ann. The certificate of acknowledgment concludes as follows: "Witness my hand and official seal the day and year first above written. S. C. Perrin, Clerk Kenton County Court, Kentucky." And on the margin of the record there appear the words "Official Seal." It does not purport to be the seal of the county court, and so far as the record discloses there is no way of determining what kind of a seal it was.

The evidence shows that Beck's 50,000 acres was not an undivided interest, but was laid off to itself, and had been considered a distinct parcel of land ever since the deed to him, and there could be no pretense that he had any interest in the 480,000 and 320,000 acres, in connection with Bouvier and Hollister. Hollister's interest had been conveyed to Hamilton in 1848, and by Hamilton to Searles in 1849, and Searles had participated in the agreement of December 7, 1850, providing for the sale of the land and its purchase by Bouvier, and under that agreement deeds had been made to Terrill and Warren. The deed professes to convey the interest of the grantors in the two original tracts of 480,000 and 320,000 acres. These tracts had, five years before the alleged date of this deed, been broken up and divided amongst the parties as shown.

Hollister was a Philadelphia man, along with Bouvier, Herman, and Sypher. Beck lived in Baltimore, as shown by the deeds. The deed professes to be upon consideration of \$1 and other valuable considerations, "and in order to invest the title to the land hereafter to be conveyed and described in the said party of the second part, in order that he may sell and dispose of the same to a better advantage, these presents are duly made."

Attention is called to the covenant of the grantors: "And the said parties of the first part does hereby covenant and agree to and with the said party of the second part that at the time of the delivery hereof said parties of the first part are the lawful owners of the premises above granted and seized thereof in fee simple absolute." Michael Bouvier was very careful, in making the deeds for portions of these lands under the agreement of December 7, 1850, to describe accurately the part conveyed, and to set forth how it was derived, and to give only a special warranty. The evidence shows that Michael Bouvier always wrote his name M. Bouvier, and that he was an intelligent man, who wrote and spelled correctly.

Place.

This alleged deed purports to have been acknowledged before the clerk of the county court of Kenton county, Ky., in 1858. The evidence shows that Kenton county is the county that lies opposite Cincinnati, Ohio, in which is the present city of Covington. In 1858 the county seat was Independence, a small town of 200 inhabitants, 12 miles out in the hills from Covington, 14 miles from the Ohio river. It was the only county seat at that time, and all the records of the court proceedings prior to 1860 are found in the clerk's office at Independence. In 1860 a branch county seat was established at Covington, but the records of 1858 are all at Independence. It was a hilly, limestone, agricultural country with no minerals or other special resources.

By agreement of parties, the age of Mr. Bouvier was stated to be 64 years, and Mrs. Bouvier 61 years in 1858. He was in delicate health, being afflicted with valvular trouble of the heart, from which he became unconscious at times, and was not permitted to travel by himself. Some of the family always went with him. Mrs. Bouvier never traveled from home, except on the rarest occasions and from necessity, and was subject to car sickness in a very distressing way when she traveled. At that time the route of travel to Cincinnati, or Kenton county, Ky., from Philadelphia, was by railroad to Pittsburg, and then through Ohio to Cincinnati, or by boat down the Ohio river. There were no sleeping cars or accommodations, and the custom was for passengers to travel from Philadelphia as far as Altoona, and stay there overnight, then go to Pittsburg, and then take one of the two routes through Ohio. The round trip might have been made, by making close connections, in four days, but that was manifestly almost impossible.

The evidence shows that Michael Bouvier and his family lived at 1240 North Broad street, Philadelphia, from 1854 until 1874; the family consisting of the father and mother and three daughters, Alexine, Mary, and Zenaide, and two sons, John Vernou and M. C. Bouvier. These three daughters have never married, and after their father's death they moved to New York, where they have lived ever since and are still living with their brother, M. C. Bouvier, who is also unmarried. These three ladies and their brother, John Vernou Bouvier, all testify, in most positive terms, that neither their father nor their mother ever went West at all. They were never in Cincinnati, or Covington, or Kenton county, Ky. Mr. Bouvier, with two of his daughters, went in 1857, the year the Philadelphia Bank failed, to Tazewell county, Virginia, by way of Richmond, to visit these lands. And when John was wounded during the war at Fairfax Court House, Mr. and Mrs. Bouvier and one or more of the daughters went to see him. A trip was taken by their mother once to Boston. These were the only trips taken by Mrs. Bouvier, and Mr. Bouvier was not permitted to travel without some one of the family accompanying him. The daughters lived closely at home. They were home bodies, occasionally went to the seashore for a few days in summer, but otherwise remained in the family, and they testify definitely with reference to November, 1858, that it is impossible that their father and mother could have taken a trip to Kenton county, Ky., without their knowing it, and that no such trip was taken.

John Vernon Bouvier, Price, Smith, Spillman & Clay, and Frank A. Harrigan, for plaintiff.

Holt & Duncan, for defendants.

KELLER, District Judge (after stating the facts as above). The bill prays that the deed of November 10, 1858, may be canceled as a forgery, and as a cloud upon the title of complainant. It is admitted that, except for said deed, the complainant has title to the land in controversy, and it is also admitted, in the answers of the defendants, Sypher and Cornelia Herman, that the complainant up to 1906 or 1907 had possession of and exercised acts of ownership over the lands involved, and received income therefrom. After the long and detailed statement made, I do not feel it necessary to do more than indicate very briefly my reasons for deciding this case in favor of the plaintiff.

These reasons group themselves into those that are based upon indicia that the deed of November 10, 1858, is, as alleged, a forgery, and those that go to show that, even if not a forgery, it was never completed by valid delivery, and hence is invalid as a source of title, and should be canceled under the prayer for relief contained in the bill. And the indicia of forgery group themselves into those which are evidenced by the deed itself (or, rather, its record, as the paper itself is not produced, and the defendants disclaim any knowledge whatever about it), and those evidenced by other facts or testimony.

Among the indicia of the first class I may name:

(1) In view of the state of the proved and admitted facts as to the title of the lands embraced in the two Robert Morris patents for 320,000 acres and 480,000 acres at the date of the purported execution of this deed, to wit:

(a) That Thomas Beck, at that time and for long prior thereto, had no interest therein; he having long theretofore received a deed for his 50,000 acres described by metes and bounds, and having prior to 1850 conveyed the same to H. Styles or J. A. Huber, as shown in the agreement of December 7, 1850; and

(b) That David S. Hollister, at the date of said deed, had no interest in said land, having parted with his interest therein to Edwin C. Searles and Oakes Terrill by assignment, and the Searles interest having been assigned to Richard Warren prior to March 9, 1853, and all of the Hollister interest having been actually conveyed by Bouvier and wife by metes and bounds by the deeds dated March 9, 1853, to Oakes Terrill and Richard Warren, respectively.

It is a matter throwing the gravest doubt upon the authenticity of this deed that Thomas Beck and David S. Hollister should have been named as grantors therein. Both Michael Bouvier, the remaining grantor, and John Herman, the purported grantee, as well as Beck and Hollister themselves, well knew that the two latter persons had no interest whatever in the lands mentioned in the deed, and that their former interests were owned in severalty by Styles or Huber, Terrill, and Warren, and, as to those interests, all the grantors knew they were conveying nothing, and the grantee knew he was receiving nothing. To hold this deed as other than a forgery convicts Beck and Hollister of attempted fraud, and Bouvier and Herman of participation therein.

(2) The fact that David S. Hollister is described in the deed as "unmarried" indicates that the parties who prepared this deed were not familiar with the facts, as in the trust deed made October 16, 1847, by Herman, Hollister, and Eustache Bouvier to Michael Bouvier and Thomas Rawlings, said Hollister is joined by "Mary Ann Hollister," his wife, and, while there is nothing in the record to show that she continued in life to the date of this deed, his description as "unmarried" does not comport with the facts.

(3) The apparent ignorance of the existence of the Harman survey, the Bouvier section deeds, and all of the changes of ownership from undivided interests to definite ownership of tracts by metes and bounds. In order to credit the recitals in this deed with common honesty, it is necessary to predicate to the scrivener and to the parties ignorance of these various changes; and this, as the statement shows, cannot be done as to *any* of the parties to this deed. John Herman caused the Harman survey to be made and received his two deeds for 63,000 acres and 17,850 acres, respectively. Michael Bouvier executed those deeds, and two others to Terrill and Warren for the Hollister interest.

(4) The careless and faulty wording of the deed itself, as compared with the extremely careful and painstaking deeds theretofore made by Michael Bouvier in all of his transactions concerning these same lands, all of which former deeds were evidently the handiwork of expert conveyancers.

(5) The astounding and unexplained and seemingly inexplicable fact that this deed, purporting to be made and signed by David S. Hollister, Michael Bouvier, and Louisa C., his wife, all three being residents of the city of Philadelphia, should have been carried to the village of Independence, Kenton county, Ky., 14 or 15 miles from the city of Cincinnati, and 11 or 12 miles from the railroad, to be acknowledged. Every other deed made by either of the three parties named was acknowledged in the city of their residence.

(6) The fact that the deed was not admitted to record until 1877, after the purported grantors, the grantee, and S. C. Perrin, the clerk of the county court of Kenton county, Ky., before whom the deed purported to have been acknowledged, were all dead, and hence could not be interrogated respecting the facts.

Among the indicia of forgery presented by facts or evidence outside the record of the deed itself, I note the positive evidence of living members of the Bouvier family that in the year 1858 neither Michael Bouvier nor Louisa C. Bouvier, the father and mother of the witnesses, and the alleged grantors in the deed, visited the state of Kentucky. This evidence, to my mind, was extremely convincing, coupled as it was with evidence as to the trip to Tazewell, Va., in 1857, and the reasons why the father never traveled unattended, and the mother seldom at all, except in cases of necessity, and taken with the other internal evidence to which I have alluded, and that to which I shall allude hereafter, leaves no doubt in my mind that neither Michael Bouvier nor Louisa C., his wife, acknowledged the deed of November 10, 1858, or was, on that date or in that year, at the county seat of Kenton county, Ky.

[1] At the hearing the point was attempted to be made that the evidence of the Misses Bouvier and others to show that their father and mother were not in Kentucky in 1858, and hence could not have acknowledged the deed of November 10, 1858, was inadmissible. This is not the law. It is always admissible to show that parties never appeared before the officer and acknowledged a deed. 1 Ency. of Law (1st Ed.) p. 160, and cases cited; Donahue v. Mills, 41 Ark. 421; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. St. Rep. 622. There is a wide distinction between this and the admission of an appearance before the officer, but a denial of the occurrence of certain of the material incidents recited in the certificate. In the latter class of cases it is generally held that the recitals in the certificate can only be impeached for fraud or imposition, and then only if the knowledge or notice of the fraud can be brought home to the grantee. 1 Ency. of Law, p. 160.

It would, indeed, be a most unfortunate state of affairs if it were to be held that parol evidence that the alleged grantors in a deed were not present before the officer named therein, and could not have acknowledged the same before him, could not be given in respect to an instrument which was never produced for record for 19 years after its purported execution, and not so produced until after every person connected with the alleged instrument was dead. And especially in a case where the sole evidence of its *existence* lies in the record so made after the lapse of 19 years, and where there is nothing to show that, even at the time of its recordation, the paper so recorded was or ever had been in the possession of the grantee named therein, nor that any claim was made under said instrument for 30 years after such recordation.

[2] Among the evidences repelling the presumption of the delivery of the deed, which would ordinarily arise from the fact of recordation, I may mention:

(1) The fact that the deed was not recorded until 19 years after its date. In *Equitable Mortgage Company v. Brown*, 105 Ga. 475, 30 S. E. 687, it was held that there is no presumption of delivery where it appears that the deed was registered after the grantor's death. See, also, *Hill v. McNichol*, 80 Me. 209, 13 Atl. 883; *Walsh v. V. M. Ins. Co.*, 54 Vt. 351; *Knolls v. Barnhart*, 71 N. Y. 474; *Ten Eyck v. Whitbeck*, 156 N. Y. 352, 50 N. E. 963.

(2) The absence of any claim by the grantee or those claiming under him for about 30 years after the deed was recorded, or nearly 50 years after its date. See cases above noted, and also *Marnix v. Riordan*, 75 App. Div. 135, 77 N. Y. Supp. 357 (1902).

(3) The fact that for all of said 30 years no taxes were paid by the descendants of the alleged grantee.

(4) The acts and conduct of the grantor subsequent to the date of the alleged deed are absolutely inconsistent with an intention on his part to execute and deliver the deed in question. His payment of taxes up to his death in 1874, and execution by him in January, 1865, of a deed for 36,450 acres of the land embraced in the deed of 1858, and his letter to John Herman, later in that year, in relation to his proposed sale of the remainder, are all utterly inconsistent with the execution and delivery of this deed.

(5) The acts and conduct of the alleged grantee and his descendants are also inconsistent with the valid delivery of this deed. Herman's actions in his lifetime were confined to those tracts of lands to which he had deed by metes and bounds. He never had these lands assessed to himself for taxes. It does not appear that he ever had possession of the deed, and the communication to him from M. Bouvier in 1865 negatives the idea that there had then been any delivery of such a deed to him, and he (Herman) died the next year. In 1894 or 1895, in the bill brought by Mary Ann Herman and Cornelia M. Herman against Jesse R. Irwin and others, the said plaintiffs only claimed $\frac{77}{150}$ of the alleged excess of the Morris grants above the acreage found by the Harman survey, and made the Bouvier heirs parties, and upon the last page of said bill it affirmatively appears that at that date (1895) said Mary Ann Herman and Cornelia M. Herman made no claim whatever to the land in controversy in this suit, although said deed of November 10, 1858, had then been on record for 18 years, but claimed only their alleged proportion of the alleged excess of the two Morris grants over the six tracts laid off in 1853, and of which the 8,400-acre tract in controversy was one (though not conveyed).

(6) The only knowledge that is afforded as to the custody of the paper that was recorded in McDowell county in 1877 is afforded by a notation on the margin of the deed book in these words:

"This deed was mailed to S. S. Marsh, care H. T. Basford, P. O. Box 3476, New York, June 29/77."

[3] Efforts have been made to ascertain the further history of the paper, as well as to ascertain what, if any, relation either of these persons sustained toward either the grantors or grantee under this deed, but without effect; so that there is nothing to show that this paper, either before or since its recordation, has ever been in any proper cus-

tody. Under these circumstances it seems that the bare record of the paper can certainly have no more force than the original paper, unrecorded, but produced and relied upon, could have. And as to the weight which would be given to it, in *Applegate v. Lexington, etc., Mining Co.*, 117 U. S. 255, 6 Sup. Ct. 742, 29 L. Ed. 892, Mr. Justice Woods, delivering the opinion of the court, says:

"The rule is that an ancient deed may be admitted in evidence without direct proof of its execution, if it appears to be of the age of at least 30 years, when it is found in some proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just ground of suspicion."

For the reasons herein indicated, a decree may be drawn in favor of the plaintiff, granting the relief prayed for in the bill.

THE H. F. DIMOCK.

(District Court, S. D. New York. March 28, 1910.)

SHIPPING (§ 209*)—PROCEEDINGS FOR LIMITATION OF LIABILITY—BOND FOR VALUE.

In proceedings for limitation of liability by the owner of a vessel which had been in collision, a bond for value given by petitioner must cover her value at the time she ended her voyage, and her then pending freight, and unadjudicated claims for salvage services and general average charges cannot be deducted from such value, although such expenses were incurred to enable her to complete the voyage, and are entitled to precedence over collision claims, since the collision claimants have the right to contest such claimed liens.

[Ed. Note.—For other cases, see *Shipping*, Cent. Dig. §§ 646-662; Dec. Dig. § 209.*

Limitation of owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

In Admiralty. Petition by the Metropolitan Steamship Company, owner of the Steamship H. F. Dimock, for limitation of liability. On exceptions to report of commissioner to ascertain value. Exceptions sustained.

The steamship above named collided with another vessel while on a voyage from New York to Boston, and received such injuries that she required the services of salvors. She succeeded, however, in completing her voyage and delivering her cargo in a partly injured condition. She then returned to New York, and there instituted proceedings for a limitation of liability. It was referred to a commissioner to ascertain her value for purposes of giving bond in the limitation proceedings. The report of the commissioner having been filed, this hearing was had on exceptions thereto.

Mr. Burlingham, for petitioner.

Mr. Kirlin and Mr. Brown, for claimants and exceptants.

HOUGH, District Judge (after stating the facts as above). It is admitted that, in order to ascertain the amount of bond to be given by

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

petitioner, the cost of repairs must be deducted from the sound value. The commissioner, however, has recommended that salvage and certain general average charges should also be deducted.

It cannot be denied that, in order to secure the limitation of liability provided by the statute, the shipowner must pay or secure "the value of the ship at the time her voyage was ended and the amount of her then pending freight." In this case the voyage of the Dimock did not end until her arrival in Boston. She encountered no disaster which terminated her voyage upon a reef, as in *Pacific Coast Co. v. Reynolds*, 114 Fed. 877, 52 C. C. A. 497.

Therefore the question is, What was the value of the ship when she arrived in Boston? It may be true—I think it is—that in order to reach Boston she incurred expenses, particularly for salvage, which are paramount to claims arising out of the collision that rendered salvors necessary. But such claims when the voyage ended existed only as maritime liens. The collision claims likewise so existed, and the fact that all lienors might not be of equal rank can make no logical difference either in the ownership of the vessel or her monetary value.

If salvage and general average claims are to be treated as diminishing the injured value of the vessel at her port of destination, no reason is seen why any other maritime lien of superior priority should not be treated in the same way, and the value for which the owner must give bond be considered only as that sum which remains for the collision (or other disaster) claimants after the payment or allowance of all prior liens. This is surely illogical. Suppose that, when the Dimock arrived at Boston, salvors had there filed a libel against ship and cargo—her owner could at once have filed his petition for limitation and the usual injunction would have stayed the salvage suit, and compelled salvors to come into the limitation proceeding. So, too, other claims ultimately brought into general average would have been compelled to prove against the fund arising from the sale of the injured vessel.

There is no difference in legal effect between surrender and sale through a trustee, and giving a bond or stipulation. Either the sale proceeds or the bond amount represents the vessel and the whole vessel just as she was when her voyage terminated, and against that whole all claims of whatever rank must be proved. It may be convenient—I think it is—where the amount of a claim is clear and its priority undisputed to allow payment in the first instance, and not compel such superior lienor to go through the formality of participating in a proceeding frequently cumbersome, sometimes extremely tedious, and almost always prolonged. But that convenience cannot become a principle of law. It seems to me that the cases referred to in argument do not, with the exception of one sentence in *The Abbie C. Stubbs* (D. C.) 28 Fed. 719, sustain the conclusion advocated by petitioner and adopted by the commissioner. In the case just cited, the Stubbs and the Perkiomen had been in collision. The latter vessel was wholly lost, and her owners proceeded against the Stubbs *in rem*. Both vessels were held in fault; and the Stubbs sold under the resulting decree. The latter's owners then moved to limit liability, apparently in the col-

lision suit. All parties were before the court, the entire value of the Stubbs was in court, and, after hearing, salvage and general average for cargo jettisoned were allowed as claims entitled to priority over the demand of the Perkiomen. It seems to me that this was right, but when Nelson, J., added that the allowed claims "stand on the same footing as repairs made after the collision," I think he went too far, if he meant that they bore the same relation to the sound value of the vessel. Repairs after collision are not included in appraised value because from the nature of things they are not and cannot be included in "injured value"; but salvage and general average charges are necessarily so included because it is only out of "injured value" that salvage and general average liens can be paid.

In *The Anna* (D. C.) 47 Fed. 525, the order actually made seems entirely consistent with the view above sought to be advanced. In that case the vessel was bound to a place called "Cohen's Landing." She sank before she got there, was raised and accomplished her voyage, and the court entered an order "for her appraisement as she was at Cohen's Landing with a separate statement of the cost of raising her and of the amount of freight earned." This means, as I take it, that the court reserved for future decision the question as to the reasonable value of raising the Anna and the allowance of such reasonable sum as a prior claim out of her injured value at the port of destination.

In *Pacific Coast Co. v. Reynolds*, *supra*, the voyage terminated upon a distant and unknown reef. Whatever value attached to the wreck was produced by salvors bringing it to port. By the time limitation proceedings were instituted the repairs, or more properly the rebuilding of the wreck, had been nearly or quite completed. No wreck existed, and the question presented to the court was, "What was the value of the steamship at the end of her voyage; that is, as she lay stranded on the reef?" a question which could only be settled by considering the value of the wreck at the port of distress whether she had been brought by salvors, and deducting therefrom the expense of bringing her into that port. The question there considered is the same as is presented here and in many limitations after collision; but the method of solution was peculiar—not because the law varies, but because the facts were unusual. There the only method of arriving at value when wreck terminated the voyage was to work backward and make deductions from a value found to exist in another port or place and long after such termination. That is not true here. In both the Stubbs and *Pacific Coast Co.* Cases there were no deductions from "injured value" before payment into court. In the former the whole injured value was in court. In the latter the only litigated question was how such value should be determined, but, once ascertained, it was never doubted that it should all be paid into the registry. If the record before the court showed that there had been an opportunity for all parties in interest to inquire into the actual value of the salvage services rendered the Dimock, and into the nature and amount of the other charges admitted in general average, it might be well to avoid circuity of procedure and at once allow such of these demands as appear para-

mount to all others, and then permit the owners (whose underwriters have really discharged said claims) to give bond for the balance, as divisible among collision claimants. But the record is not sufficient to enable this to be done, and an average adjustment cannot take the place of a "day in court."

The theory of procedure has been that salvage and general average are to be treated, not as claims or liens against the fund derived from or representing the injured value of the Dimock, but as something to be deducted before that value can be fixed. This on the reason of the matter I am convinced is error. The claimants must have an opportunity to contest salvage and average demands as they may contest any other lien against the fund. That opportunity they have not had. Nor, as above sought to be shown, do the cases cited militate against the view advanced, except the sentence from the Abbie C. Stubbs, declaring that the charges under consideration "stand on the same footing as repairs made after collision"—and from that statement of the law I dissent.

The argument for some of the claimants that, inasmuch as the petitioner owner itself employed the salvors, therefore the salvors' claim cannot participate in this limitation has not passed unnoticed. No finding on this point need now be made. If the salvors had a lien on the Dimock, that lien still exists against her proceeds. Whether or not they had such lien is one of the questions that may be raised, and, if raised, must be adjudicated in due time.

It is therefore ordered that the petitioners give a bond for the injured value of the Dimock on arrival in Boston, or, what is the same thing, for her sound value less cost of repairs, and also for her pending freight, the bond to bear interest from the date of the filing of the petition herein.

BILGER v. NUNAN et al. FITCH v. NUNAN. KAHLER v. SAME.
HUGHES v. SAME.

(Circuit Court, D. Oregon. April 28, 1911.)

No. 3,612.

WILLS (§ 616*)—CONSTRUCTION—ESTATE DEVISED—AUTHORITY TO MORTGAGE—"HAVE, HOLD, USE AND DISPOSE OF AS SHE MAY SEE FIT DURING HER LIFE"—"To HAVE AND TO HOLD."

Testator bequeathed all his property, real and personal, to his wife, to have, hold, use, and dispose of as she might see fit during her life, giving to her full power and authority to sell, convey, and transfer all or any part of the same, fully and absolutely, so as to pass complete title to purchasers or grantees from her, and that whatever of such property or its proceeds remained in her hands at her death should go to their daughters. *Held*, that though the words "to have and to hold," if standing alone, in connection with the words "during her life," would be effective to qualify the estate devised so as to vest the widow with a life estate only, yet when coupled with the words "use" and "dispose of" as she might see fit, they indicated that the whole title was intended for the widow's use and disposition, and hence the will conferred on her full authority to sell or mortgage the fee, under B. & C. Comp. §§ 5336, 5573, providing that a devise of real property shall be taken as a devise of all

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

the testator's interest subject to his disposal, unless it clearly appeared from the will that he intended to devise a lesser estate.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.*

For other definitions, see *Words and Phrases*, vol. 4, pp. 3217-3219; vol. 8, p. 6990.]

Actions by Sallie Bilger, Fitch, Kahler, and Hughes against Jeremiah Nunan and others. Judgments for defendants.

W. E. Crews, W. W. Cardwell, and J. E. Fenton, for plaintiffs.
John M. Gearin and H. D. Norton, for defendants.

WOLVERTON, District Judge. This is an action in ejectment to recover possession of an undivided one-sixth interest in and to a tract of land in Jackson county, Or., containing 292 acres. Plaintiff is the daughter of James A. Cardwell, deceased, and claims title under a will executed by him February 18, 1890. The defendant Jeremiah Nunan claims title by virtue of a sheriff's deed executed in pursuance of a decree and order of sale obtained under the foreclosure of a mortgage executed by Caroline Cardwell, the widow of James A. Cardwell, upon the real property in controversy.

The paramount question presented for consideration is whether the widow could legally mortgage the estate of decedent under the proper construction of the will, being the same as that under which the plaintiff claims title. The will is in language following:

"I give, devise and bequeath to my wife Caroline Cardwell all my property and estate, both real and personal, of every kind of which I shall die possessed, to have, hold, use and dispose of as she may see fit during her life, hereby giving her full power and authority to sell, convey, deed and transfer all or any part of said property fully and absolutely so as to pass complete title to purchasers or grantees from her as she may see fit.

"And it is my will that whatever of my said property and the proceeds thereof which remains in the hands of said Caroline Cardwell at her death shall go to our daughters hereinafter named.

"On account of our daughter Medora L. Berry and her husband having heretofore left some property with me which entitles her to more of my estate than the others, it is my will that she shall receive out of what remains undisposed of at the death of my wife, the sum of Two Hundred and Fifty Dollars, and the rest of whatever so remains shall be divided equally among my daughters Medora L. Berry, Maria Kahler, Sallie Bilger, Della Fink, Rose Cardwell and Laura Cardwell, share and share alike.

"And inasmuch as my sons Alvin B. Cardwell, C. D. Cardwell and Wm. W. Cardwell have already received advancements and pecuniary assistance from me equal to their shares of my estate, they are not to receive any portion of my estate under this will."

The question depends upon what estate the widow took under the will, and what power or authority was accorded to her for disposing of the estate.

The authorities are in much conflict as it respects the construction of bequests similarly worded, and not a great deal of light can be thrown upon the subject by an elaborate review of them. Much depends upon the wording peculiar to the particular will, viewed from the standpoint of the special circumstances and conditions under which it was executed so as to ascertain the purpose and intent of the testator as

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nearly as may be. So also the local statutes may have an important bearing.

Under the statute of Oregon the employment of the term "heirs" is not necessary to create an estate in fee simple, and it is further provided that:

"A devise of real property shall be deemed and taken as a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest." Sections 5336, 5573, B. & C. Comp.

This changes the rule of the common law, which was that only a life estate was intended to be devised, unless words of inheritance or words of like import were used. Little et al. v. Giles et al., 25 Neb. 313, 41 N. W. 186, 188. One rule is the complete antithesis of the other, and the presumption following is the opposite.

In view of the premises, I consider the case of Roberts v. Lewis, 153 U. S. 367, 14 Sup. Ct. 945, 38 L. Ed. 747, controlling here. It involved the construction of the will of Jacob Dawson in language following:

"To my beloved wife, Editha J. Dawson, I give and bequeath all my estate, real and personal, of which I may die seized, the same to be and remain hers, with full power, right and authority to dispose of the same as to her shall seem most meet and proper, so long as she shall remain my widow, upon the express condition, however, that if she should marry again, then it is my will that all of the estate herein bequeathed, or whatever may remain, should go to my surviving children, share and share alike."

A case involving a construction of the same will, but between different parties, was formerly before the Supreme Court, in which it was held that the wife took a life estate only in the property, subject to termination by her second marriage, with a limitation over to the children of the testator, following Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322; Giles v. Little, 104 U. S. 291, 26 L. Ed. 745. Later another case arose in Nebraska under the title of Little et al. v. Giles et al., above cited, which was a suit to quiet title. The will again came up for construction, and it was there held that, under the statutes of the state, a conveyance of the real estate by the widow before her remarriage conveyed the fee of such realty, and her subsequent marriage did not affect the title to the same, the court concluding in the following language:

"There is no doubt, both from the will itself, and from the circumstances as proved under which it was made, that the intention of the testator was to empower his widow to convey all of his real and personal estate if she saw fit to do so, and, as she had exercised this right and power before her remarriage, the grantees under her deeds acquired all the title of the testator to such lands."

The Nebraska statutes, which seem to control the decision, are in effect the same as the Oregon statutes above cited. It was after this decision that the case of Roberts v. Lewis, supra, went to the Supreme Court. The case of Giles v. Little was reconsidered, and in an opinion rendered by Mr. Justice Gray it was said:

"And this court, on reconsideration of the whole matter, with the aid of the various judicial opinions upon the subject, and of the learned briefs of counsel, is of opinion that the sound construction of this will, as to the extent

of the power conferred on the widow, is in accordance with the conclusion of the state court, and not with the former decision of this court, which must therefore be considered as overruled."

The will of Dawson is so similar in its disposition of the estate to the one in controversy that the reasoning of the distinguished jurist is singularly to the purpose here. The devise here is of all the testator's property, both real and personal, of which he should die possessed, which without more would carry the fee. Then follow the words "To have, hold, use and dispose of as she may see fit during her life." This language is as well consonant with the idea of a fee. The words "To have and to hold," if standing alone, by connection with the words "during her life," would be effective to qualify the estate devised, and make of it a life estate; but when coupled with the words "use and dispose of as she may see fit"—that is, the "property and estate, both real and personal"—they indicate that the whole title was intended for her use and disposition, and especially is this so when the language following is considered, namely:

"Hereby giving her full power and authority to sell, convey, deed and transfer all or any part of said property fully and absolutely so as to pass complete title to purchasers or grantees from her as she may see fit."

Could language be more apt and explicit for empowering the widow to dispose of the entire estate as she saw fit or was disposed? I place but little stress upon the words "from her." Whatever transfer or conveyance she might make would be from her, and so the title would pass from her, the same as if the testator had made it himself. This view is borne out by the succeeding clause, declaring that "whatever of my said property and the proceeds thereof which remains in the hands of said Caroline Cardwell at her death shall go to our daughters," which bears the impress of a power of absolute disposition resting with the widow. It implies that property may remain in her hands, and that the proceeds of property might so remain, and this could not be without she had the power of disposal of such as was not left in her hands. Nor is the technical word "remainder" used, as was the case in the will construed in *Smith v. Bell*, and which had a strong bearing in inducing the conclusion there reached. The clauses following these are perfectly natural under the idea of absolute power of disposal by the widow, and it would be only the property that remains in her hands that would be distributed as therein directed. I am persuaded, therefore, that the case of *Roberts v. Lewis*, *supra*, is controlling here. Many state adjudications are to the same purpose. *In re Will of Burbank*, 69 Iowa, 378, 28 N. W. 648; *Pellizzarro v. Reppert*, 83 Iowa, 497, 50 N. W. 19; *In re Weien's Will*, 139 Iowa, 657, 116 N. W. 791, 18 L. R. A. (N. S.) 463; *Bowen's Adm'r et al. v. Bowen's Adm'r et al.*, 87 Va. 438, 12 S. E. 885, 24 Am. St. Rep. 664; *Farish et al. v. Wayman et al.*, 91 Va. 430, 21 S. E. 810; *Hansbrough v. Trustees of Presbyterian Church*, 110 Va. 15, 65 S. E. 467; *Todd v. Sawyer*, 147 Mass. 570, 17 N. E. 527; *Hair v. Caldwell*, 109 Tenn. 148, 70 S. W. 610. See, also, *Elyton Land Co. v. McElrath*, 53 Fed. 763.

In my opinion, therefore, Caroline Cardwell was accorded the power of disposal of the absolute fee of this property, which is sufficient for the present controversy; and, as the greater authority includes the less, she was also empowered to mortgage the same. The foreclosure therefore and sale thereunder, together with the deed of the sheriff, carried the title to the defendant.

A question was suggested as to whether the heirs should have been made parties to the foreclosure suit, but as the suit was instituted and concluded in the lifetime of Caroline Cardwell, and the sheriff's deed passed, I do not deem that they were indispensable parties thereto.

The same ruling will obtain in the cases of Fitch v. Nunan, Kahler v. Nunan, and Hughes v. Nunan.

UNITED STATES V. INTERNATIONAL MERCANTILE MARINE CO.

(Circuit Court, S. D. New York. May 1, 1911.)

ALIENS (§ 54*)—DEPORTATION—LIMITATION.

Under Act Cong. March 3, 1903, c. 1012, 32 Stat. 1213, and Act Cong. Feb. 20, 1907, c. 1134, §§ 20, 21, 34 Stat. 904, 905 (U. S. Comp. St. Supp. 1909, p. 459), providing for the deportation of aliens unlawfully in the country within three years after landing, the government is entitled to the whole of the last day of the three years in which to make the arrest, prescription being interrupted by the arrest, and to a reasonable time in which to carry out the sentence of deportation.

[Ed. Note.—For other cases, see Aliens, Dec. Dig. § 54.*]

Action by the United States against the International Mercantile Marine Company. On demurrer to complaint. Overruled.

Henry A. Wise, U. S. Atty.

Burlingham, Montgomery & Beecher, for defendant.

LACOMBE, Circuit Judge. I agree with Judge Foster (U. S. ex rel. Calamia v. Redfern [C. C.] 180 Fed. 506) that under sections 20 and 21 of the act of February 20, 1907, "the government should have the whole of the last day of the three years in which to make the arrest, and, prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation."

The demurrer is overruled.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

NIEDNER v. THOMSON.

(Circuit Court, D. Oregon. July 5, 1910.)

No. 3,471.

BILLS AND NOTES (§ 518*)—ACCOMMODATION PAPER—EVIDENCE.

In an action on a note executed to a bank, evidence held to require a finding that the note was for the benefit of the maker, and not for the accommodation of the bank.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1818; Dec. Dig. § 518.*]

At Law. Action by Walter Niedner, as receiver of the Farmers' & Traders' National Bank of La Grande, Or., against A. B. Thomson. Judgment for plaintiff.

Bausman & Kelleher and Wm. M. Ramsey, for plaintiff.
Raley, Richards & Raley, for defendant.

WOLVERTON, District Judge. This is an action by the receiver of the Farmers' & Traders' National Bank of La Grande to recover upon a promissory note, executed by Thomson to the bank, bearing date August 3, 1903. From the testimony of Guy E. McCully, who was the assistant cashier of the bank, it appears that the defendant Thomson, in company with S. W. Spencer, came to the bank on the evening of August 2, 1903, after banking hours, and that each of them executed a note for \$6,000 to the bank; that of Thomson being dated the next day, namely, August 3d, and that of Spencer August 5th. The amount of each of these notes was, to the knowledge and understanding of both Thomson and Spencer, passed to the account of Spencer in the bank. Thereafter Spencer drew against the account and exhausted the funds from that source. McCully further testifies, in effect, that the arrangement for the meeting of Thomson and Spencer with him at the bank at this time was made between J. W. Scriber, who was the cashier of the bank, and these parties, Scriber directing McCully what to do, and that whatever McCully did in the premises was done in pursuance of the direction of Scriber. McCully is corroborated in his statement by the facts, first, that the notes were executed by both these men, as detailed by him (this is shown by the books of the bank); and, second, by the deposit tags, which show that Spencer was credited upon his account with the amount of each of said notes; and, further, from the fact that Spencer checked against these accounts, as appears from his own statement, as well as the books of the bank, and also the statement of Scriber.

McCully is contradicted by the testimony of both Thomson and Spencer, and in a way by that of Scriber. Spencer and Thomson both say that they were not at the bank together on the evening designated

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

by McCully, or at any other time, while each of them admits the execution of the notes. Scriber testifies that he had an arrangement with Spencer whereby he should have large credit, but declines to testify whether or not any such arrangement was made with the knowledge of Thomson. Scriber, however, has been greatly discredited by the fact that he admits that, after Thomson secured possession of his note from the bank, he (Scriber), in order to replace the Thomson note, executed another and subscribed Thomson's name thereto, which new note was placed with the bills receivable, so that the transaction would appear regular, if at any time the bank examiner should appear to check up the accounts of the bank. Spencer is discredited by the fact that he admits that at the time he was engaged in shady transactions by which to obtain the title to public lands from the general government. From the full survey of the testimony, it would appear, also, that Thomson, while receiver of the land office at La Grande, was aware of the transactions of Spencer in obtaining title to the public lands, and that he made no effort to inform the government of such transactions. Indeed, it would seem that he had an interest therein, and was expecting to profit thereby.

I should have stated before this that, after the execution of said note by Thomson, namely, about September 22d, he came to the bank while Scriber was absent, and requested McCully to let him have the note for a short time, promising to return same very soon, the object being to have the note out of reach if the inspector of the land department, who was then checking up the books of the receiver, should call at the bank and make inquiry; and in pursuance of that request McCully delivered the note to Thomson. Thomson, however, subsequently failed and refused to return the note to the bank, although he was often requested to do so both by McCully and Scriber. Thomson claims for this transaction that he executed the note at the request of Scriber, purely for the accommodation of the bank, Scriber agreeing to return it to Thomson shortly; that in pursuance of that agreement McCully redelivered the note to Thomson. This is the defense that Thomson makes to the action.

If this were true, it is not clear yet that the receiver would not be entitled to recover as against Thomson; the receiver representing the creditors of the bank. But, however this may be, I deem McCully worthy of much the larger credit as a witness, being corroborated, as I have indicated above, by the record evidence whenever produced, and by the reasonable inferences deducible from the circumstances, and the connection and relation of all the parties interested.

For these reasons, I conclude that the plaintiff is entitled to recover against the defendant for the amount prayed.

UNITED STATES v. NORTH GERMAN LLOYD S. S. CO.

(Circuit Court, S. D. New York. April 22, 1911.)

ALIENS (§ 40*)—DEPORTATION AT CARRIER'S EXPENSE—TIME LIMIT—STATUTES—RETROACTION.

Act Cong. March 26, 1910, c. 128, 36 Stat. 263, abrogating the three-year time limit for deportation of aliens at the expense of the carrier by which they unlawfully entered, does not operate retroactively, and hence does not apply to an alien prostitute, where the three-year limit expired in February, 1908.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 100; Dec. Dig. § 40.*]

Action by the United States of America against the North German Lloyd Steamship Company. On demurrer to the bill of complaint. Demurrer sustained.

Henry A. Wise, U. S. Atty.
Lucius H. Beers, for defendant.

LACOMBE, Circuit Judge. With a single amendment, this is the same complaint which was before this court, and held bad on demurrer, in opinion filed February 9, 1911 (185 Fed. 158), which may be referred to for a full statement of the facts and quotations from the statutes. The amendment adds the averment that when Aurelia Darlet arrived in this port on one of defendant's steamers, February 14, 1905, she "was a prostitute, but the fact that she was a prostitute was not known by defendant, nor by the immigration officials of the United States."

The statute in force when the alien came here was Immigration Act March 3, 1903, c. 1012, §§ 19, 21, 32 Stat. 1218, under which, in the case of aliens entering the country in violation of law, deportation from the port of arrival at the expense of the owner of the vessel by which they came might be had "within the period of three years after landing or entry therein." In the case of Darlet this three-year period expired February 14, 1908. Nearly two years later, March 26, 1910, the immigration act was amended (Act March 26, 1910, c. 128, 36 Stat. 263), so as to do away with the three-year limitation of the provisions as to deportation.

The only question is whether the amending act shall be construed as retroactive, so as to reimpose upon the steamship company the obligation which it assumed when it brought the alien here, and which had terminated by its own limitation nearly two years before the amendment was passed. In the former opinion the conclusion was reached that it was not the intention of Congress that the amendment should operate retroactively.

This opinion remaining unchanged, the demurrer is sustained.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

READING FINANCE & SECURITIES CO. v. HARLEY.

(Circuit Court of Appeals, Third Circuit. April 25, 1911.)

No. 25 (1,470).

1. TROVER AND CONVERSION (§ 2*)—PROPERTY SUBJECT OF ACTION—INTEREST CERTIFICATES—CONSTRUCTION.

A finance company, promoting the organization of a life insurance company, issued to plaintiff a certificate reciting that it was to be exchanged for a stock certificate, after incorporation, for a certified number of shares, and that it was a certificate of deposit, and certified that plaintiff had subscribed and paid by note for 6,043 shares of the capital stock of the proposed company, and was dated, executed, and sealed. In an action against the finance company for conversion of the certificate, it contended that it was entitled to hold the same as collateral for plaintiff's notes. *Held*, that the certificate was a thing of value, which could properly be the subject of an action of trover, and was not a mere receipt for payments on subscriptions of stock to be thereafter delivered.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 2.*]

2. PLEDGES (§ 16*)—COLLATERAL SECURITY—EVIDENCE OF DEPOSIT.

Defendant finance company, promoting the organization of an insurance company, issued a certificate of interest to plaintiff, reciting that he was entitled to certain shares of the company's stock, for which the promoters had received plaintiff's note. On the same day the finance company delivered to plaintiff a letter reciting that the certificates of deposit had been delivered to plaintiff at \$15 per share; the company having accepted plaintiff's notes therefor, with the understanding that plaintiff would not sell any of the shares for less than \$20 a share, the company agreeing to transfer all or any portion of the certificates from time to time, and allow plaintiff a commission on the subscription price, provided plaintiff reduced his notes to the extent of the net sum due on the certificate so transferred, as transfers were made, and that all sales made by plaintiff on time should be in consideration of notes taken in the name of the company, and in consideration thereof it agreed to advance plaintiff commissions and profits on such of the notes as were commercially satisfactory to it. *Held*, that such letter did not evince an intention on the part of the company as a matter of law that the certificates showing plaintiff's interest should be left with it as collateral security for plaintiff's notes.

[Ed. Note.—For other cases, see Pledges, Dec. Dig. § 16.*]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Action by F. C. Harley against the Reading Finance & Securities Company. Judgment for plaintiff (183 Fed. 1023), and defendant brings error. Affirmed.

John G. Johnson, Oliver Lentz, and E. H. Deysher, for plaintiff in error.

Alex. Simpson, Jr., and Harry F. Kantner, for defendant in error.

Before BUFFINGTON and LANNING, Circuit Judges, and YOUNG, District Judge.

LANNING, Circuit Judge. The Reading Finance & Securities Company, which we will call the Finance Company, acting as fiscal agent for the sale of the capital stock of a company which it was proposed to incorporate under the name of the Citizens' Life Insurance

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Company of America, issued on March 10, 1910, two certificates, one of which was in the following form:

"Authorized Capital, \$500,000. This certificate to be exchanged for certificate of stock after incorporation. No. 435. 6,043 Shares. The Reading Finance & Securities Company (Incorporated), Reading, Pa. Certificate of Deposit. This is to certify that F. C. Harley, Reading, Pa., has subscribed and paid by note for six thousand forty-three shares of the capital stock of the proposed the Citizens' Life Insurance Company of America. Date March 10, 1910. W. J. Cotter, President. W. Geo. Whitfield, Treasurer. Shares \$10.00 each. [Corporate seal attached.]"

On the same day, March 10, 1910, the Finance Company issued to Harley another certificate, the same in form and substance, except that it was for 3,957 shares. It will be observed that the two certificates were for 10,000 shares. On the day that these two certificates were issued, the Finance Company delivered to Harley a letter, of which the following is a copy:

"Reading, Pa., March 10, 1910.

"Mr. F. C. Harley, Reading, Pennsylvania.

"Dear Sir: We enclose you certificates of deposit for ten thousand shares of stock of the Citizens' Life Insurance Company of America (now organizing) at fifteen (\$15) dollars per share, accepting your notes of four months without interest for same, with the understanding that you will not sell or dispose of any shares at a price less than twenty (\$20) dollars per share. We agree to transfer all or any portion of said certificates from time to time, and allow you the regular agent's commission of 10 per cent. on the subscription price, provided you reduce your notes to the extent of the net sum due us on the certificates so transferred, as transfers are made. It is further stipulated and agreed that on all sales made by you on time the notes for payment on account of same shall be taken in the name of this company, and in consideration thereof we agree to advance your commissions and profits on such of said notes as are commercially satisfactory to us.

"Very truly,

The Reading Finance & Securities Company,
"W. J. Cotter, President."

This letter was delivered to Harley in the office of the Finance Company. The certificates therein mentioned were not taken away by Harley, but were left by him with the Finance Company. He also at the same time gave to the Finance Company his notes for \$150,000, representing the value of the 10,000 shares mentioned in the letter at \$15 per share. Between March 10 and June 23, 1910, he sold his rights to a portion of the 10,000 shares, and took in payment therefor cash or notes which he turned over to the Finance Company, with instructions to issue to his vendees certificates for the rights so purchased by them, and to issue to him a new certificate for the residue of his rights. Thereby his notes for \$150,000 were reduced. On June 23, 1910, he demanded possession of the certificates then standing in his name, one being the original certificate for 6,043 shares, and the other being a certificate for 709 shares, which represented the unsold portion of the rights in the 3,957 shares mentioned in the second of the original certificates. The Finance Company refused the demand, and Harley thereupon commenced this action for damages for alleged conversion of the certificates. He recovered a judgment for \$5,000. Upon the writ of error sued out by the Finance Company, its counsel contends that there is no evidence to support the judgment, and that the Finance

Company was not bound to deliver the certificates to Harley previous to the payment of his notes.

[1] We cannot accept as correct the contention of the plaintiff in error that the certificates are mere receipts for payments on subscriptions of stock to be thereafter delivered. The Finance Company did not so treat them. At the trial of the action, it contended that it was entitled to hold them as collateral security for Harley's notes. It therefore dealt with them as things of value, which could properly be the subject of an action in trover and conversion. Indeed, it furnished to Harley printed blanks which he could and did fill out and sign as authority to the Finance Company to transfer to the new subscribers rights in portions of the shares mentioned in his certificates. By such transfers, one of the two certificates issued to him on March 10, 1910, was reduced from 3,957 to 709 shares; the remaining shares being represented by the certificates issued by the Finance Company to Harley's assignees or vendees—the so-called new subscribers.

[2] Nor can we say, as matter of law, that the letter of March 10, 1910, evinces an intention on the part of the Finance Company and Harley that the certificates should be left with the Finance Company as collateral security for Harley's notes. The letter is not clear. One cannot decide, from its language alone, what was the exact nature of the contract between the parties. At the trial, the dispute was whether the Finance Company held the certificates as collateral security for Harley's notes or for the mutual convenience of the parties in recording transfers of rights to shares represented by the Harley certificates. If the certificates were held by the Finance Company as collateral, there was no conversion of them by the Finance Company; if not, there was. This was the issue fought out before the jury in the court below. It was a question of fact for the jury to consider. That question they decided in favor of Harley's contention, and we can discover no reason for disturbing the judgment entered on their verdict.

The judgment is accordingly affirmed, with costs.

MAGEN et al. v. CAMPBELL et al.

(Circuit Court of Appeals, Third Circuit. April 25, 1911.)

No. 92 (1,449).

BANKRUPTCY (§ 241*)—CONTEMPT—PROCEEDINGS.

Where a petition against bankrupts for contempt charged that the bankrupts, on their examination concerning their affairs, on many occasions had committed perjury in giving testimony which they knew was false, and on many occasions denying knowledge and alleging inability to recall matters concerning which they must have known, etc., the gist of the offense was a charge of perjury; and hence a conviction could not be sustained on proof of the bankrupts' refusal to make a disclosure, under Bankr. Act July 1, 1898, c. 541, § 41, 30 Stat. 556 (U. S. Comp. St. 1901, p. 3437), declaring that a person shall not, in proceedings before a referee, after having taken the oath, refuse to be examined according to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

law, and, if he does so, proceedings may be instituted to punish him for contempt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 241.*]

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Proceeding by Horace E. Campbell, trustee in bankruptcy of the estates of Morris Magen and Jacob Magen, individually and as partners, trading as Magen Bros. Company, against Morris Magen and Jacob Magen for contempt. From an order (179 Fed. 572) adjudging the respondents guilty, they bring error. Reversed.

Bernard Harris and Henry N. Wessel, for plaintiffs in error.

Julius C. Levi, for defendants in error.

Before GRAY, BUFFINGTON, and LANNING, Circuit Judges.

LANNING, Circuit Judge. This writ of error brings up a judgment of the District Court adjudging Morris Magen and Jacob Magen guilty of contempt and ordering their commitment to the county jail for the period of 60 days. The alleged contempt occurred before the referee in bankruptcy. The plaintiffs in error are the bankrupts. Section 41 of the bankruptcy act provides that:

"A person shall not, in proceedings before a referee, * * * after having taken the oath, refuse to be examined according to law. * * * The referee shall certify the facts to the judge if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, shall punish such person in the same manner and to the same extent as for a contempt committed before a court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court."

The Magens were witnesses before the referee at the first meeting of the creditors. To a number of questions asked of each of them, they severally responded, "I don't know," "I can't tell," "I can't remember names," etc. Thereafter the trustee in bankruptcy filed with the referee a petition setting forth that his counsel had been examining the bankrupts on numerous occasions since their adjudication, that they—

"had at all times in such examination shown a determination to hinder and thwart a proper investigation of their affairs, and had knowingly and willfully committed on many occasions deliberate perjury in giving testimony which they knew to be absolutely false, and on many occasions in answering 'I don't know,' 'I can't tell,' 'I can't remember names,' 'I can't recall the names just at this time,' 'I don't remember the dates,' and answers of a similar character, when it was quite evident, from the nature of the questions and the manner of the bankrupts, that they could have answered them, had they so desired," that "said bankrupts deliberately, willfully, and premeditatedly committed perjury in almost every answer which they gave," and also that their answers "showed conclusively that the said bankrupts deliberately intended to frustrate the cause of justice, and to hinder and delay the proper administration of their estate."

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Upon the filing of this petition, the referee certified the facts to the judge of the District Court. In his certificate, after reciting the material averments of the petition, he said:

"There is no doubt in the mind of the referee that the witnesses are guilty of perjury, both in their answers as to facts and more particularly in their allegations that they did not remember and could not recall the transactions on which they were investigated," and that "the referee is convinced that the bankrupts deliberately feigned ignorance and are guilty of gross contempt of court."

Upon the filing of the certificate in the District Court, the trustee filed therein a petition in which, after referring to the petition filed before the referee, he said:

"Said bankrupts on March 9, 1910, were examined in reference to said statement [a statement concerning their financial condition made in January, 1909], and the several items comprising the assets and liabilities, and said bankrupts deliberately, willfully, and premeditatedly committed perjury in almost every answer which they gave relative to said statement. Their answers before the referee and the manner of their answering the questions showed beyond the question of a doubt that they answered untruthfully in every instance where they thought it advisable for them so to do. Their answers, 'I don't know,' 'I can't tell,' 'I can't remember names just at this time,' 'I don't remember the dates,' and answers of a similar character to innumerable questions, which were so simple that any business man might be able to give a proper answer to the same, showed conclusively that said bankrupts intended to frustrate the cause of justice and to hinder and delay the proper administration of their estate."

Thereupon the Magens filed their joint answer, denying any purpose of hindering or thwarting the proper investigation of their affairs, denying the alleged perjury, and denying, also, that their answers were intended to be evasive, or that they intended to hide anything that was within their knowledge. A summary hearing was then had, and the court, after consideration of the facts, adjudged "both bankrupts guilty of the contempt charged."

The charge, as we have seen, was perjury; but the case was presented to the District Court as though it were that the bankrupts had taken the oath and then refused to be examined according to law. Had that been the charge, the case would have been much like the Schulman Case, 177 Fed. 191, 101 C. C. A. 361, and possibly the judgment now under review might have stood. But we think the trustee in bankruptcy erred in not framing his petition in such manner as to state a case of contempt under the forty-first section of the bankruptcy act. That section sets forth the only authority conferred by the bankruptcy act for punishing for contempt in proceedings before a referee. As the present proceeding does not conform to the requirements of that section, we have concluded that the judgment must be reversed, and the record be remanded for such further proceedings as justice may require.

Such will be the order. No costs will be awarded to either party in this court.

UNITED STATES WOOD PRESERVING CO. v. SUNDMAKER, Director of Public Service, et al.

(Circuit Court of Appeals, Sixth Circuit. April 20, 1911.)

No. 2,092.

1. COURTS (§ 366*)—FEDERAL COURTS—JURISDICTION.

Where a city public service director rejected complainant's bid for a public improvement and awarded the contract to another, whether a federal court may review the director's action, enjoin the performance of and annul the contract made, and compel an award to and the making of a contract with complainant, is a question of local law to be determined on the facts and the statutes involved, as construed by the state's highest tribunal; the federal court having authority to grant complainant any relief to which he may be entitled.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 366.*]

2. EVIDENCE (§ 9*)—JUDICIAL NOTICE—MATTERS OF SCIENCE.

Under the rule that courts will take notice of whatever is generally known within the limits of their jurisdiction, and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper, especially as applied to matters of science involved in cases before him, the court would take judicial notice that creosote oil of commerce called for by the specifications, providing for the paving of a street with wood blocks treated with "dead" oil of coal tar, contained both anthracene and anthracene oil.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 8; Dec. Dig. § 9.*]

3. MUNICIPAL CORPORATIONS (§ 241*)—BIDS—REGULATION—STATUTES—EXECUTION.

Laws providing that public contracts shall be made with the lowest and best bidders with or without the right on the part of the awarding officer or board to reject any and all bids are for the benefit of property holders and taxpayers, and are to be executed with sole reference to the public interest.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 673; Dec. Dig. § 241.*]

4. MUNICIPAL CORPORATIONS (§ 336*)—STREET IMPROVEMENTS—BIDS—AUTHORITY OF DIRECTOR.

Rev. St. Ohio § 1536—679, relating to the letting of contracts for street improvements, authorizes the board of public service to reject any and all bids, and vests in it a discretion which will not be interfered with by mandamus where such discretion has not been abused, and no vested right of the bidders is involved. *Held*, that the duties of the director of public service of a city under such section were not merely ministerial, but were discretionary and deliberative, and that he was authorized not only to reject any and all bids, but was required to determine who was the best as well as the lowest bidder, acting solely for the public good, the law requiring him to consider, not only the financial ability, business judgment, capacity, skill, responsibility, and reputation of the various bidders, but also the quality of the materials proposed to be supplied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. § 336.*]

5. MUNICIPAL CORPORATIONS (§ 336*)—STREET IMPROVEMENTS—PAVING—BIDS—SPECIFICATIONS.

Rev. St. Ohio § 1536—679, confers on a board of public service the right to reject any and all bids for public improvement, and vests

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

in it a discretion which will not be interfered with unless abused. The director of public service of Cincinnati, having advertised for bids for the paving of a street with creosote blocks, required the bidder to deposit samples of the blocks treated and untreated and a sample of the "dead" oil of coal tar with which it was proposed to treat the blocks, specifying that such oil must be of a specific gravity, under distillation, free from carbon and adulterations, but did not specify the quantity of anthracene or anthracene oil which it should contain. It appeared to be a fact capable of scientific demonstration that the greater the quantity of anthracene oil contained in such product the more lasting would be the blocks treated therewith. *Held*, that the director in determining who was the lowest and best bidder was entitled to consider the fact that the sample of material submitted by complainant, the lowest bidder, did not contain the maximum of anthracene or anthracene oil, and for that reason to award the contract to the next higher bidder, whose sample contained a larger amount or the maximum of such substance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 862; Dec. Dig. § 336.*]

6. MANDAMUS (§ 92*)—MUNICIPAL OFFICERS—AWARD OF CONTRACT FOR PUBLIC IMPROVEMENT.

The submission by a reliable and responsible bidder of the lowest bid for contract for public work to an official whose duty it is to let the contract to the lowest and best bidder, but who has the right to reject any and all bids, does not constitute an agreement that the officer will make a contract with such bidder for the work, nor does it give the bidder such a right to the contract as will authorize a court of equity, at his instance, to compel the officer to enter into a contract for the work with him, when such officer is about to award or has awarded it to another higher bidder.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 92.*]

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Bill by the United States Wood Preserving Company against John H. Sundmaker, Director of Public Service of the City of Cincinnati, Ohio, and others. The bill having been dismissed on demurrer, complainant appeals. Affirmed.

The complainant, an unsuccessful bidder for a public contract, filed a bill to enjoin the performance of and annul the contract awarded to a competitor, and to compel the acceptance of its bid and the execution of a contract with it. Demurrs to the substance of the bill, for want of equity, and misjoinder of parties were interposed and sustained, for the reason that the complainant is without capacity to maintain the bill. The complainant declining to plead further, the bill was dismissed and a reversal of the trial court's action is now sought.

The averments of the bill, in so far as material, are as follows:

The director of public service, in pursuance of proceedings duly had by the city council of Cincinnati, advertised for bids for the improvement of a portion of Reading Road with wood block. Concerning the wood block and oil to be used in the construction of the improvement the specifications provided as follows:

"The bidder must deposit with the board of public service, at the time of making his bid, samples in suitable boxes or jars, of the following materials intended to be used, properly labeled with the name or brand of the contents, viz.:

"Sample of not less than 1 quart of heavy or 'dead' oil of coal tar.

"Two blocks each, of both treated and untreated blocks.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Each labeled with the name of the bidder and the name of the street on which he is a bidder.

* * * * *

"The heavy or 'dead' oil of coal tar shall conform to the following specifications when tested: The specific gravity of 68 degrees F, shall not be less than one and ten hundredths (1.10). When distilled in a retort, with the thermometer suspended not less than one (1) inch above the oil, it shall lose not more than thirty-five (35) per cent. up to three hundred and fifteen (315) degrees C.

"The distillation shall be made with approximately 100 grams of oil in a six-ounce retort.

"The distillation shall be completed within thirty (30) minutes after the first portion of the distillate passes into the receiver.

"Explanation. Any oil which does not contain more than three-fourths ($\frac{3}{4}$) of one (1) per cent. of free carbon will for the purposes of these specifications be held to be 'free from carbon.'

"The oil shall be free from carbon and shall contain not more than two and one-half (2 $\frac{1}{2}$) per cent. of matter in suspension. The oil must be free from adulterations, and it must be obtained wholly and entirely from coal tar and must not contain any oil derived from water gas tar, oil gas tar or other tars."

The complainant submitted a bid offering to construct the improvement for \$250,367.50. The chemist of the director having analyzed the several samples of oil submitted reported that complainant's did not meet the requirements of the specifications because it did not contain the largest possible amount of anthracene and anthracene oil. Its bid was thereupon rejected and that of Henkel & Bro. for \$262,827.20 was declared to be the lowest and best, and a contract was duly made with them to construct the improvement. The lowest bid was rejected on account of impurities in the sample of oil submitted. One of the five bids higher than complainant's, but lower than that of Henkel & Bro., was ignored because the sample tendered was the oil of tar. The bill alleges that the complainant's bid complied with all the requirements and conditions of the specifications, that they do not require or provide that the oil of coal tar in the sample submitted with its proposal, or to be used in the treatment of the block, shall contain the largest possible amount of anthracene and anthracene oil, or any of either, that complainant's sample contained a large amount of both anthracene and anthracene oil, and that its bid is the lowest and best and itself the lowest and best bidder and consequently entitled to the contract. The bill further charges that the rejection of its proposal on the sole ground that the sample of complainant's oil did not comply with the specifications because it did not contain the largest possible amount of anthracene and anthracene oil, and the finding that the bid of Henkel & Bro. was the lowest and best and they the lowest and best bidders, were not based on the proposals, or on facts contained therein, or on the analyses or tests of the samples submitted, or on the requirements, conditions, or provisions of the specifications, and were untrue in fact, and that such finding and the making of the contract with Henkel & Bro. were arbitrary, in contravention of law and of the specifications, a violation and abuse of the corporate powers of the city and of the lawful discretion of the director, and in violation of the complainant's rights, for the protection of which it has no adequate remedy at law. Complainant is financially responsible, and ready, able, and willing to perform the contract according to its requirements.

The material portions of the General Code involved are as follows:

"Sec. 4328. The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.

"Sec. 4329. The bids shall be opened at 12 o'clock noon, on the last day for filing them, by the director of public service and publicly read by him. Each bid shall contain the full names of every person or company interested in it, and shall be accompanied by a sufficient bond or certified check on a solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated with the price thereof. The director may reject any and all bids. Where there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected."

Lawrence Maxwell, Joseph S. Graydon, and Joseph L. Lackner, for appellant.

Edward M. Ballard, for Sundmaker and others.

Louis J. Dolle and James B. O'Donnell, for August Henkel & Bro.

Before SEVERENS and KNAPPEN, Circuit Judges, and SATER, District Judge.

SATER, District Judge (after stating the facts as above). [1] Under the facts stated, may a court review the director's action in rejecting complainant's bid and in awarding a contract to and entering into a contract with Henkel & Bro. and enjoin the performance of and annul the contract thus made, and compel an award to and the making of a contract with the complainant?

The question presented is one of local law, and must be decided with reference to the well-pleaded facts, the statute involved, and the construction, if any, given to it by the state's highest tribunal. If the bidder has an enforceable right, this court may afford him relief.

The bill alleges that the specifications did not call for an oil containing the largest amount of anthracene and anthracene oil, or any of either. The dead oil of coal tar is commonly called "creosote," and is extensively used as a preservative in the treatment of wood block for paving. It had previously been specified for such purpose in public lettings in Cincinnati. State v. Miller, 10 Ohio Cir. Ct. R. (N. S.) 406. In that case the complainant was a party, and, having regard to the difference in registering degrees of temperature on the Centigrade and Fahrenheit thermometers, the specifications as to the character of oil there under consideration were substantially the same as in this case.

[2] The rule is well settled that courts will take notice of whatever is generally known within the limits of their jurisdiction, and, if a judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in cases brought before him. Brown v. Piper, 91 U. S. 37, 42, 23 L. Ed. 200; King v. Gallum, 109 U. S. 99, 101, 3 Sup. Ct. 85, 27 L. Ed. 870; Eureka Vinegar Co. v. Gazette Printing Co. (C. C.) 35 Fed. 570; Wigmore on Ev. § 2580; 7 Ency. Ev. 1031, 1032. Notice, therefore, will be taken of the fact that the creosote oil of commerce called for by the specifications contains both anthracene and anthracene oil. Anthracene is one of its high boiling constituents, a fact which the specifications themselves suggest. The United States Department of Agriculture, as shown by "Circular No. 98, Quantity and Character of Creosote in

"Well Preserved Timbers" and "Circular No. 141, Wood Paving in the United States," to determine what is in fact a good oil for the preservation of wood, has repeatedly extracted the creosote employed for that purpose from treated timber, and, in so far as the results are shown and tabulated in Circular No. 98, the distillates have uniformly shown the presence of anthracene oil, and in most instances in a large amount. Heavy oils of coal tar which contain the greatest percentage of anthracene oil remain almost indefinitely in the treated wood and protect it from decay and boring animals, the timbers treated being the most lasting when such oil is present in the largest quantity.

Considering the bill in the light of the well-known facts disclosed by science, it first recites that the specifications call for an oil necessarily possessing certain constituents, and then subsequently denies that the specifications require the presence of those constituents in such oil. The denial must be ignored, because a demurrer does not admit allegations which are impossible or which the law adjudges to be untrue. 6 Ency. Pl. & Pr. 338. Disregarding, therefore, the statement that the specifications did not require that the oil submitted as a sample and to be used in preparing the wood block for the construction of the improvement should contain anthracene and anthracene oil, the averment is that the complainant complied in all respects with the requirements and conditions of the specifications in that the sample of oil submitted by it with its bid contained large and substantial amounts of those ingredients, but that the specifications did not require that such oil of tar should contain the largest amount of them. But to say that the sample submitted contained large and substantial amounts is not the same as saying that those are the amounts necessary to meet the test which the director reserved the right to make and for which the specifications called.

[5] The amount of anthracene and anthracene oil in heavy oil of coal tar which would stand the prescribed test is not stated, but, if that amount is less than the greatest, there was no prohibition against the submission or acceptance of samples containing more of those ingredients than is found in the prescribed minimum standard. Each bidder was at liberty to select the quality of oil he proposed to use, but his submitted sample was required to contain both of those ingredients, and, the larger the percentage of them in the oil to be used, the more durable would be the improvement and the greater the benefit the public would derive from it. One bid was rejected because the oil therewith submitted contained an excess of free carbon, another because the sample of oil offered was an oil of tar, and not a coal tar product. Complainant's bid was rejected because the oil it proposed to use did not contain the largest possible amount of anthracene and anthracene oil. The lowest bid then remaining was that of Henkel & Bro. It was also held to be the best, and the logical conclusion to be drawn from the bill is that it was accepted because it was adjudged to contain a larger amount of those ingredients than the complainant's.

[3] Laws which provide that public contracts shall be made with the lowest and best bidders, with or without the right on the part of the awarding officer or board to reject any and all bids, or which contain kindred provisions, are enacted for the benefit of property hold-

ers and taxpayers and not for the benefit of or to enrich bidders, and are to be executed with sole reference to the public interest. State v. Commissioners of Shelby County, 36 Ohio St. 326, 331; State v. Board, 81 Ohio St. 218, 90 N. E. 389; Colorado Paving Co. v. Murphy, 78 Fed. 28, 31, 23 C. C. A. 631, 37 L. R. A. 630; State v. Commissioners of Public Printing, 18 Ohio St. 386, 390.

[4] The director, whose duties in awarding the contract were not merely ministerial, but discretionary and deliberative, was not only vested with the power to reject any and all bids, but was required, acting solely for the public good, to determine who was the best as well as the lowest bidder. In determining these questions, the law cast on him the duty of considering the financial ability, the business judgment and capacity, the skill, responsibility, and reputation of the various bidders, and the quality of the materials proposed to be supplied. Inquiry, investigation, comparison, deliberation, and decision were necessarily involved. The state court has declared the rule applicable to such a situation in State v. Board, 81 Ohio St. 218, 90 N. E. 389, which is relied on by both parties and which dealt with the statute under consideration in this case, and in Ohio v. Hermann, 63 Ohio St. 440, 59 N. E. 104, which involved a statute which required the contract to be made with the lowest and best bidder. Both were suits in mandamus by unsuccessful bidders. Both of them, citing State v. Commissioners, 36 Ohio St. 326, broadly announce that the rule is well settled that, where authority is given by statute to a board to let a contract to the lowest and best bidder, discretion is thereby conferred which the courts will not undertake to control.

The first paragraph of the syllabus in State v. Board is as follows:

"By section 1536—679, Revised Statutes, pertaining to the letting of contracts for street improvements, discretion is given a board of public service to reject any and all bids, and this discretion will not be interfered with by mandamus where such discretion has not been abused and no vested right of any bidder is involved."

The complainant insists that the logical inference to be drawn from that paragraph is that the discretion given to reject any and all bids will be interfered with by the courts whenever such discretion has been abused. But the syllabus must be considered in connection with the opinion and in the light of the issues and facts of the case. Booco v. Mansfield, 66 Ohio St. 121, 135, 64 N. E. 115. The language of the opinion is clear that the discretion with which a court will interfere is a discretion exercised with a fraudulent intent to the injury of the party complaining, and that injury must be to a vested right. There is no charge in this case of a fraudulent intent. What the bill alleges after admitting that the samples of oil submitted by bidders were tested is that the finding against the complainant and in favor of Henkel & Bro. is untrue and not based on analyses or tests of submitted samples, or on the requirements, conditions and provisions of the specifications, and that the director's action was arbitrary, in contravention of law and the specifications, and a violation and abuse of the corporate powers of the city and of his lawful discretion. Moreover, the complainant did not acquire and does not have a vested right.

The statutory provision authorizing the director to reject any and all bids was notice to intending bidders, and to the director himself, that by his call for sealed proposals he was not obliged to accept any bid that might be made, or to award a contract thereon, unless he deemed the bid the lowest and best and the bidder satisfactory, and further adjudged the acceptance of the bid and the execution of a contract in pursuance thereof to be for the best interests of the city. The complainant's proposal bound neither party, and, as a contract was not consummated, the city acquired no right against the complainant and the complainant acquired none against it. *State v. Board*, *supra*; *Commonwealth v. Mitchell*, 82 Pa. 350, 351; *Kerr & Bro. v. City of Phila.*, 8 Phila. (Pa.) 292, 293.

[¶] The submission, by a reliable and responsible bidder, of the lowest bid for a contract for public work to an official whose duty it is under the statute to let the contract to the lowest and best bidder, but who has the right to reject any and all bids, of which fact the bidder is bound to take notice when and before his bid is submitted, does not constitute an agreement that the officer will make a contract with such bidder for the work; nor does it give the bidder such a right to the contract as will authorize a court of equity, at his instance, to compel the officer to enter into a contract for the work with him, when such officer is about to award or has awarded it to another bidder, even though he be higher. Some of the cases decided under statutes permitting the rejection of any and all bids and otherwise similar or kindred to that under consideration, and some of the text-writers, sustaining this view, are *State v. Directors and Wardens of the Ohio Penitentiary*, 5 Ohio St. 234; *State v. Board*, *supra*; *State v. Cincinnati*, 3 Ohio Cir. Ct. R. 542; *State v. County Commissioners*, 9 Ohio Cir. Ct. R. (N. S.) 210, 214; *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630; *Brown v. City of Houston* (Tex. Civ. App.) 48 S. W. 760; *Kerr & Bro. v. City of Phila.*, *supra*; *Hoole v. Kinkead*, 16 Nev. 217; *Anderson v. Public Schools*, 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707; *Johnson v. Sanitary District*, 163 Ill. 285, 45 N. E. 213; *Kelly v. City of Chicago*, 62 Ill. 280; *Douglass v. Commonwealth*, 108 Pa. 559; *Hanlin v. Independent Dist.*, 66 Iowa, 69, 23 N. W. 268; *Abbott's Munic. Corp.* § 268; *High's Ex. Leg. Rem.* § 92.

The statutes of Ohio amply provide for the protection of taxpayers. The city solicitor is required by section 4311, General Code, to apply in the name of the corporation to a court of competent jurisdiction for an injunction to restrain the misapplication of its funds, the abuse of its corporate powers, or the execution or performance of any contract made in its behalf in contravention of the laws and ordinances governing it, or which was procured by fraud or corruption. Should he fail, upon the written request of a taxpayer of the corporation, to make such application, then such taxpayers may, under the provisions of section 4314, institute suit or proceedings for such purpose in his own name on behalf of the corporation. But cases brought, like this, by a defeated bidder, are not to be confused with those brought by a taxpayer under the foregoing statutory provisions. The one has no

vested right. The right of the other is real and substantial, and the law accords him the privilege of appealing to the courts to determine whether or not that right has been or is about to be invaded.

Boren & Guckes v. Commissioners of Darke County, 21 Ohio St. 311, and *State v. Commissioners*, 39 Ohio St. 188, are not controlling, or helpful to complainant. They were decided under a statute which required the award to be made to the lowest bidder who would give a good and sufficient bond to the acceptance of the commissioners. In each of them the rule was announced that the commissioners were clothed with a discretion, to be exercised in a reasonable and proper manner, as to the acceptance of a bond, but as to awarding the contract to the lowest bidder their acts were purely ministerial. The utterance in the closing paragraph of the last-named case, on which complainant lays stress, is a dictum, irreconcilable with the preceding portions of the opinion, and in conflict with the rulings made in the later cases of *Ohio v. Hermann* and *State v. Board*. It is significant that the case has never been cited by the Supreme Court.

It follows from the foregoing that the bill is wanting in equity, and does not state such a cause as entitles the complainant to relief, and to that extent the demurrers are sustained. No ruling is made on the demurrer for misjoinder of parties.

The lower court is affirmed.

FELIX et al. v. UNITED STATES.†

(Circuit Court of Appeals, Fifth Circuit. March 21, 1911.)

No. 2,086.

1. UNITED STATES (§ 11*)—VOTERS—QUALIFICATION—REPRESENTATION IN CONGRESS.

Const. art. 1, § 1, vests all legislative power granted in a Congress to be composed of a Senate and House of Representatives, and section 2 declares that the House of Representatives shall be composed of members chosen every second year by the people of the several states, and that the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature. *Held* that, though the states may prescribe the qualifications of voters for the most numerous branch of their own Legislatures, they do not in prescribing such qualifications directly prescribe the qualifications of voters for representation in Congress, though under such constitutional provision the qualifications are the same in each case; the right to vote for a member of Congress being fundamentally based on the federal Constitution creating the office and prescribing the qualifications of voters therefor.

[Ed. Note.—For other cases, see *United States*, Cent. Dig. § 7; *Dec. Dig.* § 11.*]

2. CONSPIRACY (§ 29*)—“PRIVILEGE” OF CITIZENS—“RIGHT.”

The right or privilege to vote at an election for a member of the House of Representatives of the United States is a right or privilege secured by the Constitution of the United States, and such right is therefore within the meaning of section 5508 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3712).

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 42-52; *Dec. Dig.* § 29.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5583-5589; vol. 8, p. 7764; vol. 7, p. 6220-6224; vol. 8, p. 7790.]

*For other cases see same topic & § NUMBER in *Dec. & Am. Digs.* 1907 to date, & Rep'r Indexes

† Rehearing denied April 13, 1911.

3. CONSPIRACY (§ 29*)—TO OPPRESS OR INTIMIDATE—STATUTES—APPLICATION.

Rev. St. § 5508 (U. S. Comp. St. 1901, p. 3712), provides that if two or more persons conspire to oppress, threaten, or intimidate "any citizen" in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, or because of his having so exercised the same, they shall be fined, etc. *Held*, that such section was not intended for the sole protection of the civil rights of citizens of African descent, depending entirely on the federal Constitution and laws passed in accordance therewith, but protected all citizens in the civil rights guaranteed and secured to them by the Constitution and laws of the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 42-52; Dec. Dig. § 29.*]

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

Paul Felix and others were convicted of conspiracy to injure and oppress or threaten certain citizens of the United States in the exercise of a privilege secured to them by the Constitution and laws of the United States, and they bring error. Affirmed.

The indictment against the plaintiffs in error and seven others was found and filed February 13, 1909. It contained two counts, and, omitting formal parts, was as follows:

"The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid, on their oath present that Paul Felix, * * * W. W. Stiles, * * * all of the parish of Jefferson, in said state, in the said division of said district and within the jurisdiction of said court, being persons of evil minds and dispositions, together with divers other evil disposed persons whose names are to the grand jury aforesaid as yet unknown, on the 3d day of November, in the year of our Lord one thousand nine hundred and eight, at the parish of Jefferson, in the state of Louisiana, in the said division and district, and within the jurisdiction of said court, at which time, to wit, the 3d day of November, 1908, a general election for presidential electors and members of the House of Representatives of the United States, together with certain state, parochial, and municipal officers within the state of Louisiana was being held under and in accordance with the Constitution of the United States, the laws of the Congress of the United States, and the laws of the state of Louisiana, and a poll was then and there opened, and an election was then and there legally had and held in each voting precinct in said state, in each of which said voting precincts persons were then and there lawfully voted for by the legal voters therein for said United States presidential electors, members of the United States House of Representatives, and state, parochial, and municipal officers, and that a certain precinct, to wit, the precinct known as the city of Kenner, Edward Stoulig, Raoul De Gruy, Henry Roth, Philip Klees, Frederick Schneckenberger, Anthony Maggiore, Michael Christina, John Maggiore, A. Wattingly, Chris. Louchbaum, and divers other persons to the grand jurors aforesaid unknown, were then and there, as defendants well knew, male citizens of the United States, residents of the said voting precinct, twenty-one years of age, and had been citizens and residents of said precinct for more than six months and of said parish in which said precinct is located for more than one year, and of the said state for more than two years, next preceding said election, and were then and there, as defendants well knew, under the Constitution and laws of the United States and the laws of the state of Louisiana, having compiled with all the laws of the United States and of the state of Louisiana, to qualify them as electors of the state of Louisiana, and legally entitled to vote for persons for presidential electors, members of the House of Representatives of the United States, and state, parochial, and municipal officers; that said voters at the time and place aforesaid presented themselves with the intention and for the purpose of voting; that the defendants knowing all of the afore-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

said facts did then and there unlawfully, knowingly, and feloniously conspire, confederate, combine, and agree together and each of them with the other, and they and each of them with divers other parties to the grand jurors aforesaid unknown, armed with pistols, guns, and other mortal weapons to injure, oppress, threaten, and intimidate said voters in the free exercise and enjoyment of a right and privilege which they then and there had and which was then and there secured to them by the Constitution and laws of the United States of then and there voting for persons to fill offices of presidential electors, members of the House of Representatives of the United States, parochial, and municipal officers of the state of Louisiana, and that, in pursuance of said conspiracy and to effect the purpose and object thereof, the defendants then and there unlawfully, willfully, corruptly, and maliciously injured and prevented the said voters from voting on said voting day, the same being a right or privilege granted and secured to the said Edward Stoulig, Raoul De Gruy, Henry Roth, Philip Klees, Frederick Schneckenberger, Anthony Maggiore, Michael Christina, John Maggiore, A. Wattingly, Chris. Louchbaum, in common with all other good citizens of the United States by the Constitution and laws of the United States of America.

"Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

"Count Second.

"And the grand jurors aforesaid, on their oath aforesaid, do further present that the said Paul Felix, * * * W. W. Stiles, * * * at the time and place and in the manner and mode as specified in the first count of this indictment, and in the act of conspiring, injuring, oppressing, threatening, and intimidating the said Edward Stoulig, Raoul De Gruy, Henry Roth, Philip Klees, Frederick Schneckenberger, Anthony Maggiore, Michael Christina, John Maggiore, A. Wattingly, and Chris. Louchbaum, aforesaid, in the free exercise and enjoyment of their right and privilege secured to them by the Constitution and laws of the United States of voting for United States presidential electors, members of the House of Representatives of the United States, state, parochial, and municipal officers, the said Paul Felix, * * * W. W. Stiles, * * * aforesaid, did then and there with force and arms, armed with dangerous weapons, to wit, pistols, guns, scissors, willfully and maliciously, unlawfully, and feloniously in and upon one Emanuel A. O'Sullivan in the peace of the state of Louisiana and of the United States then and there being commit an assault, and did then and there willfully, maliciously, unlawfully and feloniously with a pair of scissors and did then and there unlawfully and feloniously, willfully and maliciously with a dangerous weapon, to wit, a pair of scissors, inflict a wound less than mayhem, contrary to the form of the statute of the state of Louisiana, being section No. 749 of the Revised Statutes of the state of Louisiana, as amended by Act No. 17 of 1888, by the General Assembly of the state of Louisiana, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The first count is based on the following statute:

"Sec. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States." Rev. Stat. (U. S. Comp. St. 1901, p. 3712).

The second count is based on the following statute:

"Sec. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed." Rev. Stat. (U. S. Comp. St. 1901, p. 3712).

The defendants pleaded "not guilty." The case was tried, and the jury returned a verdict of "guilty" as to Paul Felix and W. W. Stiles, and "not guilty" as to the other defendants. There were no exceptions as to the admission or rejection of evidence, nor to the charge of the court. A motion for a new trial was overruled. A motion in arrest of judgment was made on the following grounds:

"First. That the verdict herein rendered is contrary to law, and hence null and void.

"Second. That there was no offense charged in the indictment which could or can be punished under the laws of the United States.

"Third. That this honorable court was without jurisdiction in the premises, and that all the proceedings had under this indictment are null and void and of no effect."

The motion was overruled and judgment entered on the verdict, and the case is brought to this court on writ of error by Felix and Stiles, who assign that the Circuit Court erred because "the allegations and specifications contained in the indictment herein fail to constitute an offense or a crime indictable or punishable under sections 5508 and 5509 of the Revised Statutes of the United States."

Armand Romain (F. A. Middleton and Alfred E. Billings, of counsel, and on the brief), for plaintiffs in error.

Charlton R. Beattie, U. S. Atty. (W. J. Waggespack, Asst. U. S. Atty., on the brief).

Before McCORMICK and SHELBY, Circuit Judges, and NEWMAN, District Judge.

SHELBY, Circuit Judge (after stating the facts as above). 1. The statute (section 5508) on which the first count of the indictment is based is applicable to conspiracies to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. The statute is applicable for the protection of "any citizen" without other limitation. The rights or privileges protected by the statute are limited. The statute embraces and protects only those which are secured to the citizen "by the Constitution or laws of the United States." The indictment charges that the defendants with others conspired to injure, oppress, threaten, and intimidate certain voters in the free exercise and enjoyment of the right and privilege to vote for members of the House of Representatives of the United States. It is contended by the learned counsel for the accused that the right or privilege to vote at an election for a member of the House of Representatives of the United States is not a right or privilege secured by the Constitution or laws of the United States, and that, therefore, such right is not within the meaning of section 5508. That contention presents the controlling question in this case.

[1] The first section of the first article of the Constitution vests all legislative powers granted in a Congress to be composed of a Senate and a House of Representatives. The second section provides:

"The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state Legislature." Subdivision 1, § 2, Const.

The states were left free to prescribe the qualifications of the voters for the most numerous branch of their own Legislatures. When they have done so, such voters are made by the Constitution qualified electors to vote for members of the House of Representatives. The states in prescribing the qualifications of the voters do not do so with reference to elections for members of Congress. They have no authority to directly prescribe such qualifications. They provide who shall vote for the popular branch of their Legislatures, and the Constitution confers on such electors the right to vote for members of the House of Representatives of the United States. The right to vote for a member of Congress, therefore, is "fundamentally based upon the Constitution, which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors." *Ex parte Yarbrough*, 110 U. S. 651, 664, 4 Sup. Ct. 152, 158, 28 L. Ed. 274; *Wiley v. Sinkler*, 179 U. S. 58, 21 Sup. Ct. 17, 45 L. Ed. 84; *Swafford v. Templeton*, 185 U. S. 487, 492, 22 Sup. Ct. 783, 46 L. Ed. 1005.

[2] 2. The learned attorney for the accused contends that section 5508 "refers specially to the civil rights of citizens of African descent dependent entirely upon the federal Constitution and laws passed in accordance therewith." It is claimed that the indictment, therefore, charges no offense because it does not appear that the aggrieved persons were citizens of African descent; or that they were interfered with on account of race, color, or previous condition of servitude. The section in question, as we have pointed out, relates to those who conspire against "any citizen." It involves no question of race. "Any citizen" is protected by it against the described conspiracies to injure him in the enjoyment of described rights and privileges. The statute has been often construed, the cases usually bearing on the question whether or not the right or privilege involved is one secured to the person injured "by the Constitution or laws of the United States." The right to make a homestead entry under a federal law has been held to be within the statute (*U. S. v. Waddell*, 112 U. S. 76, 5 Sup. Ct. 35, 28 L. Ed. 673); also, the right to aid in the execution of federal laws by giving information to the proper authorities of the violation of those laws (*Motes v. U. S.*, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150), and the right of a marshal and his posse to arrest on legal process (*U. S. v. Davis [C. C.]* 103 Fed. 457). In each of these cases it would be immaterial whether the citizen injured was a white man or a negro. So in the case at bar the race of the person alleged to have been deprived of rights secured by the Constitution or laws of the United States is wholly immaterial. In fact, the record shows that the plaintiff in *Swafford v. Templeton*, supra, "was a white man," and in that case Mr. Justice White, speaking for the court, held that the plaintiff's right to vote for a member of Congress was fundamentally based upon the Constitution of the United States, which created the office, and declared that it should be elective.

The judgment is affirmed.

KEYSTONE TYPE FOUNDRY v. PORTLAND PUB. CO.

(Circuit Court of Appeals, First Circuit. March 10, 1911.)

No. 907.

TRADE-MARKS AND TRADE-NAMES (§ 75*)—"UNFAIR COMPETITION."

The basis of an action for unfair competition is fraud or deceit, inducing the public to believe that defendant's goods are those of complainant; and where the likeness is in the goods themselves, because of the copying of the design of complainant's article, which is unpatented, and there is no attempt to deceive purchasers with respect to the manufacturer, there is no ground on which a court of equity can grant an injunction.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.*]

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

Appeal from the Circuit Court of the United States for the District of Maine.

Suit in equity by the Keystone Type Foundry against the Portland Publishing Company. From a part of the decree (180 Fed. 301), denying complainant certain relief, it appeals. Affirmed.

Ernest W. Bradford (Wilford G. Chapman, on the brief), for appellant.

Venable, Baetjer & Howard, for appellee.

Before COLT and LOWELL, Circuit Judges, and ALDRICH, District Judge.

LOWELL, Circuit Judge. The amended bill in equity set out that the complainant, hereinafter called the "Foundry," at great expense procured the design of a certain type or type face, to which it gave the name of "Caslon Bold," and that it spent a large sum in advertising this type, which by this design became known as the product of its foundry; that it offers this type for sale only for printing purposes, and not for the purpose of being copied; that this is understood by printers. The bill further set out that the defendant, hereinafter called the "Publishing Company," was engaged in the manufacture and sale of type having the Foundry's "Caslon Bold" design, which type was cast in matrices made from the Foundry's original type; that the Publishing Company, having wrongfully and surreptitiously, with intent to deceive, obtained and copied forms of the Foundry Company's "Caslon Bold" type, sold its copies of this type under that name, though of inferior quality, at reduced rates, by reason of having had no original expense about the designing and advertising. Deception of purchasers was alleged. The bill prayed an injunction restraining the Publishing Company—

"from advertising said type-face design by reproducing or copying the same in any printed matter, or appropriating, reproducing, or copying by any method or means said original type face known in your orator's advertising as 'Caslon Bold,' or from making or selling or offering for sale type having the face design known as 'Caslon Bold' as aforesaid, or any copy thereof, and

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

from in any way using or appropriating for its use the name 'Caslon Bold' for type, and from in any way interfering with the business of your orator in the manufacture and sale of type having said original face design."

The jurisdiction of the Circuit Court was not invoked by reason of an alleged infringement of a statutory trade-mark, but only because of the diverse citizenship of the Foundry and the Publishing Company.

The Publishing Company demurred to so much of the bill as alleged the manufacture and sale of "Caslon Bold" type face "otherwise than as under the name of 'Caslon Bold' or as type manufactured by the complainant," setting forth as ground of demurrer that the complainant had neither patent nor trade-mark. The demurrer was overruled, with leave to the respondent to raise at the final hearing all questions raised by the demurrer. The amended answer denied the complainant's ownership of the type face, alleged that "Caslon Bold" was a generic term "incapable of exclusive appropriation by any one," and denied fraud or deceit on its own part. Evidence was taken, and the Circuit Court in its final decree enjoined the Publishing Company from using the name "Caslon Bold" to designate its type, but dismissed the bill in so far as it sought to restrain the Publishing Company from copying the Foundry's type and selling the copy. The Foundry appealed to this court.

In substance, the case is this: The Foundry designed a type which the printing and publishing trades have found desirable. This designing involved expense, and the type so designed became well known to printers and to publishers under the name "Caslon Bold." The former were largely guided in their choice by the approval of the latter, while the publishers rested their approval upon the ultimate approval of the general public. The Publishing Company imitated this type. The Foundry treats the case as one of unfair competition, and likens the shape and design of "Caslon Bold" type to the mark or label which is used to designate an article as the make of a particular manufacturer. It contends that this is an ordinary case of unfair competition.

So far as this case is concerned, however, the type face is in effect the type itself. The expense incurred by the Foundry was concerned only with the design, not with the composition of the material, or with the shape of the metal body which carried the face. The expense of advertising was the expense of advertising the type face.

"The advertising necessary to market a new type face and put it fairly before the printers of the country calls for the best efforts of expert printers and advertisers." Complainant's expert Weatherly, A. 1403, Rec. p. 274.

"The success of a foundry depends upon its line of popular selling faces." Complainant's expert Orchard, A. 299, Rec. p. 88.

Doubtless those skilled in the trade would know "Caslon Bold" type as the complainant's manufacture so long as other foundries refrained from copying it. Speaking generally, however, the trade regarded only the design itself, and treated that as the essence of the type. The design was not the label or authentication of that which was otherwise desirable, but was the very desideratum itself. Here the alleged labels on the goods are the very goods themselves. The learned Circuit Judge said in his opinion:

"There is no claim on the part of the complainant to be protected with reference to the style of typography produced by the type."

There is no direct claim, indeed; but indirectly, by an ingenious extension of the doctrine of unfair competition, the complainant seeks protection for a monopoly of "Caslon Bold" type or typography. This the complainant admitted, and urged in its argument before this court.

The considerations above stated make plain that the doctrine of unfair competition will not support the enlargement of the decree which the complainant seeks. The basis of an action for unfair competition is not merely an ownership of a manufacturer's label, but also deceit or fraud on the defendant's part in the use of the label which will deceive a purchaser or user of the article labeled.

"The cardinal rule upon the subject is that no one shall, by imitation or any unfair device, induce the public to believe that the goods he offers for sale are the goods of another, and thereby appropriate to himself the value of the reputation which the other has acquired for its own products or merchandise." *Proctor & Gamble Co. v. Globe Refining Co.*, 92 Fed. 357, 361, 34 C. C. A. 405, 408.

By the language of its correspondence the defendant emphasized that its type is not of the complainant's manufacture, but is cast more cheaply and by a different process. The Foundry sought to show, indeed, that by reason of the Publishing Company's action a jobber in type might deceive a purchasing printer. But no evidence of this deceit is shown. It is highly improbable, and it is not what the Foundry complains of. The defendant has not sought to avail itself of the complainant's reputation as a founder, but of its taste and skill as a designer. This it may do. It may copy the complainant's type, so long as it does not pretend that the copy is an original product of the complainant. The doctrine is clearly stated by the Supreme Judicial Court of Massachusetts in a case concerned with the sale of zithers:

"Under such circumstances the defendant has the same right that the plaintiff has to manufacture instruments in the present form, to imitate the arrangement of the plaintiff's strings or the shape of the body. In the absence of a patent, the freedom of manufacture cannot be cut down under the name of preventing unfair competition. *Dover Stamping Co. v. Fellows*, 163 Mass. 191 [40 N. E. 105, 28 L. R. A. 448, 47 Am. St. Rep. 448]. See *Singer Manufacturing Co. v. June Manufacturing Co.*, 163 U. S. 169 [16 Sup. Ct. 1002, 41 L. Ed. 118]. All that can be asked is that precautions shall be taken, so far as are consistent with the defendant's fundamental right to make and sell what he chooses, to prevent the deception which no doubt he desires to practice.

"It is true that a defendant's freedom of action with regard to some subsidiary matter of ornament or label may be restrained, although a right of the same nature with its freedom to determine the shape of the articles which it sells. But the label or ornament is a relatively small and incidental affair, which would not exist at all, or at least would not exist in that shape, but for the intent to deceive; whereas, the instrument sold is made as it is, partly at least, because of a supposed or established desire of the public for instruments in that form. The defendant has the right to get the benefit of that desire, even if created by the plaintiff. The only thing he has not the right to steal is the good will attaching to the plaintiff's personality, the benefit of the public's desire to have goods made by the plaintiff." *Flagg Mfg. Co. v. Holway*, 178 Mass. 83, 90, 91, 59 N. E. 667.

Of the cases cited by the complainant, *Board of Trade v. Christie*, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, is not based upon the doctrine of unfair competition, and has no bearing upon the case at bar. In most or all of the other cases cited by the complainant deceit as a necessary element of the complainant's case was emphasized. The decree of the Circuit Court seems to exclude possible deception by the defendant, and the complainant does not suggest that it be strengthened, except by giving to the complainant a monopoly of the manufacture of the type itself.

The decree of the Circuit Court is affirmed, and the appellee recovers its costs of appeal.

In re GERBER. †

FREEDMAN BROS. CO. et al. v. PARKER.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,871.

1. BANKRUPTCY (§ 400*)—EXEMPTIONS—NATURE OF PROCEEDINGS—EQUITY.

Courts of bankruptcy proceed on equitable principles and will not sustain a positive fraud committed by the bankrupt in an endeavor to extend his exemptions any more than it would be sustained by a court of equity.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

2. BANKRUPTCY (§ 396*)—EXEMPTIONS—HOMESTEAD—FRAUD.

On April 15, 1909, the bankrupt, with knowledge of his insolvent condition and approaching bankruptcy, paid \$200 on the purchase price of property thereafter claimed as a homestead. Later in that month an involuntary bankruptcy petition was filed against him which he strongly contested and during the pendency thereof converted \$1,100 then in his possession into a certificate of deposit payable to his attorneys and delivered the same to them to prevent creditors from garnisheeing it. On May 18th following, such attorneys stipulated with the attorney for the petitioning creditors that the pending proceeding be dismissed and that the costs be paid out of the proceeds of the certificate and the balance returned to the bankrupt and that he should then consent to be immediately adjudged a bankrupt on a new petition filed by other attorneys for other creditors. A futile effort to persuade the bankrupt to consent to an adjudication on the first petition having been made, it was dismissed, and on the next day a new petition was filed against him on which an adjudication followed, but during the interim he paid from the certificate of deposit and other moneys held by him the balance of \$1,300 on the price of the property, receiving a deed, and immediately filed a declaration of homestead. *Held*. that such transaction was fraudulent, and that the bankrupt was not entitled to hold the property exempt as his homestead.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 396.*]

3. BANKRUPTCY (§ 400*)—EXEMPTIONS—ALLOWANCE—PROCEDURE.

While exemptions allowable to a bankrupt depend on the statutes of the state, the manner of claiming them and the proceedings to set apart and award them to the bankrupt are regulated by Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 (U. S. Comp. St. 1901, p. 3418).

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 400.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied May 22, 1911.

4. BANKRUPTCY (§ 22*)—EXEMPTIONS—RULES—FORMS—EFFECT.

The rules and forms prescribed by the Supreme Court under and by virtue of the bankruptcy act for its administration have the force and effect of law.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 22.*]

5. BANKRUPTCY (§ 399*)—EXEMPTIONS—AWARD—TIME—FORM—WAIVER.

Where a bankrupt failed to make claim for his exemptions in the manner and within the time prescribed by Bankruptcy Act July 1, c. 541, § 47, 30 Stat. 557 (U. S. Comp. St. 1901, p. 3438), General Orders 17 and 38, and Form 47 (32 C. C. A. xix, xxxvii, lxxvi; 89 Fed. viii, xvi, lii), the right to exemptions was waived.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 399.*]

Petition for Revision of Certain Orders in Bankruptcy of the United States District Court for the Northern Division of the Western District of Washington.

In the matter of bankruptcy proceedings of Benjamin Gerber. On petition of Freedman Bros. Company and others to revise certain orders granting exemptions to the bankrupt. Reversed with directions.

The bankrupt was a retail dealer in women's wearing apparel in the city of Seattle, and was adjudged bankrupt May 19, 1909, by the court below. His schedules of assets and liabilities were filed May 27, 1909.

The bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]), provides that it shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months, or the greater portion thereof, immediately preceding the filing of the petition.

The state statute applicable to the case is found in subdivision 4 of section 563 of Remington and Ballinger's Annotated Codes and Statutes of Washington, which reads as follows: "To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months; also feed for such animals for six months: Provided, that in case such householder shall not possess or does not desire to retain the animals above named, he may select from his property and retain other property, not to exceed two hundred and fifty dollars coin in value. The selection in the proviso mentioned shall be made in the manner and by the person, and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section."

The preceding subdivision of the same section, to wit, subdivision 3, is as follows: "To each householder, one bed and bedding, and one additional bed and bedding for each additional member of the family, and other household goods, utensils, and furniture, not exceeding five hundred dollars coin in value. The other household goods and utensils, and furniture specified above shall, on the demand of the officer having the execution or attachment in hand, be selected by the husband if present, if not present they shall be selected by his wife, and in case neither husband or wife, nor other person entitled to the exemption by having the description of a householder shall be present to make the selection, then the sheriff shall make a selection of the household goods, utensils and furniture, equal in value to said five hundred dollars, and shall return the same as exempt by inventory, and such selection by the sheriff or other person described above shall be *prima facie* evidence—(1) That such household goods, utensils and furniture are exempt from execution and attachment; (2) That the value of the property so selected is not over five hundred dollars."

In compliance with the bankruptcy act, which requires the bankrupt to include in his schedules "a particular statement of the property claimed as

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

exempt," etc., Gerber, in Schedule B (5), listed wearing apparel of himself and family, and also certain specified household goods and effects, concerning which there is no controversy. He also claimed in the schedule mentioned \$250 in cash by virtue of the above provision of the statute of the state of Washington concerning animals, and also, by virtue of the same statute, "a sufficient sum out of the assets of his estate for provisions for himself and his family for a period of six months," and also claimed certain real estate acquired by him, as hereinafter stated, as a homestead. A trustee of the estate was selected. On the 8th of July, 1909, the bankrupt filed with the referee in bankruptcy a petition asking an order directing the trustee to set aside to him the property so claimed by him as exempt, in response to which petition the trustee, on the 12th of October, 1909, filed with the referee a report, designating and setting aside to the bankrupt all of the property so claimed as exempt, to wit, the wearing apparel and household furniture, \$250 in money by virtue of the above section of the statute of Washington in lieu of cows, swine, bees, and fowls, \$25 a month, aggregating \$150, for the maintenance of the bankrupt and his family for six months, and also the real property claimed as a homestead.

Within 20 days after the filing of the trustee's report of such exemptions, a number of the creditors of the bankrupt joined in filing exceptions thereto, directed only to the allowance of the cash exemptions and the homestead. With respect to the cash exemptions the exceptions were based upon the contention that at the time the bankrupt filed his schedules the property of his estate was still in specie, and the bankrupt had ample opportunity to make his selections from such existing property; that he had no right to claim money in lieu of goods; and that by failing to make his selection at the time and in the manner provided by law he had waived such exemption. In respect to the cash allowance for the maintenance of the bankrupt and his family for six months, the contention of the creditors was that the statute of Washington does not authorize exemptions in lieu of provisions and fuel, either in money or property. The homestead allowance was excepted to on the ground that the bankrupt had acquired the homestead in contemplation of his immediate adjudication as a bankrupt and in pursuance of a scheme to defraud his creditors.

The issues thus formed were heard by the referee, who found and decided as follows: That, as to the lieu exemptions allowed by the trustee, the facts were that no claim for specific property in lieu of the animals and supplies was made by or on behalf of the bankrupt; his only claim being for a cash allowance. That the specific property which he might have claimed on account of such lieu exemptions was sold by the trustee, and not more than 60 per cent. of its value obtained therefor upon such sale. That in view of those facts the referee was of opinion, and so held, that the bankrupt should only receive in cash 60 per cent. of the amount to which he would have been entitled in specific property had he made claim therefor, and was therefore entitled to \$150 in cash out of the proceeds of the property sold by the trustee. "That as to the exemptions of property necessary for his maintenance, the statute not having provided any amount in lieu thereof, there seemed to be no guide to aid in determining how much cash he would be entitled to instead of specific property if he had made claim therefor; but the same reasons would obtain for reducing the cash allowance on this account as for that claimed in lieu of certain animals, and the referee agreeing with the trustee that \$25 per month would have been a fair allowance if taken in property, 60 per cent. thereof, or \$15 per month, would be a fair allowance in cash." For the reasons stated, the referee reduced the aforesaid allowances made by the trustee to \$150 and \$90, respectively.

With regard to the homestead claim, the findings of fact and conclusions of the referee were as follows: "That on the 15th day of April, 1909, the bankrupt paid a deposit of \$200 on the purchase price of the property now claimed as homestead. That at that time he was wholly insolvent, and knew himself to be insolvent. That many suits were pending, and were threatened by creditors for accounts against the bankrupt long past due. That during the latter part of April, 1909, a petition in involuntary bankruptcy was filed against the bankrupt by creditors, which petition was strong-

ly contested by the bankrupt. That during the pendency of such proceeding the bankrupt converted \$1,100, which he had in his possession, into a bank certificate of deposit payable to the order of Blaine, Tucker & Hyland, his attorneys, and delivered said certificate to said attorneys. That his purpose in placing said money in that shape was to prevent creditors from garnisheeing it. That on May 18, 1909, the bankrupt's attorneys stipulated with the attorney for the petitioning creditors that the pending bankruptcy proceeding be dismissed; that costs aggregating \$237 incurred in said proceeding be paid out of the \$1,100 held by Blaine, Tucker & Hyland; that the balance be paid back to Gerber; and that Gerber should consent to be immediately adjudged bankrupt upon a new petition to be filed against him by other attorneys representing other creditors. That an effort was made by the attorney who had filed the first petition to persuade Gerber to be adjudged bankrupt upon the first petition, but the bankrupt insisted upon a dismissal of said first petition and the filing of a new one. That in pursuance of said stipulation the said first proceeding in bankruptcy was dismissed on the 18th day of May, 1909, and on the 19th day of May, 1909, said Gerber was adjudged bankrupt upon a second petition filed that day. That during the interim between the dismissal of the first petition and the filing of the second petition said Gerber paid a balance of \$1,300 cash on the purchase price of the property, receiving a deed therefor. That immediately after receiving said deed he filed a declaration of homestead on said property. That the \$1,300 cash so paid was made up of the balance received from Blaine, Tucker & Hyland upon the dismissal of the first petition and other moneys held by the bankrupt. From the foregoing facts the court concludes that the bankrupt invested said funds while insolvent and knowing himself to be insolvent, for the purpose of withholding same from his creditors; that the bankrupt insisted upon a dismissal of the first petition in bankruptcy in order that he might conclude the transaction with respect to the purchase of said property before the filing of the second petition upon which he was adjudged bankrupt; that in equity and good conscience it would seem that in view of these facts said homestead should not be set aside to the bankrupt as exempt, but under the liberal rule laid down by the Supreme Court of this state said undersigned (referee) was constrained to hold that it was, notwithstanding his opinion as to the equities involved in the proposition."

Upon petition to the court below for a revision of the foregoing decision of the referee, the court confirmed that decision, and hence the proceedings here.

Leopold M. Stern, for petitioner.

James B. Kinne, for bankrupt.

Henry F. McClure, Walter A. McClure, and Wm. E. McClure, for respondents.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The motion to dismiss the petition for review is without merit and is denied.

While it is well-established law that exemptions in behalf of unfortunate debtors are to be liberally construed in furtherance of the object of such statutes, it should never be forgotten that courts have not the power to legislate, and can no more add an exemption not fairly within the statute than they can take from the statute. So also must it be remembered that courts of bankruptcy proceed upon equitable principles, and should no more sustain a positive fraud than would a court of equity. In respect to this homestead claim, both the referee and the District Court expressly recognized its fraudulent character. In view of the facts found, it is impossible to see how it could have been otherwise. Here was a debtor fully conscious of his

bankruptcy, strenuously opposing those of his creditors who were seeking his adjudication as a bankrupt, the while disposing of and secreting his cash, and finally consenting to such an adjudication provided the creditors would dismiss their then pending petition for his adjudication as a bankrupt and procure other creditors to file a new one; his obvious purpose, made manifest by his action, being to put, in the interim, the money to which his creditors were justly entitled into property upon which he could and did forthwith declare a homestead. Surely no court acting upon equitable principles should sustain such a transaction.

In denying the validity of a similar claimed exemption, the Circuit Court of Appeals for the Fourth Circuit said, in the case of McGahan v. Anderson, 113 Fed. 115, 119, 51 C. C. A. 92, 95:

"As to the homestead exemption, the evidence of the bankrupt is by no means satisfactory. He admits that he began the erection of the 'house in July or August, 1889—after July 1st.' He does not make a candid disclosure as to where the money came from to build this house, but, when pressed, admitted that a part of it 'came from the sale of goods which he had not paid for.' He fails to disclose how much money came from the goods which he had purchased and never paid for. He alone was possessed of the information upon the subject. It was his duty, in setting up a claim to a homestead, to show by clear and conclusive proof that at the time he built the house upon the property he was in a solvent condition, and able to satisfy all the claims against him, before he could take money from his business for the purpose of securing a homestead. The fair deduction from all the evidence in this case tends clearly to prove that at the time he commenced the erection of this house he was in a failing condition, if not insolvent. He built this house upon a lot owned by his wife, and afterwards had it conveyed to himself in order that he might have it set apart as a homestead. This is a most potential fact to show that he was shaping his course to protect himself as far as possible from the consequence of bankruptcy, which the evidence tends to show was imminent at that time, for on the 25th day of October following a petition of involuntary bankruptcy was filed against him, and in less than a month he was adjudicated a bankrupt. We deem it unnecessary to discuss the evidence in detail filed in this case, but content ourselves with the conclusions that we have reached based upon all the evidence, more particularly on the evidence of the bankrupt himself."

See, also, In re Mayer, 108 Fed. 599, 47 C. C. A. 512; In re H. L. Evans & Company (D. C.) 158 Fed. 153; In re Boothroyd & Gibbs, Fed. Cas. No. 1,652.

Respecting the money allowance to the bankrupt in lieu of the cows, calves, swine, bees, and domestic fowls exempted by the Washington statute, it is not claimed that the exact provisions of the statute of that state here in question have been expressly construed by the Supreme Court of Washington; but its rulings in the cases of Carter v. Davis, Sheriff, 6 Wash. 327, 33 Pac. 833, and United States Fidelity, etc., Co. v. Hollenshead, 51 Wash. 326, 98 Pac. 749, are quite suggestive of the true construction of the provisions of that statute. The first of the cases mentioned was brought by the wife of one R. P. Carter against the sheriff of one of the counties of the state of Washington to recover certain property levied by the sheriff under certain writs of attachment issued against R. P. Carter, and also to recover certain moneys, being the proceeds of attached property sold by the sheriff by order of court. The property levied upon and sold consisted of

two horses named Big Nellie and Fannie, for which the sheriff received \$165, and also certain other live stock, consisting of mules, horses, and cattle, for which he received \$250. R. P. Carter having left the state, his wife, "acting for the said R. P. Carter, and in his absence," duly and legally claimed of the appellant (sheriff) as exempt from attachment and sale, and as being community property of the respondent (plaintiff) and the said R. P. Carter, certain household goods and furniture," not exceeding \$150 in value, and not involved in the litigation; and "also \$250 in coin, the proceeds of the sale of live stock, selected in lieu of the exemptions provided for in subdivision 4 of section 486 of the Code of Civil Procedure; and also the sum of \$165, the proceeds derived from the sale of the horses Big Nellie and Fannie." The court said:

"Now, conceding that R. P. Carter was a householder at the time of the levy, and it appearing that his family consisted of his wife, the respondent, only, he had a right as such householder, if entitled to any exemption whatever, to retain one bed and bedding and other household goods and utensils and furniture, such as he might select, but not exceeding \$500 coin in value. Code Civ. Proc. § 486, subd. 3. The respondent, as his representative, selected the 'bed and bedding' and certain other household goods, utensils, and furniture, not exceeding \$150 in value, none of which were levied upon by the appellant, and then demanded of appellant, in lieu of other property of like character which was not selected, and perhaps not even possessed by her husband, \$250, the proceeds of the sale of the live stock above mentioned, none of which was claimed to be exempt at all, and also the sum of \$165, the proceeds derived from the sale of the two horses Big Nellie and Fannie. The claim to this \$250, in the hands of the sheriff, is manifestly unfounded in law. The section of the statute referred to authorizes the selection of 'other household goods, utensils and furniture,' and prescribes the method and by whom such property may be selected, but confers no right to retain or select other property of a different character in lieu of that authorized to be selected and retained."

If, as the court there held, the right given by the Washington statute to select "other household goods, utensils and furniture," in cases provided for, was confined to other property of the same kind, and conferred no right to retain or select other property of a different character in lieu of that authorized to be selected and retained, it would seem to follow necessarily that the same construction must be given to like provisions contained in subdivision 4, § 563, Rem. & Bal. Code, Wash.

The case of United States Fidelity, etc., Co. v. Hollenshead presented an appeal from a judgment directing the payment of money in the registry of the court to a judgment creditor, upon disallowing a claim for exemptions. We extract from the opinion of the court:

"After trial on the merits, judgment was entered for plaintiff and against defendant, in a suit to recover money upon contract. On the same day, and after the trial on the merits, judgment for the sum of \$589.41 was entered against the First National Bank of Ritzville, Wash., in a garnishment proceeding ancillary to the main action. Defendants and the garnishee defendant were represented by the same attorney in all proceedings prior to the rendition of the judgment. The trials being concluded on the 7th day of June, the court announced its judgment in each case, but they were not formally entered until the 10th day of June, 1907. On the day prior to the formal entry of the judgments, defendant Hollenshead made and filed a claim for exemptions, in the following form:

"State of Washington, County of Adams—ss.: I, Aaron Hollenshead, one of the above-named defendants, being first duly sworn, on oath do depose and say that the judgment in the above-entitled action was obtained against myself, as one of the defendants, in the sum of \$_____, on this 7th day of June, 1907; that I am a householder, residing in the town of Ritzville, Adams county, Wash.; that the family consists of myself and wife; that I am possessed of household goods, utensils, and furniture, not equal in value to the sum of \$500; that the same are exempt from attachment and execution; that I am entitled to an exemption, under the statute, to a further exemption in the sum of \$250 coin, in value; that the above-named plaintiffs have recovered judgment against the First National Bank of Ritzville, Wash., garnishee defendant, in the sum of \$589.41, in the above-entitled action; that I am entitled to the sum of \$250 in lieu of cows, calves, swine, bees, fowls, and feed therefor, which I do not own or possess, out of the moneys which the said First National Bank of Ritzville now have in their possession and from which the said judgment stands against."

"Execution having issued, the garnishee defendant paid the amount found to be due from it to appellant into the registry of the court, and thereafter upon motion the court ordered the money paid over to plaintiff in satisfaction of its judgment. Upon these proceedings defendant predicates error, and insists that, under the liberal rules applied by this court in construing exemption statutes, the money should have been paid over to him as exempt. However, we believe that the rule relied upon by appellant cannot be invoked until a claim has been made at the proper time and in a proper manner.

"The law is solicitous for the welfare of the debtor, but it also recognizes the rights of the creditor to fully satisfy his judgment out of the property of the debtor that is not exempt from execution. The right to claim property in lieu of other property specifically exempted by statute is a privilege, and will be waived unless asserted at the time and in the manner expressly or impliedly required by the law. 12 Am. & Eng. Encyc. Law (2d Ed.) 198," where the law is stated to be as follows:

"If a statute exempts a particular kind of property or specific articles only, the right of exemption does not extend to any other kind of property or to any other articles."

See, also, Cyc. vol. 18, p. 1381.

The ruling therefore of the Supreme Court of Washington is that claims to such exemptions as those in question conferred by the Washington statutes must be seasonably made.

While the exemption right in the case in hand depends upon the statutes of Washington, as has already been said, the manner of claiming such exemptions and of setting apart and awarding them is regulated by the bankruptcy act. In re Friedrich, 100 Fed. 284, 40 C. C. A. 378; In re Mayer, *supra*. And the Supreme Court, by virtue of the bankruptcy act, has prescribed the time and manner of preferring such claims. No. 38 of the General Orders in Bankruptcy, so prescribed, provides:

"That the several forms annexed to these general orders shall be observed and used." 32 C. C. A. xxxvii, 89 Fed. xvi.

And the official form so annexed requires, among other things:

"A particular statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description, and present use."

General Order 17 (32 C. C. A. xix, 89 Fed. viii), which defines the duties of the trustee, requires him to "make report to the court within twenty days after receiving the notice of his appointment, of the ar-

ticles set off to the bankrupt by him, according to the provisions of the forty-seventh section of the act, with the estimated value of each article, and any creditor may take exceptions to the determination of the trustee within twenty days after the filing of the report."

Section 47 of the act, referred to in the order last quoted, also defines the duties of the trustees, which duties include the direction to (11) "set apart the bankrupt's exemptions, and report the items and estimated value thereof to the court as soon as practicable after their appointment."

And Form 47 (32 C. C. A. lxxvi, 89 Fed. lii) prescribed by the Supreme Court requires the trustee to set forth in the report which is thereby required of him a schedule of the "property designated and set apart to be retained by the bankrupt aforesaid, as his own property, under the provisions of the acts of Congress relating to bankruptcy."

The rules and forms so prescribed by the Supreme Court under and by virtue of the bankruptcy act have the force and effect of law, and it therefore seems to us to result necessarily that the bankrupt here, even though it should be conceded that he was not limited to the species of property specified in the statute of Washington as hereinbefore indicated, lost any right he may have had to the exemptions claimed, by his failure to make the claim in the manner and within the time legally prescribed therefor. And it has been so decided. In re Von Kern (D. C.) 135 Fed. 447; In re Blanchard (D. C.) 161 Fed. 793; In re Prince & Walter (D. C.) 131 Fed. 546; In re Duffy (D. C.) 118 Fed. 926; In re Staunton (D. C.) 117 Fed. 507; In re Haskin (D. C.) 109 Fed. 789; In re Wunder (D. C.) 133 Fed. 821; In re Pfeiffer (D. C.) 155 Fed. 892. See, also, Moran v. King, 111 Fed. 730, 49 C. C. A. 578.

It also results from what has been said that the bankrupt was not entitled to the cash allowance in lieu of provisions and fuel.

The judgment is reversed, with directions for further proceedings in accordance with the views above expressed, and with costs in favor of the petitioners and against the respondent.

CHAS. H. LILLY CO. v. BRENT. †

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,825.

SALES (§ 88*)—CONSTRUCTION OF CONTRACT FOR SALE OF SEED—WEIGHT OF BUSHEL—QUESTION FOR JURY.

Plaintiff, a seed dealer in Kentucky, by letter offered defendant, a dealer in Seattle, blue grass seed "at \$1.40 per bu. f. o. b. cars," guaranteeing "that it will test 21 pounds to the measured bushel." Defendant accepted by wire confirmed by letter, describing the purchase as "One minimum car * * * blue grass seed weighing 21 lbs. to the bushel at \$1.40 per bushel f. o. b. cars." Plaintiff wrote: "Yours * * * confirming purchase of blue grass seed from us duly to hand and seems to be correct. * * * Kentucky blue grass seed testing 21 # to the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 10, 1911.

measured bushel at \$1.40 per bu. (14#) f. o. b. cars here." The seed was shipped, and the controversy between the parties was as to whether, under the contract, 14 or 21 pounds constituted a bushel. Plaintiff alleged, and offered evidence tending to prove, that by custom in the seed trade 14 pounds was a bushel, while defendant denied the custom, and introduced evidence tending to prove that it did not exist west of the Missouri river, and that defendant had never heard of it. *Held*, that the contract on its face was ambiguous as to the number of pounds to be delivered for a bushel, and that under the evidence the question was one for the jury.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 248-250; Dec. Dig. § 88.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action at law by N. Ford Brent against the Charles H. Lilly Company. Judgment for plaintiff (174 Fed. 877), and defendant brings error. Reversed.

John H. Allen and Walter B. Allen, for plaintiff in error.

Harold Preston and E. M. Carr, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. Both parties to this action are engaged in the seed business. The defendant in error was plaintiff in the court below, where he brought the action to recover of the plaintiff in error, defendant below, \$3,024 for a certain carload of 270 bags of fancy cleaned true Kentucky blue grass seed of the alleged weight of 30,340 pounds, with interest and costs, alleged by the plaintiff to have been shipped to the defendant in pursuance of certain correspondence set forth in the complaint, consisting of a letter of the plaintiff to the defendant of date June 17, 1908, a telegram from the defendant to the plaintiff of date June 22, 1908, and a letter from the defendant to the plaintiff of date August 3, 1908. Those letters and that telegram are as follows:

"Chas. S. Brent & Bro.

"Paris, Ky., June 17, 1908.

"Mess. Chas. H. Lilly & Co., Seattle, Wash.—Dear Sirs: We offer you, for wire acceptance and if unsold 325 bags of Fancy Cleaned True Kentucky Blue Grass Seed at \$1.40 per bu., f. o. b. cars here, August, Sept. or October shipment. Samples of the new crop will not be ready before the first of August, but we will guarantee to deliver only new crop and that it will test 21 pounds to the measured bushel. Hoping to be favored with your order, we are

"Yours truly,

Chas. S. Brent & Co."

"Seattle, Wn., June 22.

"Chas. S. Brent & Bro.

"Book order one minimum car Kentucky blue grass, yours 17th.

"The Chas. H. Lilly Co."

"Seattle, August 3, 1908.

"Chas. S. Brent & Bro., Paris, Kentucky—Gentlemen: Referring to our requisition No. 7272, June 22d, please ship Kentucky blue grass at your earliest convenience. We are advised that minimum car load weight is 30,000 pounds

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

and through rate \$1.35. Please route via L. & N., St. Louis, C. B. & Q. and N. P.

"Yours truly, The Chas. H. Lilly Co., Per N. H. Nivision.

The complaint also contained this allegation:

"That by the general custom of seed merchants in the United States of America, existing during all of the year 1908 and long prior thereto and ever since, the weight of a bushel of Kentucky blue grass seed was and is fixed at 14 pounds for the purpose of ascertaining and determining the price or value of any quantity of such seed sold at a fixed rate per bushel. That at all times herein mentioned the said general custom of seed merchants was well known to the defendant as well as to the plaintiff, and all of the dealings between the plaintiff and defendant, hereinafter alleged and described were made subject to and controlled by said general custom."

By its answer the defendant put in issue the allegations of the complaint in respect to the custom of seed merchants.

The defendant admitted the correspondence set out in the complaint and above quoted, and set up in defense that the defendant, on or about June 22, 1908, purchased of the plaintiff the blue grass seed referred to in the foregoing correspondence, upon the following written requisition, to wit:

"The Chas. H. Lilly Co.
"Established 1885.

"No. 7.272.

"Five requisition number.

"Send bill in duplicate to Seattle.

"Purchase Contract.

"Seattle, June 22, 1908.

"Chas. S. Brent & Bro., Paris Kentucky:

"Ship to the Chas. H. Lilly Co., Seattle, Wash.

"Ship when—Aug. Sent Oct., 1908, our option.

"No drayage allowed on this order.

"The following articles:

"One minimum car New Crop Fancy Cleaned True Kentucky Blue Grass Seed weighing 21 lbs. to the bushel at \$1.40 per bushel, 'F. o. b. cars Paris, Ky.'

"Per your quotation June 17th.

"Confirming our wire to you this date as follows: 'Book order one minimum car Kentucky Blue Grass Yours Seventeenth.'

"Ordered by F. L.

"Date received 9/15.

"Amit. received 30,240.

"Tally sheet 5,634.

"Invoice date 8/22.

"Amount 2,006.67.

"Freight 408.24.

"Paid Sep. 15, 1908."

The answer alleged that thereafter, to wit, on or about August 23, 1908, the plaintiff loaded on board car at Paris, Ky., 30,240 pounds of such seed, amounting to 1,440 bushels, and shipped the same to the defendant, in payment of which the defendant tendered to the plaintiff \$2,016 in accordance with the contract between the parties, having previously paid freight and other charges thereon, and that it continues such tender.

The case was tried before the court with a jury, and upon the conclusion of all of the evidence a peremptory verdict for the plaintiff was directed by the court and accordingly returned, to which action an exception was reserved by the defendant.

The record shows that the real controversy between the parties was whether the contract called for 14 or 21 pounds of seed to the bushel. The alleged custom among seedmen to regard 14 pounds of such seed as constituting a bushel was put in issue by the answer, and, while there was much testimony on behalf of the plaintiff tending to support his allegation in that regard, the defendant introduced testimony tending to show that the custom did not exist west of the Missouri river, that it never heard of such custom, and that in the Seattle market the custom was to buy and sell by the pound only. The court below, in passing upon the motion for a new trial which was made, recognized the correctness of the obvious point that, if the question of such custom was an open one, the case should have been submitted to the jury; but the learned judge was of the opinion that the correspondence precluded the defendant from disputing the claim of the plaintiff that 14 pounds of such seed constituted a bushel according to the terms of the contract.

Is that so? In the first place, it is to be noted that the plaintiff's evidence in respect to the custom was admitted over the defendant's objection and exception; the objection being that there was no ambiguity about the written contract, but, on the contrary, that it was clear and specific to the effect that a bushel was to consist of 21 pounds of seed. The only ground for the admission of such evidence was that it might aid in the true construction of the contract. If needed for that purpose, it was clearly a matter for the jury, since the evidence upon the subject was conflicting; and such could only have been the theory upon which the alleged custom was set up in the complaint.

The original offer of the plaintiff to the defendant was "325 bags of Fancy Cleaned True Kentucky Blue Grass Seed at \$1.40 per bu., f. o. b. cars" at Paris, Ky., guaranteed to "test 21 pounds to the measured bushel," August, September, or October shipment. The defendant's telegraphic response of date June 22d to that offer was, "Book order one minimum car Kentucky blue grass, yours 17th." This telegram was followed on the same day by the defendant's "requisition" (Form No. 7,272) confirming its telegram, and expressly describing the article ordered as: "One minimum car New Crop Fancy Cleaned True Kentucky Blue Grass Seed weighing 21 lbs to the bushel at \$1.40 per bushel, f. o. b. cars Paris, Ky. Per your quotation June 17th."

This requisition or order was answered by the plaintiff under date June 27, 1908, as follows:

"Paris, Ky., June 27-1908.

"The Chas. H. Lilly Co., Seattle, Wash.—Gentlemen: Yours of the 22d (yours No. 7,272) confirming purchase of Blue Grass Seed from us duly to hand and seems to be correct. 325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at \$1.40 per bu. (14#) f. o. b. cars here. While the shipment is optional with you as to Aug., Sept., or October yet we would like for you to express your preference now so that there will be no delay in making the shipment when you want it. You understand that we are generally very much rushed during these months and would not like to sell to others up to capacity for August and then learn that you wanted your car shipped that month. Awaiting your further favors,

"Yours very truly,

Chas. S. Brent & Bro."

In reply to the foregoing letter of June 27th, the defendant wrote as follows:

"Seattle, 7-2-08.

"Chas. S. Brent & Bro., Paris, Kentucky—Gentlemen: Answering your favor of the 27th, we wish to correct your understanding of our order. This called for minimum car of 15 tons and not for 325 bags. We would like to have shipment between August 15th and September 15th providing new crop is harvested by that time, but notify us and send sample before shipping so that we will be ready to take care of the seed."

Subsequent correspondence occurred between the parties in relation to the dispute that arose between them, but the contract is to be found in the correspondence already set forth, commencing with the plaintiff's offer to sell the defendant the seed at "\$1.40 per bu., f. o. b. cars" Paris, Ky., with a guaranty that the seed would "test 21 pounds to the measured bushel." What is the meaning of the word "test" as here used? There is nothing in the letter expressly indicating its meaning. The defendant seems to have understood it as meaning "weight," for in its written requisition or order of June 22d, confirming its telegram of the same date, it ordered one minimum car load of the seed offered "weighing 21 lbs. to the bushel at \$1.40 per bushel, f. o. b. cars Paris, Ky. Per your quotation June 17th." The view of the court below was that the defendant was bound to "treat fourteen pounds as a bushel," because of the plaintiff's letter of June 27th acknowledging receipt of the defendant's requisition or order, and the latter's failure to make any objection to the description of the thing sold therein contained, while calling attention to the fact that the order called for one "minimum car of 15 tons and not for 325 bags."

The letter of the plaintiff to the defendant of June 27th upon the point in question is as follows:

"Yours of the 22d (yours No. 7,272) confirming purchase of Blue Grass Seed from us duly to hand and seems to be correct. 325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at \$1.40 per bu. (14#) f. o. b. cars here" Paris, Ky.

The plaintiff knew by the requisition which he received that the defendant understood the word "test," as applied to the seed in the plaintiff's original offer of it, to mean "weight," for the order was for one minimum car of seed "weighing 21 lbs. to the bushel at \$1.40 per bushel." There is certainly no ambiguity about that language. The court below said in its opinion denying the defendant's motion for a new trial that "there can be no question but that the plaintiff at all times understood the contract to call for 14 pounds to the bushel."

We are unable to discover any ground for that statement. If the plaintiff did not understand the defendant's order, or did not think it therein correctly interpreted the word "test" in his original offer of the seed for sale, ought he not to have frankly said so? Instead, in his letter of June 27th acknowledging receipt of the defendant's order, he said that it "seems to be correct," and proceeded to add in his letter: "325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at \$1.40 per bu. (14#) f. o. b. cars."

This is the first time 14 pounds appeared in the correspondence between the parties. What did it mean? On the trial it was shown that

the defendant had for a number of years issued a seed catalogue in which it listed, among other articles, Kentucky Blue Grass Seed as containing 14 pounds to the bushel; but there was evidence on the part of the defendant tending to show that this was inserted only for the purpose of informing farmers and others using such seed that 14 pounds in weight should be sown where the directions called for the sowing of a bushel. It is manifest that such considerations were for the jury if the contract was ambiguous.

When the plaintiff first offered the defendant the seed, he said nothing about 14 pounds, but that it would "test" 21 pounds to the bushel. When the defendant gave its order in pursuance of that offer, it ordered one minimum car load "weighing 21 lbs. to the bushel, at \$1.40 per bushel," which interpretation by the defendant of the meaning of the word "test," as used in the offer, the plaintiff said in his letter of June 27th "seems to be correct," and made no objection unless it can be found in the next succeeding terms, to wit: "325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at \$1.40 per bu. (14#) f. o. b. cars."

The figures and symbol in parentheses (meaning 14 pounds) so inserted by the plaintiff, taken in connection with the preceding correspondence between the parties, and for the first time appearing therein, are, in our opinion, ambiguous, and their meaning, taken in connection with the balance of the correspondence, should have been left to the determination of the jury, in view of all the facts and circumstances of the case, under appropriate instructions from the court.

The judgment is reversed, and the cause remanded to the court below for a new trial.

BOISE CITY, IDAHO, v. BOISE ARTESIAN HOT & COLD WATER CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,875.

1. FRANCHISES (§ 2*)—SPECIAL PRIVILEGES—GRANT.

Franchises and special privileges must be construed most strongly against the grantee and in favor of the government.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 58*)—DELEGATION OF POWER—CONSTRUCTION.

Legislative grants of power to municipal corporations must be strictly construed to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145–147; Dec. Dig. § 58.*]

3. MUNICIPAL CORPORATIONS (§ 682*)—CHARTER—FRANCHISE—GRANT—EXTENT.

Where the charter of a city authorized it to grant the use of its streets for the laying of water mains to supply its inhabitants, the city was only authorized to grant such use for a reasonable time and could not grant a perpetual franchise under the rule that a municipal corporation may not irrevocably surrender any part of its power to control its pub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lic streets by contract or otherwise without the express consent of the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1469; Dec. Dig. § 682.*]

4. MUNICIPAL CORPORATIONS (§ 682*)—WATERWORKS COMPANY—FRANCHISE—CONSTRUCTION—TERM—LICENSE FEE—STATUTES.

Rev. St. Idaho 1887, § 2710, provides that no corporation formed to supply a city with water may do so unless previously authorized by ordinance or unless done in conformity with a contract between the corporation and the city or town, and that such contract shall not deprive the city or town of the right to regulate rates, nor shall any exclusive right be granted or contract or grant made for a term exceeding 50 years. Held that, where a city granted a franchise to defendant's predecessors to use the streets for the construction of a water system without specifying any term for the continuance of the grant, it was not a grant for 50 years, but a mere license revocable by the city at will, and hence did not deprive the city of the right thereafter to impose on defendant payment of a monthly license fee for the use of the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1470; Dec. Dig. § 682.*]

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho.

Action by Boise City, Idaho, against the Boise Artesian Hot & Cold Water Company, Limited. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

The plaintiff in error was plaintiff in the court below, where it brought the action to recover from the defendant certain license fees imposed by one of its ordinances, enacted in 1906. The facts of the case are undisputed. They show, among other things, that the plaintiff in error is a municipal corporation operating under a special charter granted by the Legislature of the territory of Idaho during the year 1863, and subsequent amendments thereto; that on the 3d day of October, 1889, the city enacted an ordinance entitled "An ordinance granting Eastman Brothers the right to lay water pipes in Boise City," the only two sections of which ordinance are as follows:

"Section 1. H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks for the supplying of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes in, through, and along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along, and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times promptly repair all damage done by them or their pipes, or by water escaping therefrom.

"Sec. 2. This ordinance shall take effect from and after its passage and approval." Approved October 3, 1889.

The Artesian Water & Land Improvement Company having become organized as a corporation under the laws of the state of Idaho for the purpose of supplying Boise City and its inhabitants with water for public and family use, the city, on the 10th day of July, 1890, enacted an ordinance entitled "An ordinance granting to the Artesian Water & Land Improvement Company the right to lay water pipes in Boise City," the three sections of which are as follows:

"Section 1. The privilege of laying down and maintaining water pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water & Land Improvement Company, its successors or assigns.

"Sec. 2. All water pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled, and with all convenient speed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

"Sec. 3. This ordinance shall take effect and be in force from and after its passage." Approved July 10, 1890.

Immediately after the enactment of the ordinance in their favor, Eastman Bros. proceeded to construct a system of waterworks, consisting of artesian wells and reservoirs, and laid mains and pipes under and along the streets and alleys of Boise City, and to supply the city and its inhabitants with pure mountain water, in accordance with that ordinance, expending in such construction over \$20,000 to the time they sold their interest therein to an Idaho corporation called the Artesian Hot & Cold Water Company, Limited, hereinafter mentioned.

Immediately after the enactment of the ordinance in favor of the Artesian Water & Land Improvement Company, it proceeded to sink artesian wells, construct reservoirs, and lay pipes under and along the streets of the city and to supply the city and its inhabitants with pure, fresh water for municipal, domestic, and irrigation purposes, under and pursuant to the aforesaid ordinance in its favor, expending in the construction, extension, and improvement of its waterworks more than \$50,000 up to the time of its sale thereof to the aforesaid Artesian Hot & Cold Water Company, Limited, as hereinafter mentioned.

The Artesian Hot & Cold Water Company, Limited, was organized under the laws of the state of Idaho, and was authorized by its articles of incorporation to supply the plaintiff in error and its inhabitants with water for municipal and domestic uses, and to purchase and acquire the waterworks, wells, reservoirs, pipe lines, properties, rights, and franchises of both the Eastman Bros., and the Artesian Water & Land Improvement Company, which purchase was effected on the 28th day of March, 1891.

The defendant in error is a corporation organized and existing under the laws of the state of West Virginia, with its principal place of business at Boise City, Ada county, Idaho. Its articles of incorporation authorize it to carry on "a waterworks system, and to sell and rent water to the inhabitants of the said Boise City and to take, purchase, acquire, hold, operate, and maintain rights and privileges of water companies, associations, or corporations, and to acquire, use, own, and operate all properties, franchises, rights, claims, privileges, and everything belonging to that certain corporation known as the Artesian Hot & Cold Water Company, Limited, and to be the successor in every respect of said corporation."

On the 28th day of August, 1901, the defendant in error acquired by purchase from the Artesian Hot & Cold Water Company, Limited, all of its rights in and to both of the water systems mentioned, and all of its said waters, as well as all of the rights and privileges granted by the aforesaid ordinances.

The record further shows: That between the 28th day of March, 1891, and the 28th day of August, 1901, the Artesian Hot & Cold Water Company, Limited, supplied the city and its inhabitants with pure, fresh water for municipal, domestic, and other useful purposes, and that during that period the population of the city increased from about 3,000 to about 6,000 people, the area of the city being enlarged by the laying out and platting of additions thereto, which were settled upon and occupied, and during which period the Artesian Hot & Cold Water Company, with the city's knowledge and consent, extended its pipe lines under the streets and alleys of the city from time to time, and supplied such additions with water to meet the demands upon it, and laid about 15 miles of additional pipe, constructed two wells and one reservoir for cold water, and erected a large steam pumping plant with a capacity of 3,000,000 gallons a day, aggregating in cost more than \$192,000. That at all times since the 28th day of August, 1901, the defendant in error has supplied the city and its inhabitants "by virtue of said ordinance and laws, and with plaintiff's knowledge, acquiescence, and consent, pure fresh water for municipal, domestic, and other useful purposes, in accordance with said ordinances, and in full compliance therewith, and with said laws of Idaho. That since said last-named date the population of Boise City has increased from about 6,000 to over 25,000 inhabitants, and this defendant, with plaintiff's knowledge, acquiescence, and consent, has extended its cold water system to meet the growth of said city, and has laid over 30 miles of

additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day, and has expended in the improvement and extension of said cold water system an additional sum of more than \$140,000. That the defendant and its predecessors in interest in and to its waterworks system are now and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff, and residents and inhabitants of Boise City, through the water mains of said waterworks systems, and in the laying and repairing of said water pipes connected with said waterworks systems."

On the 7th day of June, 1906, the plaintiff in error enacted an ordinance, the first and fourth sections of which are as follows:

"Section 1. That the said Boise Artesian Hot & Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the state of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated under said license granted by said ordinance of October 3d, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month, a monthly license fee of \$300.00, for the privilege granted by said ordinance of October 3d, 1889, to lay and repair water pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said company. * * *

"Sec. 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid ordinance of October 3d, 1889."

The action was brought to recover the aggregate amount of three years' license fees so imposed, and which the defendant refused to pay after demand made.

The court below held that the ordinance of July 10, 1890, to the Artesian Water & Land Improvement Company, its successors and assigns, having been accepted and acted upon by the grantee and its successors, created a franchise for 50 years, and that the imposition of the license tax provided for by the ordinance of June 7, 1906, was an impairment of such franchise and therefore void. Judgment followed accordingly, and the city brought this writ of error.

Frank B. Kinyon and Cavanah & Blake, for plaintiff in error.

Richard H. Johnson, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and HANFORD, District Judge.

ROSS, Circuit Judge (after stating the facts as above). It will be seen from the foregoing statement that the trial court held in effect that the ordinance of July 10, 1890, granted to the Artesian Water & Land Improvement Company, one of the predecessors in interest of the defendant in error, a franchise to use the streets and alleys of the city for the purpose of supplying it and its inhabitants with water for the period of 50 years. If that be so, then manifestly the attempted imposition by the ordinance of June 7, 1906, of the license fees in question was of no effect. The court below held that the fact that the plaintiff in error was incorporated and exists under a special charter does not render inapplicable to it the provisions of section 2710 of the Revised Statutes of Idaho of 1887, and that the provisions of that section should be read into the ordinance of July 10, 1890, as a part thereof, and thereby fixed the life of the franchise or privilege granted by that ordinance at 50 years.

Section 2710 of the state statutes so referred to reads as follows:

"No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

We are unable to give to this statute the effect attributed to it by the court below. Its terms and purposes, we think, seem quite plain. Every corporation formed to supply any city or town of the state with water is thereby prohibited from doing so unless previously authorized by an ordinance of the authorities thereof, or unless done in conformity with a contract entered into between such city or town and the corporation. Such contracts are authorized by the statute, subject to the express provision that they shall not take from the city or town the right to regulate the rates for water, nor, further expressly declares the statute, shall any exclusive right be granted, nor shall any such contract or grant be made for a term exceeding 50 years.

This is very far from saying that no such contract or grant shall be made for a shorter period than 50 years. It fixes a maximum beyond which no contract or grant is permitted to extend, but leaves the matter of time, within that limit, to be fixed by contract or by grant of the municipality.

In the case of Water Co. v. Knoxville, 200 U. S. 22, 33, 26 Sup. Ct. 224, 227 (50 L. Ed. 353), the Supreme Court said:

"Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' Such were the words of this court in Turnpike Co. v. Illinois, 96 U. S. 63, 68 [24 L. Ed. 651]. The universal rule in doubtful cases—this court said in Oregon Railway Co. v. Oregonian Ry. Co., 130 U. S. 1, 26 [9 Sup. Ct. 409, 32 L. Ed. 837]—is that 'the construction shall be against the grantee and in favor of the government.' As late as Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 562 [12 Sup. Ct. 689, 36 L. Ed. 537], this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' Siddle v. Grandjean, 111 U. S. 412, 438 [4 Sup. Ct. 475, 28 L. Ed. 321]. We have never departed from or modified these principles, but have reaffirmed them in many cases. It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

Turning to the ordinance of July 10, 1890, it is seen that it only granted to the Artesian Water & Land Improvement Company, one of the predecessors in interest of the defendant in error, the privilege

of laying down and maintaining water pipes in the streets and alleys then laid out in Boise City or thereafter to be laid out and dedicated, with provisions for the proper performance of the work with reasonable diligence. In effect the provisions of that ordinance were precisely similar to those of the previous ordinance of October 3, 1889, granting to the Eastman Bros., also predecessors in interest of the defendant in error, similar rights, which were held by this court in the case of *Boise City Artesian Hot & Cold Water Co. v. Boise City*, 123 Fed. 232, 59 C. C. A. 236, to have conferred on the Eastmans a license merely, revocable at the pleasure of the city; we there saying:

"The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. In the Constitutions of nearly all the states it is provided that no exclusive or perpetual franchises shall be granted, and, irrespective of such constitutional limitation, it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. The city of Boise was incorporated by the territorial Legislature of Idaho on January 11, 1866. It was given power 'to provide the city with good and wholesome water,' and to erect or construct 'such waterworks and reservoirs within the established limits of the city as may be necessary or convenient therefor.' There can be no doubt that under this provision of its charter the city had the power to grant the use of its streets for a fixed reasonable period of time, either to an individual or to a corporation, for the purpose of furnishing a water supply to the inhabitants. It had no authority, however, to make a perpetual contract. A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the Legislature. Cooley's Constitutional Limitations (2d Ed.) 205, 210; Dillon on Municipal Corporations, §§ 715, 716; *Barnett v. Denison*, 145 U. S. 135, 139, 12 Sup. Ct. 819, 36 L. Ed. 652. And legislative grants of powers to municipal corporations are to be so strictly construed as to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof. *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 426, 9 L. Ed. 773, 938; *Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 696, 17 Sup. Ct. 718, 41 L. Ed. 1165; *Stein v. Bienville Water Supply Co.*, 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622. From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own waterworks, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water, and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

If a revocable license only, it does not seem to be questioned that the city might either terminate the license, or impose a license fee as a condition of its continued enjoyment.

It results from what has been said that the judgment must be and is reversed, with directions for further proceedings in accordance with the views here expressed.

HANLEY v. UNITED STATES. †

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,814.

1. PUBLIC LANDS § 19*)—UNLAWFUL INCLOSURE—PROSECUTION.

Whether defendant, who was general manager of a large stock ranch owned by a corporation, on which there was a fence which, together with natural barriers, inclosed a large quantity of government land, was personally chargeable with the offense of maintaining such inclosure in violation of Act Feb. 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), *held*, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

2. PUBLIC LANDS (§ 19*)—PROSECUTION FOR UNLAWFUL INCLOSURE—INSTRUCTIONS.

The charge of the court in a prosecution for maintaining an unlawful inclosure of public lands in relation to evidence of the intention and purpose with which the fences complained of were built and maintained considered, and *held* without error.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

3. PUBLIC LANDS (§ 19*)—PROSECUTION FOR UNLAWFUL INCLOSURE—INSTRUCTIONS.

Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), prohibits the construction or maintenance of any inclosure of public land by one having no claim or color of title thereto. Section 4 provides that any person violating the act "whether as owner, part owner, agent, or who shall aid, abet, counsel, advise or assist in any violation thereof," shall be deemed guilty of a misdemeanor. *Held* that, under an indictment charging only the maintenance of such an inclosure, the defendant could not be convicted of having aided, abetted, counseled, advised, or assisted in its maintenance.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

In Error to the District Court of the United States for the District of Oregon.

William Hanley was convicted of a criminal offense, and brings error. Reversed.

C. E. S. Wood and John M. Gearin, for plaintiff in error.
John McCourt, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

ROSS, Circuit Judge. The plaintiff in error was defendant in the court below to an indictment containing two counts, the first of which charged him with unlawfully maintaining and controlling certain fences, which, together with natural barriers and cross-fences, inclosed a large body of public land of the United States situated in Harney county, state of Oregon, and the second of which counts charged him with unlawfully preventing and obstructing persons from peaceably entering upon or establishing a settlement or residence on the tracts of public land within the inclosure, and preventing and obstructing their passage over and through the public lands so inclosed by means of the fences described in the first count, contrary to the provisions of Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 10, 1911.

Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524). Upon the trial of the issues made by the defendant's plea of not guilty, a verdict was rendered in his favor upon the second count of the indictment and of guilty under the first count.

The inclosure complained of was constructed many years prior to the times in question here by one Peter French, who was the owner of a large amount of land called the "P Ranch," upon which he had a great many head of stock, and consisted of a wire fence fastened to posts set about 30 feet apart which was erected upon a string of 40-acre tracts of land owned by French, and extending many miles to where it connected with natural barriers consisting of precipitous rim rock several hundred feet in height. The ranch consisted of about 140,000 acres, and within the inclosure were also many thousand acres of public land of the United States. Several public roads pass through the lands over which the government mails are carried, and which are also used as common highways by the traveling public. At some at least of the points where the roads were crossed by the fence gates were placed by the builder of the fence. After the death of French, which occurred in 1897, the administrator of his estate operated the property and made use of the inclosure as French had done until the fall of 1906, when it was acquired by other parties, for whom the defendant Hanley in April, 1907, became general manager of the ranch as well as the stock thereon.

It is insisted on his behalf that the trial court should have directed a verdict in his favor upon the ground that the evidence failed to show that he ever maintained or controlled the inclosure including the government land. An attentive consideration of the record, however, satisfies us that the facts and circumstances of the case as disclosed by the evidence were such that the jury might properly conclude that Hanley knew that the fence was originally constructed upon the ranch lands, in connection with natural barriers, so as to include within such inclosure a large amount of government lands, thereby giving the ranch owners practically exclusive possession and control of those public lands; that, when he became general manager of the ranch and of the stock upon it for the new owners, he came into control of the fences, which control he exercised by means of a general foreman and subordinate ones; and that the property under his management was operated as though the fences were maintained for the purposes for which they were originally constructed. Indeed, there was direct testimony to the effect that the inclosure was repaired by a foreman appointed by the defendant after he became manager. In respect to that, however, the court instructed the jury:

"The defendant can only be held responsible for his own acts and his own knowledge, and not for the independent acts of his foreman or subordinates not done pursuant to his instructions or with his knowledge or approval. So that if these fences were repaired or maintained by those in immediate charge of the property as a part of their general care and without orders from the defendant, and without the knowledge or approval of the defendant, he would not be guilty. And so the defendant cannot be found guilty under the indictment, no matter what the condition of the fences was in fact, if, as an agent for the property, he had no knowledge of the condition of the fence in its actual location and construction, so as to constitute an inclosure or bar-

rier, but understood that the fence was down and no obstruction, and after assuming charge of the property he did nothing personally, or by his instructions or counsel or with his approval or assent, to keep up the fence as such inclosure or obstruction. In arriving at your verdict, however, you will take into consideration the defendant's relation as a manager of the Harney Valley Development Company, his prior acquaintance with and knowledge, whatever it was, of the lands and the premises owned by that company, of the topography and lay of the country, of the manner in which the deeded lands or parts of them were inclosed, of his authority over the other agents and employés about the ranches concerned, and of all facts and circumstances appearing in evidence that have a tendency to throw light upon the subject; and, if from all this it appears that he aided or assisted, counseled, or advised the maintenance or control of said alleged inclosure in any way, then you should find him guilty. Otherwise, not."

It is true that there is uncontradicted evidence to the effect that the defendant told the agent sent by the Land Department of the government to examine the inclosure in question, that he thought the fences were down and open in places, and that, if they were not in a condition satisfactory to the government, he would make them so, and would willingly go with the agent in person for that purpose; still, if the fences under the defendant's control did in fact unlawfully inclose land of the government, we do not think it can be properly held that the defendant's offer to the land agent would render the offense nugatory. We are of the opinion that the evidence was such as to make proper the action of the trial court in refusing to direct a verdict for the defendant.

The remaining question relates to the instructions given and refused by the court. Any person may lawfully fence or otherwise inclose his own land, and may connect his fence or inclosure with that of an adjoining landowner, provided he does so in good faith. When, however, under the guise of inclosing his own land, he constructs or maintains such a fence or inclosure for the purpose and with the intention of inclosing public lands of the government, the act is unlawful. *Camfield v. United States*, 167 U. S. 528, 17 Sup. Ct. 864, 42 L. Ed. 260; *Potts v. United States*, 114 Fed. 52, 51 C. C. A. 678. The court below so instructed the jury, in effect, in the following language:

"It is sufficient within the intendment of the statute that the inclosure comprising any of such public lands was designated and intended by the person or individual constructing or maintaining the same to hinder or impede the ordinary ranging of stock, or its natural and free ingress from without, or egress from within, or is reasonably calculated in the manner of its construction or maintenance to accomplish a like result, or which serves to exclude or to hinder or impede other persons or the public from free and unrestrained access to and upon the lands so inclosed for the purposes for which any individual has the right of access to public lands. Nor is it essential that the person so constructing or maintaining the inclosure shall do so by fencing entirely his own, but he may accomplish the result by joining his fencing to that of others so as to make the barrier complete, or he may conjoin his fencing to natural barriers, such as ledges of rock, precipitous bluffs, steep declivities, or mountain ranges, or other natural obstructions, not readily passable, or which in their practical effect would impede or interrupt the ordinary ranging of stock, or which, together with the fencing, would prevent, obstruct, or impede in some measure the more natural and free passage of persons and individuals to and upon the public lands so inclosed. There is no controversy here as to the lands described in the indictment be-

ing a part of the public domain, and the defendant lays no claim to any of such lands, by entry or otherwise, with a view to their acquirement from the general government, so that these two elements of the offense charged may be taken as proven. The case, therefore, turns wholly upon the question whether the defendant maintained or controlled fences which, being joined onto the rim rock, constituted an inclosure as defined of such public lands. The government has described what fencing and rim rock or other natural barriers constitute the inclosure complained of by setting forth the beginning and ending point, and the courses and distances thereof, and it is thereby confined in its proof to the establishment of such an inclosure as is alleged.

* * * The intent or purpose with which fencing or an inclosure was constructed or maintained, if so constructed or maintained, may be gathered from all the testimony showing the local conditions and environment, the ownership or want of ownership of the lands affected by the inclosure, their occupancy, and the use of which they are susceptible. Men do not build fences or construct or maintain inclosures except for a purpose. That purpose is usually manifest. It is to control in some degree at least the use or the manner of use and occupancy of the lands or premises inclosed. Indeed, an inclosure is the assertion of a claim of some right or title to the premises inclosed, and it operates as a notice to others of such claim. Nor does it affect such assertion of claim and notice that gates and bars that may be opened and closed are provided at convenient intervals in such fencing. These are primarily constructed for the use and convenience of the proprietor of the fencing, and usually only for others and the public when placed upon private easements or public highways. So that ordinarily any person breaking the close, or going upon the lands and premises inclosed for occupancy, or taking his stock thereon for pasturage, would be accounted a trespasser, a violator of private rights, or even a wrongdoer in a criminal sense; and thus is demonstrated the deterrent effect the maintenance of an inclosure about public lands will have upon those desirous of entering thereon for any purpose.

"A person has a right, under the law, to erect fences wholly upon his own land, and to maintain them if he so desires, and if incidentally such fences may obstruct or impede the ingress or egress of stock ranging upon the public lands, or the free passage of persons upon or over such lands, no one can complain, because a man has a right to do what he pleases with his own, so long as he does no willful injury to another. But he cannot make the construction of fencing upon his own lands a subterfuge for inclosing or preventing free passage upon the public lands. To make plain to you what I mean, I will allude to some of the facts as they appear in this case. The Harney Valley Development Company owns the narrow strip of land, consisting of 40-acre tracts, by legal subdivisions joining one upon another in continuous succession, running from Fish creek north $12\frac{1}{4}$ miles to the vicinity of the North fork of Little Krumbo creek; thence east about $2\frac{3}{4}$ miles; thence north $2\frac{1}{2}$ miles; and thence east 2 miles, more or less, to a junction with the rim rock at McCoy creek, and another strip of like character running from Blitzen river west about $7\frac{3}{4}$ miles to a little beyond the road to Roaring Springs. Upon these narrow strips of land has been constructed but a single line of fencing for their entire length, which if conjoined upon the rim rock described, with barriers constructed in the draws of the rim rock, serves, with other fencing upon the north, to inclose 80,000 acres of the public lands. The lands comprised by the narrow strips are in very large proportion practically valueless for any purpose except for grazing. Now, if title to these strips of land was acquired and the fences were constructed thereon as a subterfuge or pretext, so that it could be said that the fences were constructed entirely upon private lands, the device could not avail the owner. The inclosure yet would be an inclosure of public lands within the inhibition of the statute. So a maintenance of such fence is likewise inhibited by the statute.

"You are the judges of the purpose for which this fencing was constructed in the first place, whether to inclose public lands or not; and, if so, whether it was maintained by the defendant as alleged in the indictment, and, if so, for what purpose."

This seems to us to state the law fairly in respect to the point there referred to. The difficulty, however, in the case is this: The court refused to give this requested instruction:

"The indictment declares the acts of the defendant complained of to have been committed prior to June 22, 1908, and it is uncontradicted in the evidence that the defendant assumed charge of this property in April, 1907, and that prior to that time he had no association or connection with it. You will therefore limit your consideration and determination to the defendant's own personal conduct from the time he assumed charge of the property up to June 22, 1908,"

—and, instead, gave to the jury this instruction, in respect to each of which actions of the court the plaintiff in error reserved an exception:

"It is not essential that the offense or offenses charged shall be shown to have been committed upon the exact date as alleged, but it is sufficient if it be established that the defendant committed the acts constituting the offenses charged at any time within three years prior to the finding of the indictment, which was March 20, 1909. You will therefore, under these instructions, determine whether the alleged inclosure complained of has been maintained by the defendant, William Hanley, either as manager or agent of the Harney Valley Development Company, or whether he has aided, abetted, counseled, advised, or assisted in its maintenance in any way and at any time within the three years prior to March 20, 1909."

Section 1 of the act of Congress of February 25, 1885, makes unlawful the acts charged against the defendant in the first count of the indictment, and section 3 of the act makes unlawful the acts charged against him in the second count. By the fourth section of the act it is declared:

"That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars, and be imprisoned not exceeding one year for each offense."

While the fourth section thus makes it unlawful for any one to aid, abet, counsel, advise, or assist in any violation of the act, the indictment does not charge that offense against the defendant. But the court in the instruction last quoted told the jury to consider and determine, among other things, whether Hanley aided, abetted, counseled, advised, or assisted in the maintenance of the alleged inclosure in any way at any time within the three years prior to March 20, 1909. The evidence is without conflict to the effect that Hanley's connection with the management of the ranch only commenced in April, 1907, although there was evidence to the effect that he had resided in Harney county since 1879, and had from time to time visited the ranch during that period.

It is, of course, true that the proof is not to be limited to the exact date alleged in the indictment, but it is quite as true that an offense for which one stands indicted cannot be established in whole or in part by proof of his commission of an offense not included in the indictment. Whether or not Hanley aided, abetted, counseled, advised, or assisted the administrator of the estate of French or anybody else within three years next preceding the indictment in the maintenance

of the alleged inclosure was beside the charge upon which the defendant was on trial. It was his own alleged acts in unlawfully maintaining the fence, and in unlawfully excluding others from the government lands specified in the indictment, for which he was being tried, and it was prejudicial error on the part of the trial court to direct the jury to consider and determine whether the defendant aided, abetted, counseled, advised, or assisted somebody else to violate the provisions of section 4 of the act of Congress of February 25, 1885.

For this error, the judgment must be, and is hereby reversed, and the cause remanded to the court below for a new trial.

PORT BLAKELY MILL CO. v. ROYAL INS. CO.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,805.

1. INSURANCE (§ 334*)—POLICY—CONSTRUCTION—WARRANTIES.

Where a fire policy authorized additions, alterations, and repairs without limit of time, and also provided that insured warranted that due diligence should be used that the automatic sprinkler system should at all times be made in good order, insured was only bound during the making of repairs to its mill and sprinkler system to use due diligence to maintain the system in good working order.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 847-855; Dec. Dig. § 334.*]

2. TRIAL (§ 139*)—DIRECTION OF VERDICT—EVIDENCE.

In an action at law on a fire policy, the court was not authorized to withdraw an issue as to whether plaintiff had used due diligence to keep its sprinkler system in good order from the jury, and direct a verdict for defendant, unless plaintiff's evidence considered in its most favorable light was such that all reasonable men must draw therefrom the conclusion that plaintiff had not used due care.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.*]

3. INSURANCE (§ 668*)—SPRINKLER SYSTEM—MAINTENANCE—QUESTION FOR JURY.

In an action on a fire policy, evidence held to require submission of the question of plaintiff's due care in maintaining its sprinkler system in working order to the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Washington.

Action by the Port Blakely Mill Company and another against the Royal Insurance Company. Judgment for defendant, and plaintiff Mill Company brings error. Reversed and remanded.

Titus & Creed, Walter S. Fulton, and Hastings & Stedman, for plaintiff in error.

H. T. Granger and E. C. Hughes, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ROSS, Circuit Judge. This was an action upon a policy of fire insurance to recover for a loss sustained by the plaintiff in error, the Port Blakely Mill Company, a corporation, which was plaintiff below, by the burning of a portion of the sawmill plant owned and operated by it at Port Blakely, in the state of Washington. Upon the conclusion of the plaintiff mill company's evidence, the trial court, on motion of the defendant company, directed a verdict in its favor, which was accordingly returned. Judgment followed against the plaintiff mill company, which brings the case here upon writ of error.

The printed portion of the policy contained a provision to the effect that it should be void if the plaintiff's plant should be operated at night later than 10 o'clock, or if its operation should be suspended for more than 10 consecutive days, or if mechanics should be employed in altering or repairing the plant for more than 15 consecutive days, or if certain prohibited materials should be kept upon the premises; but those provisions of the printed portion of the policy were modified by the following provision, prepared by the plaintiff's insurance broker, and inserted in the policy by mutual consent of the respective parties thereto, to wit:

"Privilege to make additions, alterations, and repairs, and to deplete without limit of time * * * to work overtime and at nights, to do such work and keep and use such materials and products as may be incidental to the business, any prohibition of the same contained in the printed conditions of this policy being waived."

It is not disputed that by virtue of the clause just quoted the assured was entitled to make additions to the plant, alterations therein, and repairs thereto, without regard to the printed portions of the policy, and could operate the plant throughout the night and employ such mechanics and do such work and keep such materials upon the premises as it desired, and as were incidental to the prosecution of the business in which it was engaged; and, as its sprinkler equipment was by the policy expressly made a part of the machinery insured, it is conceded that the assured was entitled, under the policy, to make any additions to the sprinkler equipment, and such extensions and alterations thereof and repairs thereto as it might desire, all of which concessions, however, are coupled with this other provision of the policy:

"Warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order."

As a matter of course, if in making additions to or extensions of the plant or alterations therein permitted by the policy it became necessary to move or disconnect the sprinkler system or any part thereof, it could not in the nature of things be kept in good working order during the time of temporary suspensions for those purposes, and therefore in the nature of things it could not be maintained in good-working order "at all times." The clear meaning of the clause relied upon by the defendant in error therefore is in our opinion this: Warranted by the assured that it will use due diligence to maintain its automatic sprinkler system in good working order.

Did the assured use that required diligence was the real question in the case. The trial court refused to submit it to the jury; itself de-

ciding the question as a matter of law against the plaintiff. To test the correctness of the court's action, we have therefore to consider the evidence introduced by the plaintiff.

The evidence showed that the mill in question is 450 feet long by about 100 feet in width. The sprinkler system was installed by the company for the purpose of extinguishing fire, should it occur. Water therefor was supplied by reservoirs owned by the company. The system was divided into divisions, those numbered 3, 4, and 5 covering that portion of the mill plant comprising the mill building, in the eastern part of which was the lath mill. Each division was connected with the supply pipes leading from the reservoirs by a large vertical pipe, called a "riser." Lateral pipes containing sprinkler heads were extended from each riser over the area intended to be covered by its division of the sprinkler system. Until a fire occurred, the water supply was usually kept out of the lateral pipes by means of the air pressure, which closed and held down the gate in an automatic air valve placed in the riser; the operation of the system being that, upon the happening of a fire, such fire would fuse and melt the sprinkler heads, thus releasing the air pressure and opening the air valve, thereby permitting the water to flow from the riser into the lateral pipes and out upon the fire through the sprinkler heads. In each riser immediately below the air valve there was a gate, operated by hand, by means of which the water supply in any division could be shut off.

In its answer to the plaintiff's complaint the defendant company set up affirmatively that on or about April 1, 1907, the plaintiff caused the gate valve in division No. 3 of the sprinkler system to be closed and the connecting pipes to be removed, thereby wholly cutting off the water from that division, and that the plaintiff "carelessly and negligently and without the exercise of due diligence" caused and permitted division 3 of the sprinkler system to remain in the condition last above indicated without water, and useless as a means of fire protection, from April 1, 1907, continuously until after the fire on April 22, 1907. The record shows that the fire occurred in the night of the day last mentioned, which was Monday, in that portion of the plant covered by division 3 of the sprinkler system. In its reply filed to this affirmative defense the plaintiff mill company put in issue the averments of negligence and lack of due diligence on its part, and also denied that division 3 of its sprinkler system was without a supply of water at the time the fire occurred. It further set up that on or about April 1, 1907, its business required that additions, alterations, and repairs be made to that portion of its mill building known as the lath mill, and also to division 3 of its sprinkler system, in order to make it more effective and to extend it to the lath mill, and that accordingly, and in conformity with the conditions and provisions of the policy in suit, the plaintiff proceeded with the execution of that work, and as expeditiously and rapidly as possible; that it could not be performed without turning off the water from division 3 of the sprinkler system; that on April 21, 1907, the work had been so far completed that the water could be and was on that day turned into division 3, which was the earliest time possible, and that at the time of and during the fire in question division 3, as well as all other divisions of the sprinkler sys-

tem, was in good and thorough working order; and that the plaintiff mill company had at all times used due diligence to maintain the whole of its said sprinkler system in good working order at all times.

There was evidence on the part of the plaintiff mill company to the effect that one Ford, a man experienced in the construction and operation of sawmills and sprinkler systems connected therewith, was appointed superintendent of the plaintiff mill company's sprinkler system in March, 1903, and was such superintendent continuously to the time of the fire in question. His testimony is to the effect that he was instructed by the general manager of the mill company, who appointed him, to make a thorough investigation of the system, and order all necessary supplies to keep it in good working order, all of which he did. He explained in his testimony the details of the system, its different supplies of water, its various connections and laterals and its operation, and testified, in substance, that the company had a full crew of properly qualified men with which to keep the system in good order, who worked upon it continuously, and kept the system in good order; that the company kept in stock everything necessary to keep the system in good working order, and that he personally made an examination of some part of the system each day; and that he had a daily conference with the general manager in respect to the sprinkler system and its condition. The general manager, Mr. Eddy, testified to the same general effect, saying, among other things:

"When I became general manager of the Port Blakely Mill Company, I placed Mr. Ford in charge of the sprinkler system, and from the time he arrived at Port Blakely in 1903 until the time of the fire he was continuously during that time in charge. My instructions to him, when I placed him in charge of the sprinkler equipment, were that he should spare no expense and use every care in keeping the sprinkler system in good working order. These instructions were given almost daily. For maintaining the sprinkler equipment from January 1, 1907, down to and including the night of the fire, we had the dams and the pipes, and we had a machine shop there, and a large amount of pipe fittings and sprinkler heads, and all the necessary material for the usual repairs and up-keep of a sprinkler system. All the time we have been there we have maintained such a supply of pipes for the sprinkler equipment. I had four or five different ways of checking to determine whether or not my instructions regarding the maintenance of the sprinkler system were carried out. I made daily trips through the plant myself, personal inspection of them. I had daily conferences with Mr. Ford, both at our regular meeting time at 6 o'clock, and also when I went into his office. The foreman and superintendent met me in my office at 6 o'clock. Then the insurance companies sent men there to examine before they took our risks. I presume these men were experienced sprinkler men, and they generally came into my office and asked permission to go through. I would talk with them, and either go with them myself, or ask some man to go with them and show them the location of these different valves and parts of the system, and asked them to see me before they left, because I wanted to talk with them and get their ideas. Then the Washington Insurance Survey, or Company, of Seattle, have a man that is supposed to come there two or three times a month, and they send you regular reports after the examination. Besides, I would talk with them before they would go away. They came over to Port Blakely. I think that is about all of the various ways I have of ascertaining whether the work was kept up."

The evidence showed that in the early part of 1907 the lath mill had to be and was rebuilt, and that division 3 of the sprinkler system

had to be and was extended into the new lath mill. The superintendent, Ford, testified that he superintended the moving of it, and that at the time he had all the equipment he had referred to in his testimony.

"The fire occurred," said the witness, "a little before 11 p. m., April 22, 1907. Mr. Baird, from the Washington Insurance Association, and Mr. Miller made inspections of the sprinkler system just a short time before the fire. They are not connected with the mill company. Their inspections were made in January, or possibly in February. The plant was practically in the same condition at the time they made their inspections as it was at the time of the fire. Previous to the fire we rebuilt the lath mill. It was necessary to almost rebuild the plant. We put in new sills, spliced out the posts, took two sections of the northerly end of the building out, put in new shafting, and modernized the mill all the way through. System No. 3 of the sprinkler system, in the east end of the mill, covered the lath mill. The lath mill was in the northeast end of the mill, and was a substantial building, 12 by 12 by 16 timbers. We rebuilt the lath mill. In making the sprinkler repairs, the crew consisted of two men. At different times, when I could use them, I had as high as five or six. When we worked on the lead work, or changing the cast iron pipes, or when I could use lead men, I used them. I used from five to six men in changing the system. The changes in the sprinkler system commenced in the fore part of April, and were completed the Sunday before the fire. That would be the 21st. The fire occurred on Monday night. In making the change, while we worked lead work and changing the cast iron pipes, I think I had six men at one time and five part of the time. We had to change the location of the water main. As it came into the mill it formerly turned to the south, and the air valve stood inside of the main mill, and, after we had changed the lath mill, our main driving belts that were on the lath mill ran so close to the air-valve that we were forced to move it. We moved it north there about nine feet, a short distance into the lath mill. We were not able to work in making these changes and repairs when the mill was running on account of the belts, shafting, and pulley running in such close quarters there. The lives of the laborers would have been in danger, so that the only time we could work was when the mill was closed down. I examined the work on Sunday afternoon before the fire, and again on Monday morning. From my personal observation it was completed. I am able to say that. * * * I was present at the time the gate valve was removed from system No. 3. The valve at that time in the ruins was nearly open. It laid at an angle. It was not laying at what I would call flat. I should say an angle of about 30—I don't know—as much of an angle as 45. It lay on an angle leading toward the south. I recognized it as the air valve in No. 3. It laid in the ruins there for some time, until we commenced to take it apart. It was not disjointed at the time I first saw it, but I was present when it was disjointed. It was disjointed by a man by the name of Vatten, and he had another man there helping. I don't know the other man's name. Olson was there, three or four of those. Vatten was the man that finished it, taking the flanges apart. I told the men to move the gate valve west toward what remained standing of the fireroom. We moved it west of the lath mill towards the fireroom. It was disjointed right where it fell. I was present at the operation of disjointing and separating that valve, and saw them take it out. I found the valve nearly open, the gates lacked about an inch and a half of being wide open. The width is six inches. With the valve open, the water would be on. From my examination of this valve, made when it was disjointed, I could tell it was open at the time of the fire from the condition of the valve. The top seat of the valve is dropped down over a quarter of an inch. It is a gate valve; a Scott valve. If the valve had been closed, it would have been impossible for that top seat to have left its position, because a valve is made wedging. When they are closed, they wedge in there solid. It would have been impossible for the seat to have left its position with the gate valve closed."

The witness Ford also gave this further testimony:

"I could not say just how many days it was after I started to make the changes in the lath mill that the water was turned off from the sprinkler system. It was after the work had been pretty well in progress. To disconnect it we had to shut off the water at the gate valves and disconnect a pipe that screwed into this main pipe that you spoke of that paralleled the mill, disconnect that pipe, and screw in a plug in place here, put an air pressure on, open the valve again, and then the water was on the east end of the mill, everything excepting the lath mill. We disconnected the two-inch pipe, put in a two-inch plug, that disconnected the sprinkler system from the lath mill, which we were rebuilding. We screwed in a two-inch plug into that pipe and proceeded to put the water on. This pipe came out in the old mill at that part of the riser which was close to the floor. The two-inch pipe extended from there up to the upper floor, and also along beneath the upper floor so as to communicate with the lower floor, and from the same opening. One with a connection we call a tee—a short nipple and a tee going up into the upper floor of the lath mill, and the other extending out between them.

"Q. How long after that was it until you had occasion to change the location of the dry-pipe valve, this valve we are speaking of here, which is known, as you located it, at No. 3 on this diagram 'H'? A. We commenced the work on that after we had started the lath mill, which we started up the 1st day of April, or about the first of April.

"Q. Didn't you do that on the Sunday before it occurred, just before that? A. The changing of the pipe?

"Q. Yes. A. No; we did that before—well, we ran the lath mill for several days, wearing the bearings down before putting in a crew to do a day's work. Before we put in a crew to run full time we made them changes. I don't think we made that change on a Sunday. I would not be positive what day that was done on. We did that the very first of April—fore part of April. We didn't shut down the sawmill to do that. We could move that lower pipe with the lath mill shut down without shutting the sawmill down. There was nothing with the sawmill part to interfere with the work, unless you came below the sawmill floor, and that part was below the sill of the sawmill floor. The machinery of the sawmill was overhead.

"Q. The dry pipe was not overhead? A. You are speaking of the main leading to the dry pipe?

"Q. You moved the riser and the dry pipe itself about nine feet, didn't you? A. Yes, sir; and we just had to move the water main that the dry pipe is connected to, that the riser rises up to.

"Q. But you had to take out the connection from beneath the gate valve—took out the gate valve and the dry pipe valve, and took the riser above—took that out and moved them all over about nine feet? A. No.

"Q. What did you do? A. We just disconnected the air valve where it stood, hammered the lead out of the cast-iron pipe that was in the ground, turned the elbow—the elbow was originally facing south—turned the elbow over headed northward, took a piece of pipe out, and moved the air valve over and set it on there.

"Q. You disconnected the riser that came up from the elbow below? A. Yes, sir.

"Q. You had to disconnect the gate valve, and disconnect the dry-pipe valve. You would have to disconnect that to set it on top of the dry-pipe valve that went up to the pipe above? A. Not necessarily.

"Q. You did do it? A. We did it later on.

"Q. You did that when you moved it over? That is, what I am trying to get at? A. We didn't do all of it when we moved it over. We just moved to the top of the air valve, onto the top of this here, is what we moved first.

"Q. You didn't put all the risers back on top of the dry-pipe valve? A. No, sir.

"Q. But, before you could move the dry pipe valve, you had to take the riser off and disconnect it? A. We disconnected it; yes, sir.

"Q. So you took off the riser before connecting the dry-pipe valve with the pipe overhead? You took off that and had to plug it up above? A. Yes, sir.

"Q. Then you separated the dry-pipe valve from the gate valve, and then you separated the gate valve from the riser pipe below? A. Yes, sir.

"Q. And took off that riser pipe, and then turned the elbow and that brought it around to that, and over the other way? A. Yes, sir.

"Q. And put a piece of pipe on the end of it? A. Yes, sir.

"Q. You put on that riser pipe to bring it above the floor, then you put your gate valve on top of that again, then you put your dry pipe valve on top of that? A. Yes, sir.

"Q. That was all you did on that Sunday? A. Yes, sir.

"Q. That was along about the 1st of April? A. Yes, sir; the very fore part of April.

"Q. How long did it take you to do that work? A. We did the lead work—we shut off the water in the morning, and had it on that evening again.

"Q. That would be, according to Mr. Tobin's statement, about half past 2 that afternoon? A. Some time during the day.

"Q. From 10 o'clock until half past 2. Why didn't you go on and put the riser on top of it, and connect it back so that it would supply the east end of the mill? A. We didn't have the time that day, and we had to prepare the fittings.

"Q. What? A. The connections for connecting it up.

"Q. What were they? A. They consisted of cutting the pipe, fitting the elbows, 45 tee. The day following the moving of that pipe, or the night following the moving of that pipe, the line broke. It broke three times before we got it up.

"Q. You had to fix that the following night? A. Yes, sir.

"Q. But that had nothing to do with working on this? A. It had everything to do with working on that. It was part of that pipe.

"Q. You had to repair that? A. Yes, sir.

"Q. You could not work on this while you were working on that. Of course, that would not furnish water until it was fixed? A. Oh, no.

"Q. What I am trying to get at, in putting some other pipe onto this pipe, you have shown what you disconnected when you moved it from the place inside of the mill on the north side of the mill, nine feet north to a place inside of the lath mill. It is shown that you disconnected all these pipes that connected with the pipe, then turned the elbow over, and added the necessary piece or two to bring it over the proper distance into the lath mill, put on the riser, put on your gate valve and then put on your dry-pipe valve. There remained to be done what to complete the connection back again with the pipe from which you disconnected it to supply water to that system—tell us what? A. It needed to be taken the measure of it—making a sketch of it, having the fittings cut and put to place—put in and connected up.

"Q. We will suppose this pipe has been moved from this point? A. Yes, sir.

"Q. When it stood at this point, there was a riser that carried it up and connected it with the main east and west pipe that ran below? A. Paralleling the mill.

"Q. Just below the second floor? A. Directly over it.

"Q. Now, when you changed the connections below and carried it over nine feet above, you had to have the top of this dry-pipe valve that stood over these pipes, how high? A. I should say six feet.

"Q. Then you would have to have elbows? A. Then have to have a tee.

"Q. A tee? What for? A. To take out the main for sprinkling the lath mill. A tee is a 6 by 6 by 6. It is a cast-iron connection; a round piece of pipe with three openings. A pipe can be taken off from it. Above that is a short nipple—that is, a short straight piece of pipe about five or six inches long, for the purpose of getting the requisite height. On top of that is another short piece of pipe carried over from there, and then a 90-degree elbow. Then, on the end of that pipe, it was carried from this location back to a point underneath the overhead pipe. We had to drop down. We put it in above that and dropped down to the pipe paralleling the mill. The pipe that was carried from the new location, when it was finally put onto the dry-pipe

valve, ran up and ran high enough so as to cross over up above the main east and west top of the mill proper, and had to be dropped back down. After moving this dry-pipe valve on the 1st of April over into the lath mill, the dry-pipe valve was left in that location without connecting it up. In order to make that connection complete and supply water to the No. 3 system, it was necessary to put on the pipe and fittings and elbows we have just described, and that generally would have completed the system so as to carry water to the No. 3 system. It was some two or three weeks before moving this dry-pipe valve from the sawmill proper to the lath mill proper that it was determined that the change would have to be made. The change had to be made for the reason that the belt ran so close—the main driving belt for the lath mill—ran so close it ran almost under the cone-shaped part of the dry valve. The belt shown on Exhibit H don't cut any figure. That was on the old lath mill. For the new lath mill it was altogether different. New power and new belting had to be put in for running the additional machinery that was put into the new lath mill. When we installed and commenced trying the lath mill, two or three weeks earlier, we found that the belts ran too close to the dry-pipe valve as it was originally located to make it work safely or conveniently. It would have remained there, but, in order to protect it from the frost, we had to have a house around it. We could not have a house around it in that location. We knew it would have to be done, and we allowed it to remain intact just as long as we possibly could, in order to leave the sprinkler system intact as long as we possibly could. That was one of the reasons why we delayed it.

"Q. (Mr. Hughes.) I asked you what you gave as a reason why you didn't go on and finish it on this Sunday, or that night, or the next day? A. We possibly did all it was possible to do at that time; that is, that day.

"Q. Why didn't you do it that night, or the next day? A. We went to sleep that night.

"Q. Why didn't you do it that next day? A. We worked all the next day, all we could. The next day the lath mill was running.

"Q. Why didn't you go on and do it? A. Why didn't we do it?

"Q. Yes. A. Men, like everybody else, get tired, I suppose. If they do a day's work, they want rest.

"Q. When you commenced to do this again, was it on Sunday, the 21st of April? A. Oh, no, no; we commenced working on it the next morning.

"Q. You mean you commenced— A. Yes, sir; commenced moving the pipes, and making preparations and repairing the other breaks.

"Q. That was an entirely different matter, separate from this. That was not connected with the removal of this. A. They were connected with that valve there.

"Q. I am talking about this particular work of changing back. When did you first get out that pipe to see what pipes and elbows you had that would be sufficient to connect this back again with the main No. 3 system? A. The very next morning after I got it located—after I got it in its permanent place, the very next morning I commenced.

"Q. Assuming this was on the 1st and 2d, you say you worked the next morning? A. Yes, sir.

"Q. What did you do then? A. I took my measurements, made a sketch of it, went and looked the fittings over to see if we had ample fittings.

"Q. What did you find out? A. I found out that we had.

"Q. Found out that you had? A. Yes, sir.

"Q. What did you do after that? A. We kept after it every time we could work at it.

"Q. Tell us what you did. A. I am trying to tell it to you. If you can tell it faster than I can, go ahead. We kept at it when we got working at it. We went and took our measurements, got the pipe together, and assembled them. When I put on a 45, I found a little latent defect. That was when I put it together, possibly the fore part of the week, maybe Tuesday or Wednesday. I then ordered from Crane & Co., some time in the fore part of April. I think the day that we got around to put it together was reported to me on the 11th or 12th. I made the order on either Thursday or Friday morning, and wrote right across the face of the order, 'Please rush this order.' I don't

think I sent the order on the 14th. I think my order was dated on the 12th. I ordered by telephone, and confirmed it the day following with a written order. [Witness was here shown a carbon copy of the order.] I ordered by telephone and confirmed it with a written order on the day following, April 13th. The order came back in the fore part of the week following. I don't think it was Monday, the 15th, but that it was Wednesday, we got it. It was some time during the fore part of the week. We had all of those documents some place showing when it was received. I have the bill received from Crane & Co. The shipping bill is in the exhibits somewhere. We didn't receive it until some time during the fore part of the week. I couldn't tell as to dates, whether Sunday was the 13th or 14th, but it seems to me—I am almost positive I ordered on Thursday, and followed it with a written order on Friday. If, as a matter of fact the written order bears date the 13th, which was Saturday, I don't know whether the order was made on Saturday. I would not say it was. The work of setting up the riser in the dry-pipe valve, and putting on the tee and the nipple and the elbows, and making the connection back to the No. 3 system, was done by Mr. Olson and Mr. Casperson. Mr. Olson was not in charge of the sprinkler department. He was boss of the crew. I looked to him for to complete the work—to do the work—and Mr. Casperson was his assistant. They went to work putting it up on Sunday morning, the 21st, and worked at it all day Sunday until 5:30. Olson and Casperson did the work. I helped them. I gave them a hand to pull the pipes over the timbers. The long pipes had to be assembled and put in position, and flanged on each end, as there was no chance to screw pipes in these timbers. Consequently they had to be assembled where we could work at them, pulled together and in through the timbers. We could not set them up when the mill was going. That was the reason why we did not set them up earlier because the mill was running day and night except Sunday. That was why we waited until Sunday. On Monday morning I noticed that the pipes had been set up and connected, connecting up the dry-pipe valve from its new location over to the pipes in the old location in the mill. I didn't try the valve, or make any test to see whether the system was in operation at any time after the 1st of April and before the fire. It was just connected up the Sunday before the fire. I passed through on Monday morning. I did not go and open the valve and try the valve. I saw that everything, as far as I could see, was intact. The pipes were on and bolted together. I saw the valve in the No. 3 system, the gate-pipe valve, possibly the day following the fire. I made an examination of it possibly two or three weeks after. I never made an examination of it until it was disconnected. In the next place, no man could make an examination of it until it was disconnected."

We think enough of the testimony has been set forth to show that the question as to whether the mill company used due diligence to keep its sprinkler system in good working order was for the determination of the jury, and that the trial court was in error in directing a verdict for the defendant insurance company. In such cases that course is justified only when the plaintiff's evidence is such that it can be fairly said that all reasonable men must draw the same conclusion from it. The authorities to this effect are so numerous that it is unnecessary to cite them. The law also is that in passing upon a motion to take a case from the jury it is the duty of the court to take that view of the evidence most favorable to the party against whom a directed verdict is asked. *Janoski v. Northwestern Impr. Co.*, 176 Fed. 215, 99 C. C. A. 569, and cases there cited.

That reasonable men may differ as to whether the facts testified to in the present case show that the mill company used due diligence to maintain its sprinkler system in good working order as required by the policy in suit is well illustrated by the case of the same mill com-

pany against the Springfield F. & M. Insurance Co., reported in 56 Wash. 681, 106 Pac. 194, 28 L. R. A. (N. S.) 593, and in (Wash.) 110 Pac. 36, in which case the policy in suit, in so far as the question here involved is concerned, was identical in terms, in which the same fire was in question, and in which the plaintiff's evidence in respect to the question of diligence seems to have been substantially the same as that presented in the present case, and where it was held by at least some of the judges of the state of Washington that it showed the exercise of due diligence in the matter in question on the part of the mill company.

The judgment is reversed and cause remanded to the court below for a new trial.

THE QUEEN.

THE UMATILLA.

(Circuit Court of Appeals, Ninth Circuit. November 21, 1910. On Motion for Rehearing, March 11, 1911.)

Nos. 1,850, 1,851.

PILOTS (§ 7*)—POWER OF STATES TO CONTROL AND REGULATE—FEDERAL STATE—COASTWISE VESSELS.

The federal statutes (Rev. St. §§ 3126, 4401, 4444 [U. S. Comp. St. 1901, pp. 2036, 3016, 3037]) respectively authorize (section 3126) registered vessels of the United States to engage in the coastwise trade, with the privilege of touching at one or more foreign ports during the voyage; provide (section 4401) that all coastwise seagoing vessels shall be subject to the navigation laws of the United States, and every coastwise seagoing steam vessel subject to such laws "not sailing under register" shall when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats; and prohibit (section 4444) any state or municipal government from requiring pilots of steam vessels to procure a state or other license in addition to that issued by the United States, and from levying pilot charges upon any steamer piloted as provided therein, provided that "nothing in this title shall be construed to annul or affect any regulation established by the laws of any state requiring vessels entering or leaving any port of such state, other than coastwise steam vessels, to take a pilot duty licensed or authorized by the laws of such state or of a state situate upon the waters of such state." *Held*, that the exception in section 4401 from those vessels thereby made subject to the pilotage laws and regulations of the United States of vessels "sailing under register" includes only such vessels engaged in foreign commerce, and that under such provisions, construed together, the state of California is without power to levy pilotage charges on registered vessels, entering or leaving the port of the San Francisco, which are engaged in making voyages between that port and Washington ports on Puget Sound in charge of pilots licensed under the laws of the United States, although on each of such voyages they make a brief call at the port of Victoria, B. C., for passengers, freight, and mails.

[Ed. Note.—For other cases, see Pilots, Dec. Dig. § 7.*]

Gilbert, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Northern District of California.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Suits in admiralty by M. Anderson against the steamship Queen, and by N. Jordan against the steamship Umatilla; the Pacific Coast Steamship Company claimant. Decrees for respondent, and libelants appeal. Affirmed.

William Denman, for appellants.

Geo. W. Towle, for appellee.

Before GILBERT and ROSS, Circuit Judges, and WOLVERTON, District Judge.

ROSS, Circuit Judge. These cases were argued and submitted together. They are libels against the respective ships mentioned for alleged pilotage services. Both cases are alike, except that in that against the ship Umatilla a question is raised as to the sufficiency of the tender of the services sued for.

The cases were submitted upon an agreed statement of facts, from which it appears that the libelant in each case was, at all the times mentioned in the libel, a duly licensed pilot of the port of San Francisco, holding a license from the United States local inspectors of steamships, and also one from the California State Board of Pilot Commissioners, of the port of San Francisco; that the libelant in the case of the Queen tendered to the master of that steamship, as she was entering the port of San Francisco on the 14th day of August, 1905, his services as a pilot, which services were refused; that the steamer Queen was at the time a duly registered American vessel, and was then completing a voyage from an American port on Puget Sound to the port of San Francisco, via Victoria, British Columbia, and for some time prior thereto had been engaged in making voyages between the port of San Francisco and American ports on Puget Sound, and that on each and every of such voyages the port of Victoria, British Columbia, was a regular port of call, being the first port of call on each voyage outward from San Francisco, and the last port of call on each voyage toward San Francisco from the American ports on Puget Sound; that the steamship Umatilla was, at all of the times mentioned in the libel against that ship, a duly registered American vessel, engaged in making similar voyages, and, being about to sail on her regular voyage from San Francisco to the ports of Puget Sound, the libelant in that case tendered to the master of the ship—

"his, said Jordan's, services as a pilot so licensed, to pilot said Umatilla on her then voyage out of said port of San Francisco, by going on board said vessel alongside the wharf to which said steamship was then made fast, and not more than one hour before she was to and did sail on her voyage therefrom, and then and there orally stating to said master that he, said Jordan, was then and there ready and able and willing to so pilot said vessel, and that he, said Jordan, then desired that he be so employed."

The agreed statement shows these further facts:

"(4) That each of said vessels in said several libels mentioned was, at all of the times in said libels and schedules referred to or mentioned, a duly registered American steam vessel, and was at all said times sailing under 'register'; and each of said vessels at each of the several times in said several libels and schedules referred to was either on a voyage from the port of San Francisco in the state of California to a United States port on Puget

Sound, or from a United States port on Puget Sound to said port of San Francisco, but in either such case said vessel did, while en route between said ports in the United States, stop at the port of Victoria, B. C., to and from which said port of Victoria she did then carry, and did then and there deliver and receive, both passengers, mail, and freight; and on each and every such voyage the port of Victoria, B. C., was a regular port of call, being the first port of call or stop on each voyage outward from San Francisco, California, and the last port of call or stop on each voyage toward San Francisco, California. Each and every one of the ships in this agreement mentioned, on sailing outward bound from the port of San Francisco on her said voyage above described, displayed at her foremast head the English flag, which indicated, according to the usage and custom of vessels and their navigators, that she was destined to a port under the dominion of Great Britain, whose merchant flag was so as aforesaid displayed at her foremast head; and similarly on each and every said inward voyage above described, each and every one of the vessels in this agreement mentioned displayed the English flag on her foremast head, to indicate that she had come direct from a port under the dominion of that country.

"(5) That each of the masters and first officers of each of said vessels, at all of the times in said several libels and schedules referred to, was duly licensed under the laws of the United States of America to act as and serve as master and as pilot of any American steam vessel in entering and in departing from the said port of San Francisco, and all of the engineers and other officers of each of said vessels, who under the laws of the United States needed then to be licensed, were then duly licensed officers thereof; and each of said masters, during the two years next prior to any of the times in said libels referred to, had many times safely, and without the assistance of any pilot licensed under authority of the state of California, navigated and piloted vessels under his command, then sailing under 'register,' and of the class of those in said libels and said schedules referred to, out of and into said port of San Francisco.

"(6) That no master of any vessel owned or employed by either of said claimants, and sailing under 'register,' had ever, during the twenty (20) and more years next prior to any of the times in said libels referred to, accepted the services of any of said libelants, nor of any state licensed pilot, to pilot any such vessel out of or into said port of San Francisco; and during all of the times herein last referred to each of said libelants and all state licensed pilots well knew that their services as pilots licensed by the state of California to so pilot any such vessel would not, if tendered, be availed of or accepted by either or any of the masters of such vessel, nor by either or by any of said claimants.

"(7) That each and every and all of the said vessels, in said several libels or in any schedule hereto attached referred to, was, long prior to any of the times in said several libels or schedules referred to, well known to each and every and all of said libelants, and to all state licensed pilots of the said port of San Francisco; that said several vessels sailed from and arrived at San Francisco on a regular schedule, and could be and were by each and all of said libelants, and all state licensed pilots, identified and known in approaching the port of San Francisco long before he or any pilot needed or, in the ordinary course of his business, would make any effort to 'speak' the same, if such vessel were by him thought to be in need of a pilot.

"(8) That when the present state pilotage regulations of the port of San Francisco were under consideration by the Legislature of the state of California, the state licensed pilots of said port appeared before each of the committees of said Legislature having such matters in charge, and then by themselves and by their representatives were heard in connection with such regulations, and were likewise so heard by the Governor of said state before the act of the Legislature fixing such regulations, as now embodied in certain sections of the Political Code, was approved by him; and the fact long before then had been, and then was, and since then has been, and still is, that the only steam vessels that had been or were engaged in the coasting trade, touching en route at a foreign port, and sailing under 'register' out of or into the said port of San Francisco, were such of the vessels of said claimants,

to wit, Pacific Coast Steamship Company, or the Pacific Company, as had been and were so employed."

The answer in each case set up that the steamship referred to in it, during all the times mentioned, was a duly registered steam vessel of the United States, and then was and during many months prior thereto had been continuously employed in the carriage of persons and property between the port of San Francisco, Cal., and the ports of Port Townsend, Seattle, Tacoma, Everett, Anacortes, South Bellingham, and Bellingham, all in the state of Washington, and in like business when returning to San Francisco; that during all of said times the said ship was a coastwise steam vessel of the United States then engaged in interstate coastwise commerce and transportation, and during all of said times was under the command of a master who then held a pilot's license or certificate that had been theretofore duly and regularly issued to him by the proper and competent authorities of the United States, and which said pilot's license authorized the said master under the pilot laws of the United States to pilot any and all enrolled or registered steam vessels of the United States, including the steamship in question, into and out of the port of San Francisco, and that the chief officer of the said steamship also held, during all of the said times, a similar pilot's license, which said licenses were then in full force, and that all the engineers of the said steamship were duly and regularly licensed by the proper United States authorities as required by the United States statutes, which licenses were in full force, and that each of the several officers of said ship had taken the oath of office prescribed by statute; that the said ship on its regular voyages between the port of San Francisco and the Puget Sound ports of the United States touched en route at the port of Victoria, British Columbia, and there received on board passengers and freight for carriage thereon, the stop and stay of the ship at Victoria for such purpose being about one hour only, which stop the ship was authorized to make by the clearances granted at the United States custom house; that the number of passengers and the amount of freight taken on board at Victoria were insignificant as compared with the number of passengers and amount of freight taken on board at the American ports mentioned and transported by the steamship to and from the said American ports.

The record in each case shows that the services sued for were never in fact rendered, and that the acceptance of the proffered services was expressly refused by the respective steamships, and that the real question in each case is whether these registered steamships of the United States, plying between the American ports mentioned and making a brief incidental stop at the British port of Victoria, were compelled to accept the services at the port of San Francisco of a state pilot of California.

We are of opinion that the court below rightly held that they were not. On behalf of the appellants it is suggested that the alleged ~~evidence~~ on the part of that court arose because it failed to remember that the existing statutes of the United States upon the subject were enacted for the "better protection of the lives of passengers." The learned

judge of the court below could hardly have been unmindful of the fact that the primary purpose of all pilotage laws is the safety of persons on board the vessels to be piloted. Nor is it true, as contended on behalf of the appellants, that unless the existing statutes of the United States be so construed as to make coastwise vessels sailing under "register" subject to the compulsory pilot laws of the state, such coastwise seagoing vessels will necessarily be exempt from the requirements of any pilot law. The authority of a state to provide for and regulate pilot charges at ports within its territorial limits, in so far as such provisions and regulations do not conflict with the legislation of Congress, is unquestioned. But it is just as true that to the extent of any such conflict state legislation is invalid.

In title 52 of the Revised Statutes of the United States, for the regulation of steam vessels, it is provided, among other things, that every vessel propelled in whole or in part by steam, shall be deemed a steam vessel within its meaning, and that all steam vessels navigating any waters of the United States which are common highways of commerce, or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats propelled in whole or in part by steam for navigating canals, shall be subject to the provisions of that title. Specific provisions are therein made for the licensing of masters and pilots of domestic steam vessels, and against the navigation of such vessels by any one not so licensed, and a supervising general inspector, supervising inspectors, and local inspectors are provided for to see that none but competent persons are granted such licenses.

"Whenever any person claiming to be a skillful pilot for steam vessels offers himself for a license," declares section 4442 of the Revised Statutes (U. S. Comp. St. 1901, p. 3037), "the inspectors shall make diligent inquiry as to his character and merits, and if satisfied from personal examination of the applicant, with the proof that he offers, that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license for the term of one year to pilot any such vessel within the limits prescribed in the license; but such license shall be suspended or revoked upon satisfactory evidence of negligence, unskillfulness, inattention to the duties of his station, or intemperance, or the willful violation of any provision of this title."

And section 4443 of the same statutes (page 3037) provides that:

"Where the master or mate is also pilot of the vessel, he shall not be required to hold two licenses to perform such duties, but the license issued shall state on its face that he is authorized to act in such double capacity."

By section 4438 (page 3034) it is provided as follows:

"Sec. 4438. The boards of local inspectors shall license and classify the masters, chief mates, engineers, and pilots of all steam vessels. It shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors; and anyone violating this section shall be liable to a penalty of one hundred dollars for each offense."

Merchant vessels are, under the commercial and navigation laws of the United States, divisible into two classes—registered vessels, and vessels enrolled and licensed for the coasting trade or fisheries. But

by virtue of sections 3126 and 4361 of the Revised Statutes (U. S. Comp. St. 1901, pp. 2036, 2980) registered vessels may also engage in the coastwise trade—those sections providing:

"Sec. 3126. Any vessel, on being duly registered in pursuance of the laws of the United States, may engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters, and mails. All such vessels shall be furnished by the collectors of the ports at which they shall take in their cargoes in the United States, with certified manifests, setting forth the particulars of the cargoes, the marks, number of packages, by whom shipped, to whom consigned, at what port to be delivered, designating such merchandise as is entitled to drawback, or to the privilege of being placed in warehouse; and the masters of all such vessels shall, on their arrival at any port of the United States from any foreign port at which such vessel may have touched, as herein provided, conform to the laws providing for the delivery of manifests of cargo and passengers taken on board at such foreign port, and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed."

"Sec. 4361. Whenever any vessel of the United States, registered according to law, is employed in going from any one district in the United States to any other district, such vessel, and the master thereof, with the goods she may have on board previous to her departure from the district where she may be, and also upon her arrival in any other district, shall be subject, except as to the payment of fees, to the same regulations, provisions, penalties, and forfeitures, and the like duties are imposed on like officers, as are provided for vessels licensed for carrying on the coasting trade. Nothing herein contained shall be construed to extend to registered vessels of the United States having on board merchandise of foreign growth or manufacture, brought into the United States, in such vessel, from a foreign port, and on which the duties have not been paid according to law."

There is in the two sections last quoted express statutory authority for engaging in the coastwise trade by registered vessels; and the agreed statement of facts in the present cases leaves no room to doubt that the steamships here in question were mainly engaged in that traffic, stopping only incidentally, and for a very brief period, at the foreign port of Victoria, at which port they take on a very small portion of their passengers and cargo.

The provisions of the United States statutes show that provision is made by the general government for proper pilots for all domestic vessels, whether registered or licensed, engaged in the coastwise trade, and that no such vessels can engage therein without such a pilot aboard. It is, therefore, a mistake to say, as does the proctor for the appellant, that unless registered vessels engaged in the coastwise trade be subjected to the compulsory law of the state, such vessels are not subject to any pilotage law.

"By Rev. St. § 4235 [U. S. Comp. St. 1901, p. 2903]," said the Supreme Court in the case of *Huus v. New York & Porto Rico Steamship Company*, 182 U. S. 392, 393, 394, 21 Sup. Ct. 827, 828 (45 L. Ed. 1146), "it is expressly enacted that 'until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the states respectively wherein such pilots may be,' subject, however, to a prohibition (section 4237 [page 2903]) against 'any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one state and vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam,' and to a further restriction (section

4401 [page 3016]) that 'all coastwise seagoing vessels * * * shall be subject to the navigation laws of the United States, * * * and that every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats.' To further effectuate its control over coastwise seagoing vessels, it is provided by section 4444 [page 3037] that 'no state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States, * * * nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title,' * * * although 'nothing in this title shall be construed to annul or affect any regulation established by the laws of any state requiring vessels entering or leaving a port in any such state, *other than coastwise steam vessels*, to take a pilot duly licensed or authorized by the laws of such state, or of a state situated upon the waters of such state.' The general object of these provisions seems to be to license pilots upon steam vessels engaged in the *coastwise* or interior commerce of the country, and at the same time to leave to the states the regulation of pilots upon all vessels engaged in *foreign commerce*."

See, also, Olsen v. Smith, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224; Sprague v. Thompson, 118 U. S. 95, 6 Sup. Ct. 988, 30 L. Ed. 115.

Since the foregoing opinion was prepared, our attention has been called by the appellants' proctors to three rulings of the Treasury Department, the first made October 24, 1879, the second February 12, 1884, and the third November 29, 1884, which, it is claimed, sustain the appellants' contention. The first was in response to a letter from a pilot holding a license from the United States local inspectors asking whether his right to pilot certain steamers in and out of Narragansett Bay could be interfered with by state pilots—such steamers plying between Boston and Philadelphia, and touching at Providence, a purely coastwise service, so far as appears from the inquiry. The answer was that no state pilot could interfere with the pilot holding a United States license, "if said steamers are exclusively confined to the coastwise trade and are not sailing under register."

The second letter of the Department referred to was evidently in answer to an inquiry of one holding a license under the general government, and reads:

"You are informed that a United States pilot's license gives you authority to pilot any river or coastwise steamer upon the waters for which it is granted, but it does not confer any rights to pilot a sail vessel or registered steamer, namely, 'one bound to or from a foreign port'; the pilotage of the latter class of vessels being regulated by the state laws, if there are any."

The third and last letter of the Department referred to announces the same ruling, and in these words:

"A United States license gives you authority to pilot any river or coastwise steamer upon the waters for which it is granted, but it does not confer any rights to pilot a sail vessel, or registered steamer, namely, one bound to or from a foreign port; the pilotage of the latter class of vessels being regulated by the state laws, if there be any."

The meaning of "registered" vessels, as used by the Department, was expressly stated in its last two letters mentioned to be "one bound to or from a foreign port." It is hardly to be supposed that it meant

anything else in the first letter referred to by the use of the same word "register." Now it is obvious that a vessel sailing from one American port on the Pacific Coast to another American port on the same coast is not "bound to or from a foreign port," although it makes an incidental stop en route at a foreign port. The agreed statement of facts in the present cases shows that each of the vessels in question was, at the several times in the several libels and schedules referred to, either on a voyage from the port of San Francisco, in the state of California, to a United States port on Puget Sound, or from a United States port on Puget Sound bound to the port of San Francisco. In each case the *voyage* was between those domestic ports, with an incidental brief stop en route at the British port of Victoria, such incidental touching being expressly authorized by section 3126 of the Revised Statutes of the United States, referred to in the foregoing opinion, and which we repeat, so far as pertinent:

"Any vessel, on being duly registered in pursuance of the laws of the United States, may engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage. * * *

In each of the cases above entitled the judgment is affirmed.

WOLVERTON, District Judge. I concur in the opinion of Judge ROSS, rendered herein, and will state briefly my reasons therefor. The question in the case is one purely of construction, and relates to the federal statutes regulating pilotage; the controversy being whether pilotage upon libelee's steamships in entering and departing from the Bay of San Francisco is controlled by federal or state regulations.

The statute of California (section 2468, Pol. Code) provides that all foreign vessels and all vessels from a foreign port or bound thereto, and all vessels sailing under a register between the port of San Francisco and any other port of the United States, shall be liable for pilotage as provided in section 2466 of the Code. Section 4401 of the Revised Statutes of the United States, after setting forth that all coastwise seagoing vessels shall be subject to the navigation laws of the United States, when navigating within the jurisdiction thereof, and all vessels, propelled in whole or in part by steam, and navigating as aforesaid, shall be subject to all the rules and regulations established in pursuance of law for the government of steam vessels in passing, provides that:

"Every coastwise seagoing steam vessel subject to the navigation laws of the United States, and to the rules and regulations aforesaid, not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the inspectors of steamboats."

Section 4444 provides that:

"No state or municipal government shall impose upon pilots of steam vessels any obligation to procure a state or other license in addition to that issued by the United States, or any other regulation which will impede such pilots in the performance of the duties required by this title; nor shall any pilot charges be levied by any such authority upon any steamer piloted as provided by this title; and in no case shall the fees charged for the pilotage of any steam vessel exceed the customary or legally established rates in the

state where the same is performed. Nothing in this title shall be construed to annul or effect any regulation established by the laws of any state requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed or authorized by the laws of such state, or of a state situate upon the waters of such state."

The controversy depends upon the meaning and signification to be given the words "not sailing under register," as employed in section 4401. Preliminarily, it may be stated that Congress, having the power to regulate commerce between the states, is vested with authority as an instrument of that power to regulate the pilotage service upon the rivers and harbors and bays wherever the jurisdiction of Congress extends; but the state was originally possessed of authority to regulate pilotage service, and may lawfully do so until Congress has assumed to legislate upon the subject, and to inaugurate its own regulations pertaining thereto. Prior, therefore, to the enactment of any federal statutes upon the subject, pilotage upon the bays and harbors and inland waters of the country was regulated solely by state authority, and it is only as the federal statutes have encroached upon state authority that the latter has been curtailed or superseded. Furthermore, it is a canon of statutory interpretation that every word and phrase of a statute shall be given a meaning, if it can be done in reason, that where different regulations are imposed by the same act, the entire statute shall be construed in pari materia, and that, where apparently inconsistent provisions are found, they must be harmonized if possible.

Under this rule, we must give a meaning to the clause in question, and that meaning must be determined by the intentment of Congress in adopting the law if it can be ascertained. It is my firm impression that the words "not sailing under register" were not intended to modify or qualify the words "every coastwise seagoing steam vessel," but that they were employed rather as descriptive of such vessel; their purpose being to distinguish such coastwise seagoing steam vessel from one that is engaged in foreign trade. This idea is borne out when we take into consideration the provision of section 4444 whereby the intentment is shown not to annul any regulation established by the laws of the state requiring vessels entering or leaving a port in any such state, other than coastwise steam vessels, to take a pilot duly licensed by the laws of the state. The words "not sailing under register" are wholly omitted from this section; whereas, if it was intended that such vessels sailing under register should be subject to state regulation, it is more than probable that Congress would have reiterated the words. This section, it will be observed, deals directly with a restriction upon state legislation; the former (section 4401) is for the regulation of the navigation of certain craft or vessels.

It is difficult to harmonize these two sections upon any other basis than the one which I have suggested, and the meaning of section 4401 is simply this: That all coastwise steam vessels not engaged in foreign commerce and trade shall be subject to the pilotage laws and regulations enacted by Congress. Other vessels engaged in foreign trade would still be subject to the local laws and regulations pertaining thereto. This idea is borne out by the opinion of Mr. Justice Brown

in *Huus v. New York & Porto Rico Steamship Company*, 182 U. S. 392, 21 Sup. Ct. 827, 45 L. Ed. 1146. This was the case of the navigation of a steamship, enrolled and licensed, plying between the port of New York and that of San Juan in the island of Porto Rico. Prior, however, to a discussion of that case, it should be further observed that vessels registered in pursuance of the laws of the United States "may engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers and their baggage, and letters, and mails." Section 3126, Rev. St. So that a registered vessel, it would appear, is entitled to engage in the coastwise trade.

In the case alluded to it is stated that, under the commercial and navigation laws of the United States, merchant vessels are divided into two classes: First, vessels registered pursuant to Rev. St. § 4131 (U. S. Comp. St. 1901, p. 2803), being those wholly owned, commanded, and officered by citizens of the United States, which are alone entitled to engage in foreign trade; and, second, vessels enrolled and licensed for the coasting trade or fisheries. The latter may not engage in foreign trade upon penalty of forfeiture. Section 4337 (page 2969). After referring to the several sections of the Revised Statutes, namely, 4235, 4237, 4401, and 4444, the distinguished justice makes this significant deduction, namely:

"The general object of these provisions seems to be to license pilots upon steam vessels engaged in the coastwise or interior commerce of the country, and at the same time to leave to the states the regulation of pilots upon all vessels engaged in foreign commerce."

It is significant, also, that in quoting from section 4444 the words "other than coastwise steam vessels" are italicized, thus emphasizing the deductions that the jurist has drawn from these statutes.

Following this case is another, bearing the title of *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224, in which it was determined that:

"The effect of Rev. St. §§ 4237, 4444, is not to interfere with or abrogate state laws regulating pilotage, but to withdraw coastwise steam vessels from the pilotage charges imposed by such state laws."

I have quoted from the headnote in this decision.

In a previous case, *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115, which it should be stated involves the question of a licensed steamship plying between the ports of Philadelphia, Pa., and Savannah, Ga., it was held that she was not subject to the local pilotage regulations. The court, in discussing the case, says, among other things, that:

"The section [being section 4444] expressly excepts coastwise steam vessels from the regulations established by the laws of any state requiring vessels entering or leaving a port in any such state to take a pilot duly licensed or authorized by the laws of any such state, or of a state situate upon the waters of such state."

While these cases do not expressly decide the question in issue, and while it might be said that in the first case what the court observed was

obiter, as not necessary for the decision of that case, yet the observation of the learned justice was made in view of a consideration of the very statutes in question here, and is entitled to very great weight. In the case of *Bigley v. New York & P. R. S. S. Co.* (D. C.) 105 Fed. 74, after quoting the last clause of section 4444, the court says:

"The effect of the above acts of Congress is to exempt all steam vessels sailing under a license and employed in the coastwise trade from the pilotage laws of the states, while other vessels remain subject to the state laws."

This case is one of three, including the case of *Huus against the same party*, which was appealed to the Supreme Court of the United States, being first cited herein. While the language used does not include coastwise vessels not sailing under register, yet it seems to be general in its import, as comprising all coastwise steam vessels, and is not in conflict with the observations of the Supreme Court on the same subject.

In the case of *Joslyn v. Nickerson* (C. C.) 1 Fed. 133, the steamship was registered, but was plying between Boston and Havana, being thus engaged in foreign trade, and it was held that the state regulations of Massachusetts as to pilotage applied. The case is not inconsistent, therefore, with the views herein entertained.

The case of *Murray v. Clark*, 4 Daly (N. Y.) 468, affirmed by the Court of Appeals of New York, 58 N. Y. 684, supports the opposite doctrine; but it does not appeal to me as controlling.

Sections 4401 and 4444 of the Revised Statutes were enacted into law in 1871, and it does not seem to have occurred to any one in the port of San Francisco to contest the right of the United States authorities to regulate the pilotage as it respects steam vessels plying in the coastwise trade until a recent statute was enacted by the state of California in 1905 (St. 1905, c. 611). In all the time preceding that we must assume that the pilots upon such vessels were such as were licensed by United States authority, and not by state authority. And where a statute has continued so long under one construction, it is persuasive of its rightful interpretation.

For these reasons, I am of the opinion that the cause should be affirmed.

GILBERT, Circuit Judge (dissenting). The question involved in this case depends wholly upon the construction of sections 4401 and 4444 of the Revised Statutes. In those two sections is to be found the full measure of congressional legislation on the subject of pilotage, and the full extent of the federal delimitation of state power. Section 4361, which appears under a different title, and which subjects registered vessels engaged in the coasting trade to the same regulations, provisions, penalties, forfeitures, and duties as are imposed on licensed vessels in the coasting trade, has no reference whatever to pilotage regulations. This is made plain by referring to the original act of February 18, 1793 (1 Stat. 313, c. 8, § 20), in which it specifically appears that the regulations, provisions, duties, etc., so referred to, concern only the carriage of goods and more particularly distilled liquors, and the duty of masters to make manifests thereof. No new meaning was given to that statute by carrying its provisions into the

Revised Statutes as section 4361. "It will not be inferred that the Legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed" (*United States v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. Ed. 308), and "upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology" (*McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269). And it is an established canon of construction that, in finding the meaning of a statute in the revision, the courts are permitted to refer to the original statute from which the section was taken to ascertain from its language and context to what class of cases the provision was intended to apply. *The Conqueror*, 166 U. S. 122, 17 Sup. Ct. 510, 41 L. Ed. 937.

It is to be borne in mind that, while federal authority over pilotage is paramount to that of the state, the state power does not act by authority delegated by Congress, and the question is, not what has Congress authorized the states to do, but what has Congress taken from the states by its own regulation of pilotage? In *Gibbons v. Odgen*, 9 Wheat. 207, 6 L. Ed. 23, it was said:

"Although Congress cannot enable a state to legislate, Congress may adopt the provisions of a state on any subject. When the government of the Union was brought into existence, it found a system for the regulations of its pilots in full force in every state. The act which has been mentioned (Act Aug. 7, 1789, c. 9, § 4, 1 Stat. 54, re-enacted in section 4235, Rev. St.) adopts this system and gives it the same validity as if its provisions had been specially made by Congress. * * * The act unquestionably manifests an intention to leave this subject entirely to the states until Congress should think proper to interpose."

In *Cooley v. Board of Wardens of Philadelphia*, 12 How. 299, 319, 13 L. Ed. 996, the court said:

"The act of 1789 contains a clear and authoritative declaration by the First Congress that the nature of this subject is such that, until Congress should find it necessary to exert its powers, it should be left to the legislation of the states; that it is local, and not national; that it is likely to be the best provided for, not by one system or plan of regulations, but by as many as the legislative discretion of the several states should deem applicable to the local peculiarities of the ports within their limits."

Approaching the question in issue with these principles in mind, it seems clear to me that section 4401 places under the protection of federal licensed pilots, except when on the high seas, all coastwise steam vessels, "not sailing under register," and that while section 4444 recognizes the power of the state to regulate pilotage, when entering or leaving its ports, of all vessels other than "coastwise steam vessels," the coastwise steam vessels so excluded from state legislation are those and those only which are placed under federal regulation under section 4401, namely, coastwise steam vessels, "not sailing under register." Section 4401 is the only federal statute placing vessels under the control of federal pilots while entering or leaving ports, and section 4444, being part of the same statute, is to be construed with it. Both these sections originally appeared as a single section in the act of 1871, entitled "An act for the better protection of life, etc." Act Feb. 28, 1871, c. 100, § 51, 16 Stat. 455. The field of legislation which Congress might have covered by pilotage regulations comprised three

classes of vessels: First, licensed and enrolled vessels engaged in the coasting trade; second, registered vessels engaged partly in coasting trade and partly in foreign commerce; and, third, registered vessels engaged wholly in foreign trade. Congress saw fit to regulate vessels of the first class only, and has never made any specific provision for vessels of the other two classes. It has left them to state regulation.

This was the view taken by Judge Lowell in 1880, in *Joslyn v. Nickerson* (C. C.) 1 Fed. 133, when he said, referring to Act July 25, 1866, c. 234, § 9, 14 Stat. 228:

"This statute has been modified, and the employment of such a pilot is now compulsory only upon coasting steam vessels not sailing under a register. Rev. St. § 4401."

And the learned judge cited *Murray v. Clark*, 4 Daly, 468, affirmed in 58 N. Y. 684, a case in which the meaning of sections 4401 and 4444 was discussed at length, and in which it was held that the state might impose a pilotage charge on registered vessels which are also engaged in the coasting trade, and that the rules and regulations established by the United States refer only to coastwise steamgoing vessels, not sailing under register. In *Bigley v. New York P. R. S. S. Co.* (D. C.) 105 Fed. 74, Judge Brown said that the effect of sections 4401 and 4444 was—

"to exempt all steam vessels sailing under a license and employed in the coastwise trade from the pilotage laws of the states, while other vessels remained subject to the state laws."

This seems to be the view which was taken in *Sprague v. Thompson*, 118 U. S. 90, 6 Sup. Ct. 988, 30 L. Ed. 115; and the later cases of *Huus v. New York*, etc., S. S. Co., 182 U. S. 395, 21 Sup. Ct. 827, 45 L. Ed. 1146, and *Olsen v. Smith*, 195 U. S. 332, 25 Sup. Ct. 52, 49 L. Ed. 224, are not in conflict with it.

On Motion for Rehearing.

PER CURIAM. It is ordered that the petition, filed January 26, 1911, on behalf of the appellant, for a rehearing of the above-entitled cause be and hereby is granted. It is further ordered that certain questions involved in the above-entitled cause be certified to the Supreme Court of the United States for decision, and that the counsel for the respective parties to the above-entitled cause may each propose a certificate accordingly.

SOUTHERN PAC. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,578.

1. APPEAL AND ERROR (§ 1035*)—REVIEW—HARMLESS ERROR—WAIVER.

Under the rule that an appellate court will not reverse the decision of a trial court for error, unless the error has prejudiced the party who complains of it or has deprived him of a substantial right, the action of a federal court in overruling an objection to its jurisdiction in equity,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

based on the ground of an adequate remedy at law, although erroneous, is not reversible error, where there was no issue which could have been submitted to a jury, but the case was heard and determined on the bill, answer, and admissions of the defendant, involving solely questions of law, and defendant was not therefore deprived of his constitutional right to a jury trial, which was in effect waived by his admission of the facts on which complainant's right of recovery depended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4031; Dec. Dig. § 1035.*]

2. JUDGMENT (§ 590*)—JUDGMENT AS BAR—MATTERS CONCLUDED.

The decree, in a suit by the United States against a railroad company to determine its right to certain lands under a grant, in which the only question determined was that the lands did not pass to defendant under the grant, but were erroneously patented to it, is not a bar to a second suit brought under Act March 3, 1887, c. 376, 24 Stat. 556 (U. S. Comp. St. 1901, p. 1595), and Act March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603), to recover from the company the price of the lands on an allegation that they had been sold by defendant to bona fide purchasers whose title had been confirmed under the provisions of such acts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1102-1106; Dec. Dig. § 590.*]

3. ACTION (§ 53*)—SPLITTING CAUSES OF ACTION—WAIVER OF OBJECTION.

A defendant may either expressly or impliedly consent to the institution of separate actions or a single demand, and such consent will be presumed unless he pleads the former action in bar or otherwise objects in the trial court.

[Ed. Note.—For other cases, see Action, Dec. Dig. § 53.*]

4. INTEREST (§ 46*)—MONEY RECEIVED BY RAILROAD COMPANY FOR LANDS ERRONEOUSLY PATENTED.

On a recovery by the United States against a railroad company under Act March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603), for land erroneously patented to defendant under a grant and sold by it to bona fide purchasers, the allowance of interest from the date of the act was not erroneous, where it was undisputed that defendant received the price of the land prior to that time, and where also a suit had been previously instituted by the United States in part to recover such money, which was a sufficient demand to start the running of interest, although the right to recover the money was not determined therein.

[Ed. Note.—For other cases, see Interest, Dec. Dig. § 46.*]

Appeal from the Circuit Court of the United States for the Northern District of California.

Suit in equity by the United States against the Southern Pacific Railway Company. Decree for complainant (157 Fed. 96); and defendant appeals. Affirmed.

The appellee in its bill alleged that by the act of Congress approved July 27, 1866 (Act July 27, 1866, c. 278, 14 Stat. 292), the Atlantic & Pacific Railroad Company was incorporated and granted lands in California, and that the grant was declared forfeited by act of July 6, 1886 (chapter 637, 24 Stat. 123), for failure to construct the road in aid of which it was made; that section 18 of said act of July 27, 1866, authorized the Southern Pacific Railroad Company to construct a railroad from Needles via Mojave to San Francisco, and made that company a grant of lands to aid in the construction thereof; that by the joint resolution of June 28, 1870 (No. 87, 16 Stat. 382), Congress confirmed the authority of the grant; that by section 23 of the Texas-Pacific Act of March 3, 1871 (chapter 122, 16 Stat. 579), Congress authorized the Southern Pacific Railroad Company to construct a railroad from Yuma via Los Angeles to Mojave, and made a grant of lands to aid in the construction thereof; that the lands described in Exhibit A and Exhibit

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

B to the bill were granted to the Atlantic & Pacific Railroad Company, and were not granted to the Southern Pacific Railroad Company; that it has been finally adjudged and determined by certain decisions referred to in the bill that all the lands described in those exhibits were restored to the United States by the aforesaid forfeiture act of July 6, 1886; that the Southern Pacific Company never acquired any interest therein; that all said lands so described in Exhibits A and B to the bill were, prior to March 2, 1896, erroneously patented by the United States to the Southern Pacific Company as lands granted to it by the act of March 3, 1871; that the patents thereto were accepted and received by said company under the same error and mistake; that by the act approved March 3, 1887 (Act March 3, 1887, c. 376, 24 Stat. 556 [U. S. Comp. St. 1901, p. 1595]), Congress authorized the Secretary of the Interior to issue new patents to purchasers in good faith from railroad companies, of lands erroneously patented to them; that, in case such companies refused to pay the United States \$1.25 per acre for such erroneously patented lands within 90 days after demand thereof, the Attorney General should bring suits to recover on such demanded amounts; that by the act approved February 12, 1896, Congress provided that the amount to be demanded and paid in cases where the railroad company had received from its purchasers less than \$1.25 per acre should be the amount paid to it by such purchaser; that by the act approved March 2, 1896, Congress confirmed the title of all such bona fide purchasers, and provided that, upon a proper showing before the Secretary of the Interior, the title of such bona fide purchasers should stand confirmed without suit; that the Secretary should procure suit to be brought to recover \$1.25 per acre from the railroad company for the quantity of land thus confirmed; that, upon proper showing in the court, a decree should be entered confirming the title of bona fide purchasers, and against the railroad company for the value of such land at \$1.25 per acre; that prior to March 3, 1887, the Southern Pacific Railroad Company sold all lands described in said Exhibits A and B to bona fide purchasers; that the purchaser's title was confirmed by said Act of March 2, 1896; that the value of said lands exceeds \$2.50 per acre; that to the extent of \$1.25 per acre the Southern Pacific Railroad Company holds the proceeds of said sales in trust for the complainant, the appellee herein; that Exhibit A correctly describes the lands, the acreage thereof, and sets forth the names of the bona fide purchasers thereof, and the dates when their title was confirmed by the Secretary of the Interior under the act of March 2, 1896 (chapter 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]); that more than 90 days prior to the commencement of the suit the Secretary of the Interior notified the appellant of said confirmations and demanded the proceeds received from such sales not exceeding \$1.25 per acre; that on August 5, 1898, by a decree in suit No. 184 between the parties to this suit, it was finally and conclusively adjudged by the United States Circuit Court that the persons named as purchasers in said Exhibit B were bona fide purchasers from the appellant of the lands therein described, and their title thereto was confirmed; that the said confirmation by the Secretary of the Interior of the titles of bona fide purchasers named in Exhibit A and the confirmation by final decree of the Circuit Court of the title of bona fide purchasers named in Exhibit B were made in faith of and pursuant to proof of such sales made and introduced by the appellant in former suits in the United States Circuit Court between the parties to this suit; that therefore the appellant is estopped in this suit from denying said sales and from denying that it holds the proceeds thereof in trust for the appellee to the extent of \$1.25 per acre. The bill further alleged that the determination of the rights of the complainant in the premises involves the construction and interpretation of said acts of Congress and of numerous contracts in writing executed by the appellant to numerous persons, and further involves the establishment and enforcement of a trust in favor of the complainant in the proceeds of said sales and of a lien, "and, in securing thereon to your orator an accounting from defendant Southern Pacific Railroad Company, there is great complexity involved in determining what tracts of land have been sold or contracted to be sold by said company, and at what price, and to whom, and what amount has been paid by way of principal and interest on each of said tracts to said company, and the good faith of the purchasers of such numerous tracts."

The prayer of the bill was that the court determine the true construction of said acts and define the rights and obligations of the parties to the bill, and decree that the defendant therein "holds in trust for your orator the proceeds of all sales of said tracts of land set forth in said Exhibits A and B to the bill, to the extent and amount of \$1.25 per acre for all thereof; that such indebtedness be declared a lien upon all funds in the hands of said defendant realized from the sale of said lands; and that the defendant be required to account to and pay over said sums to your orator." And the bill prayed that the defendant therein be required to answer certain interrogatories as to the sales or contracts to sell it had made of tracts of the land described in said Exhibits A and B and the names of the purchasers of each tract, the date of sale or contract, form and character of the instrument, giving the agreed price, dates, and amounts of payments of principal and interest. The appellant filed its answer to so much of the bill as sought discovery, and at the same time demurred to the remainder and residue of the bill for want of equity. The demurrer was overruled, and thereafter the appellant filed its answer to the bill, to which the appellee filed its replication, and upon the pleadings and the admitted facts a decree was rendered adjudging that the appellant pay the appellee \$40,124.30 with interest thereon at 7 per cent. per annum from March 2, 1896, amounting to \$32,861.80, and \$38.80, the costs of suit. From that decree the appeal is taken.

Wm. Singer, Jr., D. V. Cowden, E. E. Hull, and Wm. F. Herrin, for appellant.

Robt. T. Devlin, U. S. Atty., and Geo. Clark, Asst. U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and DE HAVEN, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). The question principally discussed in the briefs and argument of counsel is that of the jurisdiction of the Circuit Court to entertain the bill; the appellant contending that the appellee had a complete and adequate remedy at law. In the bill, jurisdiction in equity is invoked on the grounds of discovery, accounting, the establishment of a trust, and the enforcement of a lien. The bill fails to show, however, that there is a trust or a lien involved. Notwithstanding the allegations of the bill, it is apparent that the appellant is not in the possession of a trust fund realized from the sale of government lands which may be identified and pursued by the appellee and subjected to the payment of the price fixed by Congress as the compensation to be paid therefor. It is apparent also, that no lien exists in favor of the appellee enforceable against property held by the appellant. The jurisdiction in equity must be sustained, if at all, upon the ground of the discovery and accounting prayed for. The bill set forth two exhibits wherein were described the tracts of land which were alleged to have been restored to the United States by the forfeiture act of July 6, 1886, and which lands were alleged to have been sold to bona fide purchasers, and it set forth the names of the purchasers. The discovery which it sought was the enumeration of the sales and contracts of sale made by the appellant of each of the tracts of land described in said exhibits, the name of the purchaser of each tract, the dates of the sales or the contracts of sale, the form and character of the instruments in writing, the price of each tract, and the date and amount of each payment of principal and interest thereon. The appellant answered the bill so far as the discovery was concerned, and disclosed fully all the information so sought. At the same time, it demurred to

the remainder of the bill for want of equity, and it now contends that the suit for discovery came to an end upon the filing of a sworn answer to the discovery which was sought. It is doubtful whether, in view of the demurrer, the bill was sustainable in equity on the ground that it involved an accounting. The account does not seem to be so complicated as to require a resort to equity.

In view of the rulings of the Supreme Court in Southern Pacific v. United States, 200 U. S. 341, 351, 26 Sup. Ct. 296, 50 L. Ed. 507, and United States v. Bitter Root Co., 200 U. S. 451, 478, 26 Sup. Ct. 318, 50 L. Ed. 550, we should feel compelled to reverse the decree and direct the dismissal of the bill were it not for the following considerations: The case is not of the class of those of which equity cannot take jurisdiction. Where the subject of the suit is embraced under any of the heads of equitable jurisdiction, the court will take cognizance of it, notwithstanding there may be a remedy at law, unless the defendant raises the objection by demurrer or claims the advantage of it in his answer. Southern Pacific v. United States, *supra*. In the present case the appellant did by demurrer and answer object to the jurisdiction. But, if the Circuit Court erroneously overruled the objection, the question arises whether the appellant was injured thereby.

An appellate court will not reverse the decision of a trial court for error unless the error has prejudiced the party who complains of it or has deprived him of a substantial right. Lancaster v. Collins, 115 U. S. 222, 6 Sup. Ct. 33, 29 L. Ed. 373; Stuart v. Gay, 127 U. S. 518, 526, 8 Sup. Ct. 1279, 32 L. Ed. 191. The sole ground upon which equitable jurisdiction is denied when there is an adequate remedy at law is that the party defendant is thereby deprived of his right to a trial by jury which is guaranteed by the seventh amendment. In Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, it was said:

"The Constitution in its seventh amendment declares that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' In the federal courts this right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency. Such aid in the federal courts must be sought in separate proceedings, to the end that the right to a trial by a jury in the legal action may be preserved intact."

The appellant was not, by the ruling of the court below, deprived of a jury trial in this case. There was no issue which could have been submitted to a jury. The decree was rendered upon the bill, the answer, and the admissions of the appellant. There were no questions before the court except questions of law. It is evident that there were, and could be, no controverted questions of fact. It is clear from the authorities that the defendant, in a case such as that which is here presented, may consent to the jurisdiction in equity, and thereby waive his right to a jury trial. We see no substantial reason why, after the defendant has answered admitting, as in this case, the facts on which the complainant's cause depends, leaving only questions of law to be determined by the court, it should not be held that he thereby waives

his right to a jury trial. That was what was done in the present case, and we cannot see that the trial court committed reversible error in rendering the appropriate judgment upon the pleadings. Substantial justice has been done between the parties. It would be an unnecessary burden upon them to require that the decree be reversed, the bill dismissed, and new issues framed in an action at law, in which there could be no issue for a jury, and that the cause be prosecuted to a judgment which could in no respect be different from that which was rendered in the present case.

Error is assigned to the decree in that it requires the appellant to pay for all the lands described in Exhibit A; whereas, it is claimed that the price of 1,920 acres thereof should have been deducted, for the reason that those lands were the subject of the suit between the United States and the Southern Pacific Company, finally decided in 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, in which suit the United States did not pray for a judgment or a decree for the value of the lands, nor for a money judgment other than the costs of suit, and that by that final decree all rights of the United States in and to said lands were finally adjudicated and set at rest more than 10 years before the present suit was brought, and that the doctrine which forbids the splitting of demands bars the recovery here sought as to those lands. It is pointed out that by the final decree in suit No. 184, referred to in the bill (*Southern Pacific Co. v. United States*, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355), the complainant was authorized to bring an action to recover the value of the lands involved; whereas, in the decision in 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, no such authority was given. We find no merit in the contention. The suit in which those 1,920 acres were involved was brought to test the claim of the Southern Pacific Company to the lands in controversy and to restrain trespasses thereon by that company and by those claiming under it. No question of the rights of innocent purchasers was involved, and it does not appear that the purchasers of the 1,920 acres here under discussion were made parties to the suit. The only question involved and determined was the right of the railroad company and those claiming under it to the lands described in the bill. There was no prayer for an accounting, and no accounting was had. The decree determined only that, by virtue of patents issued to the railroad companies, the defendants to the suit had no rights whatever. So far as the right and duty of the United States to recover the debt of the appellant for lands erroneously patented to it, which it sold to bona fide purchasers, are concerned, the 1,920 acres of land so referred to now stand in the same attitude as all the other lands involved in the present suit. But, aside from these considerations, a sufficient answer to the contention is found in the fact that the appellant interposed no plea in bar and made no objection in the court below on the ground that there was a splitting of the cause of action. The defendant may, either expressly or impliedly, consent to the institution of separate actions on a single demand. *Claflin & Kimball v. Mather Electric Co.*, 98 Fed. 699, 39 C. C. A. 241. And it is held that his consent will be presumed unless he pleads the former action.

in bar or otherwise objects in the trial court. *Fox v. Althorp*, 40 Ohio St. 342; *McDonald v. Tison*, 94 Ga. 549, 20 S. E. 427; *Gardner v. Patten* (Com. Pl.) 15 N. Y. Supp. 324.

It is contended that the court erred in charging interest against the appellant from March 2, 1896, the date of the approval of the last adjustment act, instead of from January 27, 1902, the date when, by the decision in case No. 184, it was finally ascertained who were bona fide purchasers of the land. The bill in case No. 184 was filed in 1891. It was brought against the Southern Pacific Company and numerous persons, who, it was alleged, claimed to be bona fide purchasers for value. It alleged that the United States was the owner of the lands, and that they had been erroneously patented to the railroad company, and it prayed that the patent be set aside, that the title of the United States be quieted, that an accounting be taken of the moneys received by the company from the sale of the lands, that, if it should be found that any of the defendants were bona fide purchasers for value, their title be protected by the decree, and that judgment be rendered against the company for the sum of \$2.50 per acre for all of such lands. The company answered denying the right of the United States to the lands, and thereby denying its right to recover any of the proceeds of such lands as had been sold to purchasers. Neither the decision of the Circuit Court nor that of the Supreme Court on appeal (168 U. S. 1, 18 Sup. 18, 42 L. Ed. 355) disposed of the whole case. All that was decided in either court was that the company had no interest in any of the lands involved in the suit. The question of the right of those who claimed to be bona fide purchasers having been left undetermined, the case was remanded for further adjudication. On January 7, 1898, the Circuit Court rendered a decree adjudicating the rights of those who claimed to be bona fide purchasers, but rendered no judgment against the company for the proceeds of lands sold to such purchasers. An appeal was taken by the United States, and on January 27, 1902, the decree of the Circuit Court was affirmed.

It is not disputed that prior to March 2, 1896, the appellant had received from the purchasers the money for the recovery of which the present suit was brought. At that date it had in its possession money which *ex æquo et bono* belonged to the United States, and it has had the use of that money ever since. Its right to retain it had been challenged in 1891 by the institution of the suit in case No. 184. The institution of that suit was a demand for the money. *Kaufman v. Tredway*, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190. The present case is therefore unlike *United States v. Sanborn*, 135 U. S. 271, 10 Sup. Ct. 812, 34 L. Ed. 112, where the denial of interest was placed upon the ground that more than 10 years elapsed after the payment to the defendant before his right to retain the money was questioned by suit or otherwise.

"The institution of legal proceedings to collect a debt is a sufficient demand for its payment to start the running of interest thereon from the time suit is begun, and this has been held to be true even though the suit is dismissed, if, in a subsequent suit, a recovery be had." 22 Cyc. 1550, and cases

there cited; *Kaufman v. Tredway*, 195 U. S. 271, 25 Sup. Ct. 33, 49 L. Ed. 190.

"The pendency of litigation between the parties to an existing debt concerning the same will not of itself suspend interest on such debt during such litigation where the money is not paid into court. It has been held that where there is a legal contest between persons other than the debtor, rendering it doubtful to whom the debt should be paid, the debtor is not generally chargeable with interest during such contest, although if the fund in such cases has been used by the debtor, and has earned interest, the court will allow interest thereon notwithstanding the pendency of the litigation." 22 Cyc. 1558; *Potter v. Gardner*, 5 Pet. 718, 8 L. Ed. 285; *Spring v. South Carolina Ins. Co.*, 6 Wheat. 268, 5 L. Ed. 614; *Crescent Mining Co. v. Wasatch Mining Co.*, 151 U. S. 317, 323, 14 Sup. Ct. 348, 38 L. Ed. 177.

In *Spalding v. Mason*, 161 U. S. 375, 396, 16 Sup. Ct. 592, 600 (40 L. Ed. 738) the court said:

"It is no hardship for one who has had the use of money owing to another to be required to pay interest thereon from the time when the payment should have been made."

We find no error in the allowance of interest, and, finding no error for which the decree should be reversed, it is, accordingly, affirmed.

ROSS, Circuit Judge (concurring). I concur in the judgment, but am unable to agree that the suit was not properly brought on the equity side of the court. An action at law in assumpsit to recover the amount claimed by the government to be due it for the land erroneously patented to and sold by the railroad company to bona fide purchasers would not have afforded the complainant the relief to which it was entitled; for discovery was an essential prerequisite to the recovery of the money to which the government was entitled by virtue of the provisions of the acts of Congress referred to in the opinion, since the government could not know the various amounts due it under those acts from the railroad company by reason of the various sales and contracts for sales made by the company to and with the various bona fide purchasers. For that reason, therefore, if for no other, the suit was, in my opinion, properly brought on the equity side of the court, and the court having acquired jurisdiction of it for the essential purpose of finding out for what lands the railroad company owed it money, and how much, the complainant, on the coming in of the company's answer, surely was not driven to the necessity of dismissing its bill and then commencing an action at law to recover the various sums of money shown by the discovery disclosed by the answer to be due the complainant. The equitable jurisdiction of the court having been properly invoked and having attached, the court below, I think, on well-settled principles, proceeded to the final decision of the entire case. *United States v. Union Pacific R. Co.*, 160 U. S. 52, 16 Sup. Ct. 190, 40 L. Ed. 319; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 12, 19 Sup. Ct. 77, 43 L. Ed. 341; *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739; *Williamson v. Monroe* (C. C.) 101 Fed. 322.

Moreover, I think the sales and contracts were so numerous and of such a nature as to make the required and demanded accounting properly cognizable in a court of equity, where the complainant's rights

in the premises could be more plainly, more adequately, and more completely afforded than in any action at law. See Southern Pacific R. Co. v. United States, 200 U. S. 341, 26 Sup. Ct. 296, 50 L. Ed. 507; Southern Pacific R. Co. v. United States, 133 Fed. 651, 66 C. C. A. 581; United States v. Southern Pacific Co. (C. C.) 117 Fed. 544, and the numerous cases there cited.

SNOW STORM MINING CO. (NICHOLLS, Intervener) v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,854.

FRAUDS, STATUTE OF (§ 84*)—CONTRACT FOR SALE OF MINING STOCK—PASSING OF TITLE.

Complainant was the owner of 1,500 shares of stock of defendant mining company, the certificate for which was destroyed by fire. Shortly afterward he made an agreement with intervener to sell him the stock for a stated price and gave a bond conditioned for its delivery within 70 days. It was further orally agreed that complainant should obtain a letter from the secretary of the company showing that he was the owner of the stock, and that a new certificate would be issued to him on compliance with the requirement of the by-laws in that regard, and that on delivery of such letter intervener should pay for the stock. Complainant procured and delivered such letter, when intervener required, as a further condition to payment, that complainant should execute to the company an indemnity bond required before issuance of a new certificate which complainant refused to do. *Held* that, since certain things were required to be done by both seller and purchaser before payment for or delivery of the stock, the contract was clearly executory, and title to the stock did not pass; and that, as an essential part of the contract was in parol, it was void under Rev. Codes Idaho, § 6009, declaring such contracts invalid unless in writing or unless there was a delivery of some part of the property or payment of some part of the purchase price.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 154-161; Dec. Dig. § 84.*]

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

Suit in equity by Andrew Johnson against the Snow Storm Mining Company; W. A. Nicholls, intervener. Decree for complainant, and defendant and intervener appeal. Affirmed.

The appellee filed in the court below a bill against the Snow Storm Mining Company, a corporation of the state of Idaho, in which he alleged, among other things, that he was the owner of 1,500 shares of the capital stock of the corporation, the certificate for which was theretofore, to wit, on the 28th day of November, 1904, destroyed by fire, at the city of Colfax, state of Washington; that he had complied with all the requirements of the corporation—which requirements the bill set forth—prescribed for the reissuance of lost or destroyed certificates, and, notwithstanding his demand upon the corporation for the reissue of a new certificate in place of the certificate so lost, the corporation refused to issue to him a new certificate, but had paid various dividends on his said stock to some person or persons other than the complainant, and had failed and refused to pay such dividends to him. He prayed that the corporation be required to account to him for such dividends and to issue to him a new certificate.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

The mining company answered the bill, admitting the ownership of the complainant on the 28th day of November, 1904, of 1,500 shares of its stock, evidenced by its certificate No. 1,062, and that on that day such stock stood upon its books in the name of the complainant. It also admitted that prior to the commencement of the suit the complainant secured and filed with the secretary of the company an affidavit of the publication of the notice required by the by-laws of the company, accompanied by a copy of the notice so published, and the affidavit of the complainant, and it admitted its refusal to issue to the complainant a new certificate of stock. In other respects it interposed a denial of the averments of the bill.

The appellant Nicholls was, upon his petition, allowed to intervene in the cause, and thereafter filed an answer to the bill, and also a cross-bill in which he alleged that on or about the 19th day of December, 1905, the complainant entered into a contract with him, whereby the complainant agreed with the cross-complainant "to sell, and did sell," to the cross-complainant the 1,500 shares of the capital stock of the appellant company referred to in the bill, at the agreed price of 26½ cents a share, and further agreed with the cross-complainant that, in view of the lost and destroyed certificate for such shares, he (the complainant) "would do all things necessary to procure from the said Snow Storm Mining Company a new certificate of said stock, and would deliver the same to your orator, and especially that he would procure from the said Snow Storm Mining Company a statement that it would so issue the said certificate for the said 1,500 shares of stock, and that it was further agreed by and between the said parties to said agreement that the purchase price of the said 1,500 shares of stock, amounting in all to the sum of \$397.50, should be paid by your orator to the said Andrew Johnson upon the procurement by the said Andrew Johnson of the said statement from the said Snow Storm Mining Company, or upon the delivery of said new certificate"; that thereafter the complainant failed and refused to procure such statement from the mining company and "refused to do those things necessary to procure said statement from the said Snow Storm Mining Company, or to procure the said certificate, to wit, he refused to execute the indemnity bond prescribed by the by-laws of the said corporation for the issuance of a new certificate in lieu of lost or destroyed certificates; and that your orator thereafter himself gave to the Snow Storm Mining Company the indemnity required by said company as security, and thereupon, and on the 26th day of February, 1906, the said Snow Storm Mining Company issued to your orator a new certificate, being No. 1,705, for the said 1,500 shares referred to in the bill of complaint herein, and thereupon, and forthwith, your orator waived the default of the said Andrew Johnson above set forth, and tendered to him the agreed price for said stock, to wit, the sum of \$397.50, which the said Andrew Johnson refused to accept. And your orator thereafter, and upon the 1st day of March, 1906, again tendered the said amount to the said Andrew Johnson, who again refused to receive or accept the same."

The cross-bill then alleges that the cross-complainant is, and at all times has been, able and willing to comply with all the terms and conditions of the contract as alleged by him, and that the complainant refuses to accept the money tendered, or to perform any of the conditions of the contract; that the stock has no regular market price, but fluctuates daily, and cannot easily be estimated. The prayer of the cross-bill asks that the cross-complainant be adjudged the owner of the stock, and, in the event that relief be not awarded, that the complainant, Johnson, "be compelled to specifically convey said property to your orator upon the payment by your orator of the contract price therefor, at such time and in the manner that may be prescribed by the order of this court," and for general relief.

The complainant answered the cross-bill, putting in issue its averments.

The record shows that the facts of the case were practically stipulated to by the counsel of the respective parties, subject to objections to the competency of certain of the facts, and to certain of the oral testimony.

It showed the ownership by the appellee on the 28th day of November, 1904, of the 1,500 shares of stock of the appellant mining company, evidenced by its certificate of stock, and that the certificate was destroyed by fire as alleged in the bill. The by-laws of the company prescribed that any person

claiming to have lost a certificate might have a new certificate issued in its place upon producing evidence of having given notice of his loss for 60 days in a designated newspaper, and filing with the secretary of the company an affidavit setting forth the facts and circumstances of the loss, and executing a bond of indemnity in an amount to be fixed by the company.

The appellee testified that on the 19th day of December, 1905, at Colfax, Wash., he called the appellant Nicholls, who resided at Spokane, to the telephone, and told him that he (the appellee) had 1,500 shares of stock of the appellant company which he wanted to sell, but that, as the certificate for the shares had been burned, he was unable to deliver such certificate at once, and asked Nicholls if there was any way in which they could arrange for the sale so that the appellee could make the sale at once and deliver the stock afterwards, and that Nicholls replied that he thought there was, and suggested that the appellee give him a bond in the sum of \$500 to insure delivery of the certificate within 70 days, or in such time as a new certificate could be obtained under the by-laws of the company; that Nicholls said he could use the stock if such an arrangement could be made, at the price of 26½ cents a share.

On the next day the appellee wrote to Nicholls as follows:

"Mr. Wm. A. Nicholls, Spokane, Wash.—Dear Sir: As per our talk over phone yesterday, I send you a bond in the sum of five hundred dollar to secure delivery of 1,500 shares of Snow Storm stock in seventy days I prefer that the bond be given to you in person rather than some stranger if you can arrange it that way. I can deliver in that time but suppose a contingency such as delay in mail or neglect of the officers of the company to do their duty and I should be delayed a few days I know that you would not take advantage of that and stick me for \$500.00 however I leave it to your own good judgment.

"Respt.

Andrew Johnson."

The letter contained the bond referred to, executed by the appellee and two sureties, conditioned as follows:

"The condition of this obligation is such that whereas, said Andrew Johnson claims to be the owner of fifteen hundred shares of the capital stock of the Snow Storm Mining Company of Mullan, Idaho, now, in consideration of the payment of the sum of three hundred ninety-seven & $\frac{50}{100}$ dollars to the said Andrew Johnson by the said —, we, the undersigned, hereby agree to furnish to the said —, within seventy days from date hereof, a certificate of stock for 1,500 shares of the capital stock of the said Snow Storm Mining Company; now, if the said Andrew Johnson shall well and truly furnish the said 1,500 shares of the capital stock of the said Snow Storm Mining Company to the said — within the time herein specified, then this obligation is to be void and of no effect; otherwise to remain and be in full force and virtue."

The appellee also testified in effect that, needing the money, and fearing there might be some trouble in effecting the sale, he went the next day to Spokane to see Nicholls. "I went in when I got to Spokane and called on Mr. Nicholls," said the witness, "and he had the bond there and seemed to be satisfied with it, and we talked matters over a little bit, and I gave him to understand that I was expecting my money. Mr. Nicholls then stated to me that he hadn't so understood it from the conversation we had over the telephone the day before, and he said that he was unable to get his client to come through; that his client, on that proposition, wouldn't pay him the money. Then I told Mr. Nicholls, 'If that is the case, we can't do any business, because the only purpose I have in selling this property is because I need the money at the present time, and that is all there is to it.' We went on and talked a little while along that line, and I asked him if he could suggest anything that I could do that would induce his client to take the matter up and give me my money, and he said he didn't know of anything. And finally I suggested this to him, 'Now, if your client has any doubts as to whether or not I am the owner of this property, I think I can satisfy him that I really am, and he is protected by this bond as to the delivery, and I can show him that I am able and can do it when I have complied with these

certain things, and I will get a statement from the secretary of the Snow Storm Company, over the seal and signature of the company, that the books show me to be the owner of this stock, and that they will issue the same to me in sixty days, and I will then be in a position to deliver the stock.' And he says: 'I will tell you what I will do. I will see my client and present the matter to him, and you come in later on.' So I went out and had an appointment with him along in the afternoon—I couldn't name the exact hour, but probably about 2 o'clock—and I came in again, and Mr. Nicholls told me he had seen his client, and his client was satisfied to do business on that basis; and so I says: 'All right; that settles it.' And so I left the bond with him there, and I went down home with the understanding that when I got home I was to write and get this statement from the Snow Storm Company; and I done so. I wrote to the company and asked them for this statement, and got it in due course of time, and forwarded it to Mr. Nicholls, and Mr. Nicholls, when he got the letter, instead of sending me my check, as I expected, came back with a counter proposition, which I refused to accede to."

The letter of the appellee to the mining company thus referred to in his testimony was written December 29, 1906 (1905), was addressed to the secretary of the Snow Storm Mining Company, and is as follows:

"I send you under separate cover copy of the 'Colfax Gazette' in which is a notice that explains itself. A similar notice running in your Mullan paper. These notices will continue for sixty days.

"You will greatly favor me if you will send me a statement over the seal and signature of the Snow Storm Co. to the effect that I am the owner of 1,500 shares of Snow Storm stock and that a certificate of same will be issued to me soon as these notices have run the agreed length of time—sixty days.

"I have sold this stock and have given a bond to the purchaser to deliver same in sixty days. Now he wants a statement from you that I own this stock and that you will issue this certificate soon as I have complied with the law in the case. Please let me hear from you soon as possible."

On the 2d of January, 1905 (1906), the secretary of the company replied to the appellee as follows:

"Mr. Andrew Johnson, Colfax, Wash.—Dear Sir: Replying to yours of Dec. 29th, will say that after examining our records we find that you are the holder of 1,500 shares of Snow Storm stock, and will, after notices have run 60 days, and upon receipt of your affidavit stating the facts and circumstances as near as possible, together with bond for 1 year of indemnity to the company of 25¢ per share (\$375.00) properly executed, issue issue to you a new certificate for 1,500 shares."

Two days thereafter, to wit, January 4, 1906, the appellee wrote to the appellant Nicholls as follows:

"I inclose you letter from the secretary of the Snow Storm Co. that I think ought to satisfy your client the notices are now running in papers at Mullan and Colfax."

The appellant Nicholls refused payment for the stock upon receipt of such statement from the secretary of the mining company, insisting that one of the conditions of the contract was that the appellee should also furnish an indemnity bond to the mining company as a condition precedent to payment for the stock.

The record discloses this further correspondence in respect to the matter:

On the 24th of February, 1906, the appellant Nicholls wrote two letters upon the subject—one to the appellee, and the other to the secretary of the mining company. That to the appellee is as follows:

"Mr. Andrew Johnson, Colfax, Wash.—Dear Sir: The seventy days which you have under the terms of the bond given me to make delivery of 1,500 shares of Snow Storm at 26½ cents, will expire on the 27th of this month. The party to whom I sold the stock wishes to know if you will be able to make delivery on that date. Please advise me at once, as I am obliged to give him an answer.

"Respectfully,

W. A. Nicholls."

The letter of the same date to the secretary of the mining company is as follows:

"Mr. C. D. Miller, Secty. Snow Storm Mining Co., Mullan, Idaho—Dear Sir: I have a letter written to Andrew Johnson by yourself on January 2d informing (him) that the 1,500 shares of stock which was lost would be reissued providing a bond for \$375.00 was properly executed after due notice had been given for 60 days in the newspapers. I have purchased this stock and Mr. Johnson has given me bond for delivery of same. Are you ready to reissue the shares upon the execution of the bond? I believe this notice has been published for at least 60 days.

"Respectfully,

W. A. Nicholls."

On the 26th of February, 1906, the president of the mining company wrote to the appellant Nicholls as follows:

"Replying to yours of the 24th inst. If you will write us a personal letter guaranteeing these 1,500 shares of stock it will not be necessary to furnish bond. We are inclosing you herewith certificate 1,705 for 1,500 shares. Trusting that this will be much easier for you, we remain,

"Yours truly,

W. D. Greenough."

To this letter the appellant Nicholls replied on the 1st day of March, 1906, as follows:

"Mr. W. D. Greenough, % Snow Storm Mining Co., Mullan, Idaho—Dear Sir: I beg to thank you for your favor of the 26th ulto., inclosing certificate No. 1,705 for 1,500 shares Snow Storm Mining Co. stock.

"I appreciate this accommodation, dispensing with all red tape, and I will agree to protect the Snow Storm Mining Co. in case anyone should turn up later, claiming to own these shares.

"By way of explanation I wish to add that I purchased this block of 1,500 shares from Andrew Johnson on December 19th, 1905, as I remember it. He executed an indemnifying bond in the sum of \$500.00 to protect me against loss in case of failure to deliver the stock within 70 days from date. He wanted the money at that time and I agreed to pay him, providing he would get a note from the secretary of the company to the effect that the stock would be delivered to me within 70 days from date. Johnson then wrote to Mr. Miller and I have the latters' reply advising that he would issue the stock after notice had run for 60 days, providing the bond of indemnity were given to the company of \$375.00, to remain in force for one year. I then wrote to Mr. Johnson, requesting that he execute this bond when I would be perfectly willing to pay him for the shares. He did not respond to my letter and I again wrote him on January 29th, making request that he arrange to deliver the stock promptly, but received no answer. Accordingly I made him a legal tender for the stock within the 70 days, at Colfax, supposing, of course, that he was prepared to make delivery, and was willing to do so, since he had never indicated a desire to repudiate. I received a letter from him last night, informing that he did not intend to make delivery of the stock, but that he would do anything which he considered reasonable to make me whole in the transaction.

"It is a plain case of a man's trying to Welch on trade because the stock had advanced in price in the meantime. I have consulted my attorneys, Messrs. Happy & Hindman, in all the steps taken, and am advised that Johnson has no possible claim to this stock; that my bond is perfectly regular and that had he failed to deliver the stock, I could have collected \$500.00 damages at once.

"I will hold this certificate of Snow Storm just issued, until this matter is entirely cleaned up to your satisfaction. When I wrote you advising that I had purchased the shares, it never occurred to me for a moment that Johnson would try to avoid the obligation.

"I will protect you in every respect, but there is no question as regards the validity of my claim, for I have proofs, and any statements from Mr. Johnson to the contrary are false.

"Respectfully,

W. A. Nicholls."

February 27, 1906, the appellant Nicholls tendered to the appellee, through the Colfax National Bank, \$397.50, as payment for the stock in question, upon the tender of which the appellee wrote to the appellant Nicholls, as follows:

"Mr. W. A. Nicholls, Spokane, Wash.—Dear Sir: Mr. Coman of the Colfax Nat. Bank tendered me money to day for 1,500 shares of Snow Storm which I refused to accept for this reason, your client has failed to meet any of the conditions provided in the bond which I gave to you you will remember when I was in Spokane. I agreed to get a statement from the secretary of the Snow Storm to the effect that the books showed me to be the owner of 1,500 shares upon this statement and the bond I gave you—you were to pay me 26½¢ for my stock. You refused to do this but submitted a counter proposition namely that I should give to the Snow Storm Co. a bond. This I have never agreed to do, and I have considered the trade off since your client's refusal to pay me my money after I had complied with all the conditions to which I agreed when in Spokane now the publication has run the required length of time but owing to the fact this bond which I must give to the Co. is of an unusual nature it must be submitted to the home office of the bonding Co. which will require some time however I will soon be in position to deliver the stock and when I am I shall be glad to do business with you at what ever price the market may be at that time.

"You will understand the escence of the contract I made with you was the payment to me of the purchase price you having failed to do this makes the bond void and of none effect. I hope I have made my position clear in this matter and I desire to assure you that I will do anything in reason, to adjust this difficulty so that no one shall be the looser, that is in my power.

"Respt. Yours,

Andrew Johnson."

To the letter last above set out the appellant Nicholls replied as follows:

"Mar. 1, 1906.

"Mr. Andrew Johnson, Colfax, Wash.—Dear Sir: Your favor of the 27th ulto. at hand. I cannot agree with you in many of your statements. When you were in Spokane, I informed you that providing you could secure an agreement from the secretary of the company to issue me the 1,500 shares of Snow Storm after notice had run in the papers for 60 days, advising the public of the loss of the stock, that I would pay you the stipulated price of 26½ cents per share. You agreed to do this and later sent me a letter from the secretary in which he states that the stock would be issued in due time if you would file an indemnity bond at the rate of 25 cents per share, or \$275.00. I wrote, requesting you to attend to this, but received no reply. Then on January 29th, I again wrote, requesting that you make arrangements to deliver promptly, further stating that I had closed the trade and had never received any advise from you calling it off. When you left here in It was agreed that if the trade did not stand, you were to write me to that effect at once and ask for the return of the bond. I have consulted my attorneys Messrs. Happy & Hindman in every step taken by myself. They have examined the bond carefully and state that it is valid absolutely, and can be enforced.

"It would have been unreasonable to ask me to put up 26½ cents per share, amounting to \$397.50, and further, to file a bond with the secretary at 25 cents per share, or \$375.00 more, since your bond only protected me in the sum of \$500.00, whereas I would be out \$772.50, in case anyone else contested my right to the shares.

"I wrote to the secretary several days ago and informed him that I had purchased the stock from you, and he promptly issued a certificate in my name and sent it to me. You acknowledged in your letter that the money was tendered to you by the Bank at Colfax, which you refused. I now inclose my check for \$397.50, in full payment for the 1,500 shares which you sold me at 26½ cents.

"Respectfully,

W. A. Nicholls."

The check for \$397.50 inclosed in the letter last above set out was returned by the appellee to the appellant Nicholls, in a letter of date March 2, 1906.

Happy & Hindman, for appellants.

Reese H. Voorhees, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). Section 6009 of the Revised Codes of Idaho, in which state the suit was brought, declares various agreements invalid unless in writing, among them the following:

"An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money."

The statute of Washington upon the subject is substantially the same. Section 4577, Ballinger's Annotated Codes & Statutes.

Stock in corporations is embraced by such statutes. Franklin v. Matoa Gold Min. Co., 158 Fed. 941, 944, 86 C. C. A. 145, 16 L. R. A. (N. S.) 381, and cases there cited.

It is conceded by the appellants that the oral understanding had between the appellee and the appellant Nicholls over the telephone, falls within the statute; but they insist that the appellee's letter to Nicholls of date December 20, 1905, together with the bond contained therein, and his letter of date December 29, 1906 (1905), to the secretary of the Snow Storm Mining Company, constitute an executed sale, thereby passing title to the stock in question to the appellant Nicholls.

In the Elgee Cotton Cases, 22 Wall. 180, 187, 22 L. Ed. 863, the Supreme Court said:

"It must be admitted there is often great difficulty in determining whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition, to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. It is doubtless true that whether the property passes or not is dependent upon the intention of the parties to the contract, and that intention must be gathered from the language of the instrument. There are, however, certain rules for the construction of such contracts, which are well settled in England, and, we think, also in this country. Mr. Justice Blackburn, in his work on Sales, states two of them, and Mr. Benjamin, in his treatise, adds a third. They are as follows:

"First. 'When, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.'

"Second. 'Where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall also be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted.'

"Third. 'Where the buyer is by the contract bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.'

"These may be regarded as rules for ascertaining the intention of the parties. They are in most cases held to be conclusive tests. Though not supported by all the decisions, they certainly are generally accepted in England, and by most of the courts in this country."

The second of the above-stated rules of interpretation is not applicable to the present case, but the first and third are. Tested by them, we think it very clear that the letters and bond relied upon by the appellants do not show an executed sale of the stock in question. It is true that in the letter of the appellee to the secretary of the company, he says, "I have sold this stock"; but that is by no means all that he says therein. He commences the letter by saying that he inclosed certain newspaper notices which were self-explanatory, and which manifestly were the published notices required by the by-laws of the corporation of the holders of its stock who had lost their stock certificates and desired a new issue in place of those lost or destroyed. The writer of the letter proceeds:

"You will greatly favor me if you will send me a statement over the seal and signature of the Snow Storm Co. to the effect that I (not the appellant Nicholls) am the owner of 1,500 shares of Snow Storm stock and that a certificate of same will be issued to me soon as these notices have run the agreed length of time—sixty days."

And it concludes with these words:

"I have sold this stock and have given a bond to the purchaser to deliver same in sixty days. Now he wants a statement from you that I own this stock and that you will issue this certificate soon as I have complied with the law in the case. Please let me hear from you soon as possible."

As a matter of course, to ascertain the true meaning of the letter, the whole of it must be considered. The case here is altogether unlike that of *Beardsley v. Beardsley*, 138 U. S. 262, 266, 11 Sup. Ct. 318, 34 L. Ed. 928, relied on by the appellants. There the words of the contract involved implied nothing executory, but something executed. Here the letter under consideration plainly implied that everything was executory and nothing executed. Neither in this letter nor in the one of the appellee to the appellant Nicholls of December 20, 1905, inclosing the indemnity bond to him, was there any mention of the payment of the consideration for the stock, either as to time of payment or amount thereof, nor was there any statement or intimation as to the time or place for the delivery of the stock. The letter containing the words, "I have sold this stock," so much relied upon by the appellants, expressly requested that the company issue to the appellee a new certificate in place of the one destroyed, and also a statement to the effect that he (the appellee) was then the owner of the 1,500 shares, which statement the letter further expressly declared the purchaser wanted. Why? If the sale had been consummated and the title to the stock had passed to the purchaser, why should the certificate be issued to the seller as owner? The reason, we think, is obvious enough from the letters relied upon by the appellants. It is still more obvious when the petition for intervention and the cross-complaint filed by the appellant Nicholls, as well as his testimony and other evidence in the cause, is considered. It is that the sale had not been consummated, no part of the purchase

price of the stock had been paid, nor had the time arrived under the contract between the parties for the delivery of the property agreed to be sold.

If anything more be needed to show that the contract relied on by the appellants was not a completed sale thereby passing title to the stock, it is shown by the letter of the appellant Nicholls to the appellee of March 1, 1906, in which, among other things, he says:

"When you left here in December it was agreed that if the trade did not stand you were to write me to that effect at once, and ask for the return of the bond."

Turning to the petition filed by the appellant Nicholls for leave to intervene in the cause, we find these allegations:

"That on or about December 19, 1905, the complainant in the said suit entered into a contract with your petitioner herein, whereby your complainant agreed with your petitioner to sell, and did sell, to your petitioner the 1,500 shares of the capital stock of the Snow Storm Mining Company referred to in the said bill of complaint, at the agreed price of 26½ cents per share; and further agreed with your petitioner that in view of the loss and destruction of the certificate for said 1,500 shares of stock, as set out in the said bill of complaint, he, the said complainant, would do all things necessary to procure from the said Snow Storm Mining Company a new certificate for said stock, and would deliver the same to your petitioner; and especially that he would procure from the said Snow Storm Mining Company a statement that it would so issue said new certificate for said 1,500 shares of stock. That it was further agreed by and between the parties to said agreement that the purchase price for the said 1,500 shares of stock, amounting in all to the sum of \$397.50, should be paid by your petitioner to the complainant herein, upon the procurement by the said complainant of the said statement from the said Snow Storm Mining Company, or upon the delivery of the said new certificate.

"That thereafter the complainant herein refused and failed to procure such statement from the said Snow Storm Mining Company, and refused to do those things necessary to procure said statement from the said Snow Storm Mining Company, or to procure the said new certificate, to wit: He refused to execute the indemnity bond prescribed by the by-laws of the said corporation for the issuance of new certificates in lieu of lost or destroyed certificates, and that your petitioner thereafter himself gave to the Snow Storm Mining Company the indemnity required by the said company as security, and thereupon, on the 26th day of February, 1906, the said Snow Storm Mining Company issued to your petitioner a new certificate, being No. 1,705, for the said 1,500 shares of stock referred to in the bill of complaint herein, and thereupon and forthwith your petitioner, waiving the default of the complainant above set forth, tendered to the complainant herein the agreed price for the said stock, to wit, the sum of \$397.50, which the said complainant refused to accept, and that your petitioner thereafter, and upon the 1st day of March, 1906, again tendered the said amount to the complainant herein, who again refused to receive or accept the same, and that your petitioner ever since has kept the said tender good, and has been able, ready, and willing to pay to the said complainant the said amount, and still is ready, able, and willing to pay said amount and perform any and all conditions of said contract as are and were by him to be kept and performed, and hereby tenders and offers to perform all the conditions of said contract."

The cross-bill contained similar allegations.

That an essential part of the contract between the appellee and the appellant Nicholls rested in parol is not only plainly shown by the pleadings of the latter above referred to, but also from the testimony given by him to the effect:

"That on the 19th day of December, 1905, the complainant herein, Andrew Johnson, had a conversation with the intervener, W. A. Nicholls, in the course of which he stated that he was the owner of 1,500 shares of the stock of the Snow Storm Mining Company, for which he had lost the certificate, and which he offered to sell to the said Nicholls at 26½ cents per share. The said Nicholls stated that he would take the stock at that price, as he had a client who would take it off his hands. The said Johnson at that time stated that he would take whatever steps were necessary to procure a certificate for the said 1,500 shares from the Snow Storm Mining Company; but that it would be about 70 days before he could procure a new certificate in lieu of the one he had lost. The said Johnson further stated that he would procure from the secretary of the Snow Storm Mining Company a statement that he was the owner of 1,500 shares of the company's stock, and that a certificate would be issued to him or his order at the end of 70 days. And the said Nicholls agreed to pay the purchase price for the stock upon the receipt of such statement from the secretary of the company; it being agreed that Johnson was to give a bond for the sum of \$500 for the delivery of the certificate within 70 days. At that time the said Nicholls had no knowledge or information as to the conditions which would be required, or the terms which would be imposed by the Snow Storm Mining Company or its by-laws as a condition of the issuance of a new certificate of stock in lieu of the lost certificate. That this was the only transaction ever had between the complainant and the intervener, W. A. Nicholls, in reference to 1,500 shares of the capital stock of the Snow Storm Mining Company, and that all the letters covered by the stipulation filed in this case refer to that transaction alone."

It thus clearly appearing that an essential part of the contract in question rested in parol only, the contract was void by reason of the statute cited. *Mentz v. Newwitter*, 122 N. Y. 491, 25 N. E. 1044, 11 L. R. A. 97, 19 Am. St. Rep. 514; *Gault v. Stormont*, 51 Mich. 636, 17 N. W. 214; *Bogigian v. Booklovers' Library*, 193 Mass. 444, 79 N. E. 769; *Porter v. Patterson*, 42 Ind. App. 404, 85 N. E. 797; *Turner v. Lorillard Co.*, 100 Ga. 645, 28 S. E. 383, 62 Am. St. Rep. 345; *Catterlin v. Bush*, 39 Or. 496, 65 Pac. 1065; *Waterman v. Meigs*, 4 Cush. (Mass.) 497; *Bacon v. Eccles*, 43 Wis. 227.

The judgment is affirmed.

DWINNELL et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911. Dissenting Opinion, February 14, 1911.)

No. 1,865.

1. CONSPIRACY (§ 43*)—INDICTMENT—STATUTES—OVERT ACT.

Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of them do any act to effect the object of the conspiracy, all shall be liable to a penalty and to imprisonment, etc. Held that, while the conspiracy denounced by such section is not punishable until the commission of some overt act in pursuance thereof, the offense consists of the conspiracy alone, so that the validity of an indictment under such section must be tested by averments concerning the conspiracy unaided by those in respect to the overt acts committed thereunder.

[Ed. Note.—For other cases, see *Conspiracy*, Cent. Dig. §§ 89, 97; Dec. Dig. § 43.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. CONSPIRACY (§ 43*)—INDICTMENT—SUBORNATION.

An indictment charged that defendants willfully, etc., conspired at a particular time and place within the district to suborn certain named persons at a stated time, before one alleged to be the duly appointed, qualified, and acting register of the land office at R., by applying pursuant to Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), for certain of the public lands of the United States by swearing to and filing with such land officer a statement required by the act and regulations of the Land Department alleging that the applicant did not apply to purchase for speculation but in good faith and to appropriate to his own exclusive use and benefit, etc.; whereas, in truth the statement was willfully false and intended to be so by each of them, in that it was intended that each should have a distinct agreement with the defendants that the land should be for defendant's benefit. *Held*, that the indictment was not fatally defective for failure to show that the precise piece or pieces of land to be acquired had been agreed on by the alleged conspirators at the time the conspiracy was formed or for failure to allege the persons to be suborned or the particular time and place of such subornation, but that the indictment sufficiently stated the offense of conspiracy to defraud the United States denounced by Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676).

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 97; Dec. Dig. § 43.*]

3. CONSPIRACY (§ 45*)—EVIDENCE—ACTS SUBSEQUENT TO COMPLETION OF CONSPIRACY.

In a prosecution for conspiracy to defraud the United States by suborning certain named persons to commit perjury in making entries under Timber and Stone Act June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. St. 1901, p. 1545), evidence of acts of the alleged perjurers committed long after they had sworn to and filed their statements, and that subsequent to such filing they had agreed with defendant D. for a money consideration to file a relinquishment of their applications at such a time as he could manage to take it up with script, together with a relinquishment so filed, was inadmissible to show motive.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 100-104; Dec. Dig. § 45.*]

Gilbert, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern District of California.

George W. Dwin nell and another were convicted of conspiracy to suborn, and they bring error. Reversed and remanded.

S. C. Den son, Bert Schlesinger, and R. S. Taylor, for plaintiffs in error.

Robert T. Devlin, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HANDFORD, District Judge.

ROSS, Circuit Judge. The indictment in this case, the validity of which is strenuously contested by the plaintiffs in error, alleges, in substance, that at a certain stated time and place in the Northern district of California, to wit, in the county of Siskiyou in that state, the defendants to the indictment willfully and unlawfully conspired and agreed together and with various other persons to commit the crime of subornation of perjury, by instigating and procuring James Frederick French, Benjamin F. French, Frederick M. French, Samuel

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

L. French, Clarence M. Prather, and Arthur W. Jacquette, to commit the crime of perjury in the state and district stated, by appearing before Clarence W. Leininger, the duly appointed, qualified, and acting register of the United States Land Office at Redding, Cal., at a certain stated time, and "respectively take an oath to a sworn statement under the timber and stone lands acts of the United States, in which sworn statements each of the affiants so named should swear that he 'did not apply to purchase the land described in said sworn statement on speculation but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made an agreement or contract, or in any way or manner, with any person or persons whomsoever; by which the title he might acquire from the government of the United States would inure in whole or in part to the benefit of any person except himself,' which said sworn statements, after being so sworn to before the said Clarence W. Leininger, register as aforesaid, were to be filed in the said United States Land Office at Redding, Cal., by each of the persons so subscribing and swearing to the said sworn statement respectively, and which sworn statements, so to be sworn to and filed with the register of the United States Land Office as aforesaid, should be known by each of the said applicants to be false in a material matter therein to be sworn to, in this: That each of the persons at the time of so subscribing and swearing to his respective sworn statement had an agreement beforehand and an express understanding that the title he was to secure and the land he was to apply for in his sworn statement was for the benefit of the said defendants; and the defendants, and each of them, then and there, at the time of so conspiring as aforesaid, well knew that the said sworn statements aforesaid, so to be filed, would be false in the said material matter just above stated."

The indictment then alleges that the defendants thereto, to carry into effect the said unlawful conspiracy, procured a number of blank timber and stone land sworn statements under the rules prescribed in pursuance of the aforesaid act of Congress, and filled out such sworn statements for land of the United States, describing therein the specific tracts applied for by James Frederick French, Benjamin F. French, Frederick M. French, Samuel L. French, Clarence M. Prather, and Arthur W. Jacquette, respectively, and setting forth various other alleged acts of those parties and of the defendants, committed in pursuance of the alleged conspiracy, and further alleged that, notwithstanding the allegations contained in the sworn statements referred to, in truth "said applicant did not apply to purchase the land described in his application in good faith to appropriate it to his own exclusive use and benefit," but in truth that each of the said applicants well knew that he "had directly made an agreement and contract with the said George W. Dwinnell that the application should be made for the benefit of the said George W. Dwinnell, and each of the applicants so swearing to his sworn statement had so made the contract as aforesaid, whereby the title to the land should be transferred to the said George W. Dwinnell, and each

of the defendants then and there well knew that each of the applicants so swearing to the sworn statements was committing the crime of perjury in so swearing."

Section 1 of the Timber and Stone Act of June 3, 1878, c. 151, 20 Stat. 89 (U. S. Comp. Stat. 1901, p. 1545), provides:

"That surveyed public lands * * * valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold * * * in quantities not exceeding 160 acres to any one * * * at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on similar terms as timber lands."

Section 2 of the act, so far as it is applicable to the present case, is as follows:

"Sec. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation and valuable chiefly for its timber or stone; * * * that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not directly or indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure in whole or in part to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the Land Office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury and shall forfeit the money which he may have paid for said lands and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void."

The third section of the act, so far as here applicable, is as follows:

"Sec. 3. That upon the filing of said statement * * * the register of the Land Office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication at the expense of such applicant, in the newspaper published nearest the location of the premises, for a like period of time and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the Land Office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as hereinbefore required; secondly, that the land is of the character contemplated in this act * * * and, upon payment to the proper officer of the purchase money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, 1872, the applicant may be permitted to enter said tract, and on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon."

By act of August 4, 1892, c. 375, § 2, 27 Stat. 348 (U. S. Comp. St. 1901, p. 1547), the provisions of the above-mentioned act were extended to all the public-land states.

The indictment in question was based on section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676), which provides:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years."

While the conspiracy denounced by the section quoted is not punishable until the commission of some overt act in pursuance of it, the offense consists of the conspiracy alone. *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531, 27 L. Ed. 698. And as a result, the validity of the indictment must be tested by the averments concerning the conspiracy, unaided by those in respect to overt acts committed thereunder.

Reading the allegations of the indictment in connection with the statute, and the rules and regulations adopted by the Land Department pursuant thereto, it is seen that it in effect charges that the defendants willfully and unlawfully entered into a conspiracy, at a time and place named, within the district where the indictment was found, to suborn certain named persons to go at a certain stated time before a named person, alleged to be the duly appointed, qualified, and acting register of the Land Office at Redding, Cal., and respectively make application, under and in pursuance of the above-mentioned act of Congress, for some of the public land of the United States, by swearing to and filing with such land officer of the government the statement expressly required by the act of Congress and the rules and regulations of the Land Department, setting forth, among other things, that the applicant does "not apply to purchase the land described in said sworn statement on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person or persons whomsoever, by which the title he might acquire from the government of the United States would inure in whole or in part to the benefit of any person except himself"; whereas, in truth and fact, the said statement of the said applicants would be willfully false, and intended so to be by each of them and by the said defendants in that each case of the said applicants should have a distinct agreement with the defendants that the land he should so apply for and secure from the government under its act of Congress, should be for the benefit of the defendants.

The subject of the alleged conspiracy was necessarily public land of the United States, for none other was embraced by the act of Congress under which the alleged contemplated proceedings were to be had, and in respect to which the register of the Land Office is by statute authorized to administer oaths to applicants therefor. It is immaterial that the precise piece or pieces of land to be acquired should have been agreed upon by the alleged conspirators at the time of the formation of such conspiracy, nor, indeed, was it essential that the identity of the persons to be suborned or the particular time and place of such subornation be alleged. *Williamson v. United States*, 207 U. S. 425, 447, 448, 449, 28 Sup. Ct. 163, 52 L. Ed. 278; *Van Gesner v. United States*, 153 Fed. 46, 52, 53, 54, 82 C. C. A. 180.

We are of the opinion that the indictment was sufficient.

The crime charged therein was, however, as has been shown, the subornation of certain named persons to commit perjury in making certain sworn statements under the timber and stone act wherein they, in pursuance of the alleged conspiracy, should willfully swear falsely that they had made no agreement, directly or indirectly, by which the title they might acquire from the government should inure in whole or in part to the benefit of any person or persons other than the applicant; whereas, in fact each of said applicants at the time of so swearing would have an express agreement that the land he was so to apply for and the title thereto he should so secure was for the benefit of the said defendants. If the proof sustained that charge, the alleged conspiracy was thereby established, and (if the necessary overt act was committed) properly punishable. And there was evidence on the part of the government tending to sustain it, which may or may not have satisfied the jury. But to further sustain the charge so made the government was permitted on the trial of the case, over the objections and exceptions of the defendants, to put in evidence acts of the alleged perjurors committed long after the swearing to and filing of their statements under and in pursuance of the timber and stone act, as well as conversations between them and the defendant Dwinnell concerning those acts, to wit, testimony to the effect that, subsequent to the filing of the sworn statements of the applicants for the land in question, they, or at least some of them, agreed with the defendant Dwinnell, for a money consideration, to file a relinquishment of their applications for the land at such time as Dwinnell could manage to take it with scrip, which relinquishments were subsequently offered in evidence by the government and admitted over the objections and exceptions of the defendants.

Under the rulings of the Supreme Court in the Williamson Case, supra, and in the later case of United States v. Biggs, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305, we think that testimony and evidence of conversations and acts had and done by the parties subsequent to the time when under the law the alleged conspiracy was consummated were clearly inadmissible. In the Williamson Case, in which a similar subornation of perjury was charged, the court held that the crime, if committed, was consummated when the false swearing was done in the applications filed for the land under the timber and stone act; that the prohibition of the statute applied only to the condition of things existing at that time; and that consequently affidavits subsequently filed in the Land Department, even though willfully false, were not admissible to show motive at the time of the application. The decision in the Williamson Case was approved and followed in the subsequent one of Biggs, already cited.

However fraudulent the acts of the parties in respect to the relinquishment referred to, they do not constitute the crime alleged in the indictment.

The judgment is reversed, and the cause remanded to the court below for a new trial.

GILBERT, Circuit Judge (dissenting). The indictments charged Dwinnell, Gilpin, Gagnon, and Deter with entering into a conspiracy to commit the crime of subornation of perjury by procuring J. F. French, F. M. French, B. F. French, Samuel M. French, Clarence M. Prather, and Arthur W. Jacquette each to take an oath to a sworn statement under the timber and stone land acts of the United States, in which each should swear that he did not apply to purchase the land described in his sworn statement on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he had not directly or indirectly made any agreement or contract or in any way or manner with any person or persons whomsoever, by which the title he might acquire from the government of the United States would inure in whole or in part to the benefit of any person except himself, said oaths to be false and known by the affiants to be false, in that each of said persons had an agreement beforehand and an express understanding with the defendants that the title so procured was to be for the benefit of the defendants. The indictment then alleges the making and filing of the sworn statements, describes the lands to which they applied, and alleges that the conspirators on October 27, 1906, and October 31, 1906, the days on which the applications were filed, furnished the applicants money to pay their expenses while standing in line awaiting their turn to file their statements, and procured them to take and file their false oaths, setting forth the oaths, and alleging their falsity and the knowledge of the affiants of their falsity. The indictment then charges that, to carry out the said unlawful conspiracy, Dwinnell at divers days mentioned between November 12, 1906, and December 1, 1906, did prepare relinquishments of the land so filed upon by the applicants and procured them to sign the same, and at the same time paid them the specific sums which had been agreed upon prior to the time of making their applications as the price for which each applicant had agreed to make entry of the land for him, which sum was \$200 for each applicant excepting that one was alleged to have been paid \$157 on account of \$400, the agreed price.

On the trial the government introduced testimony to show that J. F. French, B. F. French, F. M. French, Samuel M. French, Jacquette, and Prather made their entries at the instance of Dwinnell and under an agreement with him whereby they were subsequently to sign relinquishments for his benefit upon his paying them certain sums agreed upon, which was \$200 for each, except that in the case of Jacquette it was to be \$400, and the testimony of the entrymen, except that of J. F. French, was received without objection, that in pursuance of the agreement Dwinnell presented to them at different dates from two to four weeks after the entries were made relinquishments in his handwriting, and that he obtained their signatures thereto and paid them the money agreed upon. All their relinquishments except those of Prather and B. F. French were offered and received in evidence without objection, and as to the relinquishment of James F. French counsel for plaintiffs in error expressly waived objection. The objection taken to the admission of the two relinquishments signed by Prather was in these words:

"I simply wish to interpose a very formal objection to these, if the court please. Your honor will see from an inspection of these papers that they appear to be dated long after these locations—one bears date December 1, 1906, and the other bears the date November 26, 1906. If they are evidence at all, they are evidence in our favor."

The objection was overruled and an exception allowed. The objection made to the relinquishment of B. F. French was that the evidence failed to show that it was made in pursuance of a prior agreement with Dwinnell; but error is not assigned to the admission of the relinquishment or the testimony in regard thereto. F. M. French, one of the entrymen, was asked:

"Q. Did you have any dealing with Dr. G. W. Dwinnell in reference to getting your relinquishment for that land?"

The question was objected to as immaterial, irrelevant, and incompetent, and occurring at a time subsequent to the taking up of the land by the witness. The objection was overruled, and an exception was allowed. The witness answered:

"We were in Gagnon's saloon, and Dwinnell said to me, 'Now, if you are ready, we will go down and fix up that business.'

"Q. Go on and tell what occurred then? A. We went down to his office. I believe Gagnon went with us. When we got down there they gave me \$180—Gagnon's check for \$180—and then we went back up to the saloon, Gagnon and I, and he gave me \$20 in currency for my relinquishment."

The witness further testified that after making the entry he had no transaction with Dwinnell until the time of signing the relinquishment.

On account of the admission of this testimony of French and the relinquishments of Prather, it is held by the majority of the court that the judgment must be reversed under the authority of the decisions in Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278, and United States v. Biggs, 211 U. S. 507, 29 Sup. Ct. 181, 53 L. Ed. 305. If it were conceded that the doctrine of those decisions were applicable to the present case, I submit that upon a record which thus shows the admission of the relinquishments of four of the entrymen and the testimony as to the execution of the same and the receipt of the agreed compensation by each, all without objection, it was harmless error to overrule an objection as to one other of the relinquishments, even if the evidence so received had been incompetent. But in my opinion the rulings in the two cases cited have no application whatever to the case at bar. The purport of what was decided in the Williamson Case is best epitomized in the language of Mr. Justice White as it is found in his opinion in the Biggs Case, page 520 of 211 U. S., page 184 of 29 Sup. Ct. (53 L. Ed. 305). He said:

"The government insisted that the papers (the false oaths taken on final proof) were admissible because the indictment charged a conspiracy to suborn perjury, not only at the time of the application to purchase, but also in the subsequent stage of making the final entry, and that, even if this were not the case, the affidavits made after application were admissible for the purpose of showing the motive which existed at the time the application was made. It was decided that the indictment only charged subornation of perjury at the time of the application. Passing on the alleged contention as to motive, it was held that, in view of the requirements as to an affidavit exacted by the statute to be made at the time of the application as to the

bona fides of the applicant and his intention to buy for himself alone and the absence of any such requirement in the statute as to the final entry, the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase, and did not restrict an entryman, after said application was made, from agreeing to convey to another and perfecting his entry for the purpose after patent or transferring the land in order to perform his contract. It was therefore held that the affidavits made at the final stage of the transaction were not admissible to show motive at the time of the applications to purchase, and that any requirements contained in the rules and regulations of the Land Department making an affidavit essential to show bona fides, etc., at the final stage, were ultra vires and void."

In the Biggs Case the indictment charged that the purpose of the conspiracy was to hire, and, under agreements with entrymen have them pay for, the lands with money of the corporation and have them make entries. It did not charge the date on which said hiring and agreement to make entries were to be made, nor that the entrymen were hired to make applications, nor that said hiring and agreement were prior to any applications. The indictment did not charge that when the applicants made application they had outstanding contracts to sell or were acting under agreement or hire for the defendants. The indictment did not charge noncompliance with the timber and stone act by the entrymen in either its letter or spirit prior to or at the time of the application. The question before the court was whether the indictment charged an offense against the United States. The court held that no indictment for conspiracy to defraud the United States by improperly obtaining title to public lands would lie where the only acts charged were permissible under the land laws, and that the timber and stone acts, while prohibiting the entryman from entering ostensibly for himself but in reality for another, did not prohibit him from selling the claim to another after application and before final action.

It would almost seem unnecessary to point out the features which distinguish the present case from both those cases. The Williamson Case goes no further than to hold that the falsity of the oath of the entryman made under the ruling of the Land Department as part of his final proof to the effect that he seeks title to the land for his own benefit, and not for another, cannot be taken as proof of his motive in making the entry, and this for the reason, and for the sole reason, that after the entry has been made the land laws leave him free to transfer his right to another. That ruling is in no way involved in the case at bar. The Biggs Case charged no unlawful agreement between the conspirator and the entryman prior to the entry, and the court held that the timber and stone acts did not prohibit an entryman from selling his claim to another after the application and before final decision, and that no indictment for conspiracy to defraud the United States by improperly obtaining title to public land would lie where the only acts charged were permissible under the land laws. But the acts charged against the conspirators in the case at bar were "not permissible," and the evidence shows clearly that no negotiations were had between the conspirators and the entryman after the entries were made. All that was proven to have been done after the date of the entries was shown to have been done in pursuance of agreements made prior

thereto and for no other purpose than to carry out those agreements. Each applicant had an agreement with Dwinnell that he was to enter the land solely for the latter's benefit, and was thereafter to execute a relinquishment and to receive his pay from Dwinnell. The government submitted evidence to prove that this was done. The evidence so offered and received proved the commission of the overt acts expressly charged in the indictment, namely, that the agreement between the conspirators and entrymen included not only the making of false oaths in the application, but the execution of relinquishments and the payment of an agreed price therefor. The indictment charges a conspiracy to suborn perjury to be committed by applicants in entering land for the benefit of Dwinnell, one of the conspirators. The testimony which is the subject of the assignments of error was admitted for the purpose of proving this allegation of the indictment and as proof of the acts of Dwinnell in carrying out the agreement with the entrymen and his purpose in procuring them to make the false entries as well as proof to establish the overt acts charged in the indictment. The court admitted it expressly for those purposes. The facts that Dwinnell prepared the relinquishments very shortly after the entries were made and without further negotiations with the entrymen than those which he had with them prior to the time of making the entries, obtained their signatures to the relinquishments, and paid them the sums which he had originally promised to pay them, tended strongly to prove the conspiracy to suborn perjury charged in the indictment.

"It is competent and proper to prove such overt acts because of their bearing upon the evidence of the conspiracy itself and for the further reason that such evidence is proper in considering the punishment to be inflicted." Elliott on Evidence, § 2946.

I submit that it ought not to be held that the effect of the decisions of the Supreme Court in the Williamson Case and the Biggs Case is to deprive the prosecution of the right to prove acts such as these acts, which were shown to have been done in pursuance of the original conspiracy and were so charged in the indictment, but were done after the date of the commission of the perjury suborned by the conspirators, and that from and after the date of the suborned perjury the field of investigation is closed to the government, and no further act of a conspirator may be offered in evidence to show the existence and the intent of the conspiracy. Such, however, is the effect of the opinion of the majority of the court in this case.

OCEANIC S. S. CO. v. SIMPSON LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1911.)

No. 1,820.

1. COLLISION (§ 43*)—STEAM AND SAILING VESSELS—DUTY OF CARE ON THE PART OF STEAMER.

It is the duty of a steamer sighting a sailing vessel ahead at sea to watch with the highest diligence her course and movements so as to be able to adopt such timely measures of precaution as may be necessary to prevent a collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 43-47; Dec. Dig. § 43.*]

2. COLLISION (§ 45*)—STEAM AND SAILING VESSELS—NEGLIGENCE NAVIGATION OF STEAMER.

A steamer *held* solely in fault for a collision at sea with a schooner at night for not paying proper attention and taking proper precautions to avoid collision after the schooner was sighted; it appearing from the testimony of her own witnesses that although the lights of the schooner were seen about twelve minutes before collision, when the vessels were four miles apart in such position as to involve danger of meeting, no order was given looking to keeping the steamer out of the way until the collision was imminent, and when it was too late to avoid it.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 51; Dec. Dig. § 45.*]

Appeal from the District Court of the United States for the Northern District of California.

Suit in admiralty by the Simpson Lumber Company as owner of the schooner Advent against the steamer Sonoma, the Oceanic Steamship Company, claimant. Decree for libelant, and claimant appeals. Affirmed.

Nathan H. Frank, for appellant.

George H. Whipple, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. The schooner Advent, while making a voyage from Coos Bay, Or., to San Francisco, with a cargo of lumber, was struck on her port bow just forward of the port cathead by the steamer Sonoma on one of her voyages from San Francisco to Seattle, inflicting damage for which the libelant was given judgment by the court below. At the time of the collision, which occurred about 2 o'clock in the morning, the weather was good and the sea smooth. The schooner, which was of 399 registered tonnage, was making from 5 to 7 knots an hour, and the steamer about 13½ knots. The record shows that the steamer discovered the green light of the schooner about 12 minutes before the collision, when the two were about four miles apart. In such circumstances the established rule is:

"That the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact." The Carroll, 8 Wall. 302-306, 19 L. Ed. 392.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A careful examination of the record satisfies us that the court below was right in its conclusion that the collision in question was brought about by the failure of the steamer to perform its duty in that regard. There is much conflicting evidence in the cause, a detailed review of which is not necessary, since it would serve no useful purpose. It will be enough to refer briefly to some of the testimony of the appellant's chief witnesses and to the steamer's log containing entries in respect to the collision, made immediately thereafter.

In the pilot house logbook the entry is:

"2:06 (of the morning of the collision) sighted vessel on port bow showing green light."

"2:16 Vessel showed a red light close aboard stopped port engine and reversed it but could not clear vessel striking her forward bringing all her top hamper down on Sonoma deck."

The entry in the mate's log of the same date is as follows:

"2:06 Sighted vessel port bow showing green lt.

"2:16 Vessel tacked showing redlight; stopped port engine and reversed full speed; 2:18 struck vessel forw'd taking jib boom & top hamper in our stbd fw'd rigging."

The log of the steamer, therefore, shows that from the time the green light of the schooner was sighted until she was struck by the ship 12 minutes elapsed. Now during that time what, according to the testimony of those in charge of the steamer's movements, did the steamer do to keep out of the way of the approaching schooner? Take the man at the wheel at the time in question—Henry Casson. We extract from his testimony as follows:

"Q. Were you on board the Sonoma at the time of the collision with the schooner Advent? A. Yes.

"Q. In what capacity were you on board? A. Quartermaster.

"Q. Where were you at the time of the collision? A. At the wheel, sir.

"Q. You were at the wheel? A. Yes.

"Q. How long had you been at the wheel? A. I was at the wheel. I relieved the man at the wheel at 2 o'clock, a little after 2, sir. The collision occurred about 2:20. * * *

"Q. Do you remember the course you were steering this night before the collision? A. Yes, sir.

"Q. What was it? A. North 45 degrees west.

"Q. Did you get any orders before the collision to change that? A. Yes, sir.

"Q. What orders did you get? A. Hard-a-starboard.

"Q. Did you execute that order? A. Yes, sir.

"Q. How long after you executed it was it before you got another order? A. Well, that is one thing I can't swear to. I won't testify to anything except what I can swear to.

"Q. Did you get another order? A. Yes, sir.

"Q. What was the other order? A. Hard-a-port.

"Q. Now, before you got this order of hard-a-port had the vessel begun to swing at all on her hard-a-starboard course? A. No, sir.

"Q. She had not? A. No, sir.

"Q. Did you execute the hard-a-port order? A. Yes, sir.

"Q. Did you complete that before you got another order? A. Hard-a-starboard; yes.

"Q. Had you completed a hard-a-port order? A. Yes, sir.

"Q. You got a hard-a-starboard again? A. Yes, sir.

"Q. Had she begun to swing on her hard-a-port course? A. No, sir; I think the ship steadied up.

"Q. Steadied up? A. Yes, sir.

"Q. Now, after this second hard-a-starboard order, what happened? A. After the second time?

"Q. Yes. A. After the second, as far as I can remember, it is quite a while ago, I think the captain told me to steady her up.

"Q. I mean with reference to the collision, how far did you get over on hard-a-starboard? A. About half way.

"Q. Then what happened? A. Then the crash came.

"Q. The crash came then? A. Yes, sir.

"Q. By that you mean the collision? A. Yes; the collision.

"Q. When you say the captain told you to steady her, when was that, with reference to the collision? A. I can't give you any definite time at all.

"Q. I am not asking for the time, but I am asking whether it was before or after the collision? A. That was after the collision, sir.

"Q. From your experience on board of the Sonoma, what would you say with reference to her being slow or quick to answer her helm? A. Well, gentlemen, the ship was slow to answer her wheel, but, when she starts to go, she goes quick.

"Q. That is, she is slow to start? A. She is slow to start, but, when she does go, she goes quick.

"Q. Now, upon these occasions, when you threw your helm to starboard, and to port and to starboard again, you say that she (had) not begun to answer her helm? A. No, sir.

"Q. How could you tell that? Where were you? A. My compass was right before me, sir.

"Q. That would show the moment that she started? A. The moment she started, sir.

"Q. How were these orders given, hard-a-starboard, and then hard-a-port and then hard-a-starboard again, whether quick, one right after the other, or some time between them? A. Well, it was quick, but still there was some delay, too, at the same time, from hard-a-port to hard-a-starboard and steady her. I want to explain to you, gentlemen, before you write it down.

"Q. Make your explanation, anything you have got to say go on and tell it. Whatever you have got, let us have it. A. When putting the helm from hard-a-port to hard-a-starboard, it takes some time for the helm to get over to hard-a-starboard from hard-a-port, or from even amidships. That would cause, perhaps, a moment of delay.

"Q. Is that all? A. That is all.

"Q. But, outside of that, they were given one right after the other? A. One right after the other; yes.

"Q. And then the crash came, as I understand you? A. Yes, sir.

"Q. And then after that you got the order to steady? A. To steady, yes; that is by Capt. Cousins.

"Q. That is, he was on the bridge by that time and gave you the order to steady? A. Yes, sir."

The foregoing was on direct examination.

On cross-examination the witness was questioned and answered, among other things, as follows:

"Q. I asked you this: Did the vessel swing or did not the vessel swing at any time after these orders were executed, according to the compass? A. According to the compass, she might have swung and she might not. A ship's head may swing, and the compass might not move.

"Q. According to the compass, I am asking you. A. According to the compass, I do not think she swung any, because by the time that the helm was hard over she was hard over the other way. It steadied her by going on the other side. By the time she was going over quarter way, she steadied, too. The ship must have been on her course.

"Q. Then it is your opinion— A. My opinion is that the ship was steering north 45 west.

"Q. Your opinion is that even though the compass did not show any swing of the vessel, still the vessel might have swung on her course?

"Mr. Frank: He did not say that.

"Mr. Whipple: Q. I am asking for your opinion. A. No, sir; that ain't my opinion at all.

"Q. In other words, you believe that the vessel kept a straight line? A. I believe that the ship never swung any.

"Q. You believe she did not? A. No; because she was slow in answering. She did not have time to swing.

"Q. Is your testimony which you gave before the inspectors that on the second order to starboard she was kept that way some time, is that correct? A. That is correct.

"Q. Then you do believe she did swing on that order? A. She must have swung on that order, because I did not get the order to steady her from Capt. Cousins until after the collision.

"Q. When he told you to steady her, how was the helm? A. Hard over to starboard.

"Q. How long had it been that way? A. Well, now, I wouldn't swear to that. I don't know how long it was, sir.

"Q. You would not swear to it. What do you think? A. I would not say nothing about it. I won't say nothing about it. I don't know how long it was over.

"Q. Would you say what your best recollection is as to the intervals between those orders? A. Well, I don't want to get caught in anything if I possibly can help it.

"Mr. Frank: Q. What do you mean by getting caught? A. I don't want to try and say 2 or 3 minutes or 20 minutes. I don't know how long it was, because you know when you come to a collision—I don't suppose you gentlemen have ever been in one—when you come to a collision, a minute seems a long time, a long time.

"Mr. Whipple: Q. You don't know anything about this collision? A. I know when we hit her.

"Q. You didn't know it till then? A. I knew it then. I thought we were up alongside of a warehouse, bumping up against one.

"Q. Then you won't state how long the intervals were between these various orders? A. No; I will not, sir.

"Q. You will not deny then that the last order to put the helm to starboard was two minutes before the collision? A. Two minutes? Well, I didn't have no clock. I didn't have no time there.

"Q. So far as you know, it might have been two minutes before the collision? A. It might have been two minutes."

Redirect examination:

"Mr. Frank: Q. Now, Casson, when you answered this last question, that was put into your mouth by the attorney that the last order—

"Mr. Gregory: We object to that statement by counsel, and we furthermore reiterate our objection to any leading questions asked by Mr. Frank.

"Mr. Frank: Q. (continuing) To starboard the helm might have been two minutes before the collision; what did you mean by that? Do you mean to say you don't know how long it was or do you mean to say that that time elapsed? A. I don't know.

"Q. Now, as a matter of fact, were you taking any note of time at all at that time? A. No, sir.

"Q. And how would you judge time, if you judged it at all? With reference to what? A. Well, now, I can't swear to that, because, as I told you, when a thing comes like that, and when you come to a crash, certainly a minute seems a long, long time.

"Q. Well, now, let me ask you another question. Am I correct when I say that on your direct examination you testified that you got your order to hard-a-starboard, and as soon as you executed that you got it to hard-a-port, that you immediately started to hard-a-port and got halfway to port when you got another order to hard-a-starboard, and you got half way to starboard when the crash came? Is that right?

"Mr. Gregory: We object to that as leading. A. I swear to that.

"Mr. Gregory: And, furthermore, upon the ground that the witness himself stated upon direct examination exactly what took place, according to his recollection, and this is putting words in his mouth which he has not testified.

"Mr. Frank: He has already so testified.

"Mr. Gregory: That is my objection to it.

"Mr. Frank: That is your objection, but it is not well founded, because that is exactly what he testified to, and I am trying to get the witness to state the thing exactly as it lies in his memory.

"Mr. Gregory: As you want it.

"Mr. Frank: Not as you want it, then.

"Mr. Gregory: That is right. I agree to that.

"Mr. Frank: Q. When counsel asked you whether or not it was a long time after you got the second order to starboard the helm before the collision, what did you understand by that? A. Starboard the helm, sir? I would like you to explain. I ain't got a very good education, and I don't understand what you are talking about unless you explain it to me.

"Q. Very well. Now, then, state for yourself how the orders were given and when the collision occurred. A. Well, it was just like a flash, sir. Of course, there was a delay in time between hard-a-port and hard-a-starboard and steady her, but I guess the time I got the word or orders was just like a flash. From that time till the time that we struck I think it ought to have taken three minutes, I guess.

"Q. When you say you guess it ought to have taken three minutes, what do you base that on? Were you paying any attention to time? A. No, sir; I was not paying any attention to the time.

"Q. Then how do you come to fix it at three minutes; is that a guess? A. Yes; just guesswork, sir."

Taking this testimony of the appellant's own witness as construed by its own proctor, it appears that, although the steamer sighted the green light of the schooner about 12 minutes before the collision and when they were about four miles apart, the first order given looking to keeping the steamer out of the way was given almost immediately before the collision, when the three orders that were given came in such rapid succession that they were characterized by the witness as coming in "a flash."

We also extract from the testimony of Keneally, the third officer of the Sonoma, who was in charge of the deck at the time in question:

"Mr. Frank: Q. Mr. Keneally, you were the mate on board of the Sonoma—the third officer on board of the Sonoma at the time of the collision? A. Yes, sir.

"Q. In charge of the deck? A. Yes, sir.

"Q. How long before the collision was it that you first saw any lights? A. About seven minutes.

"Q. How was your attention attracted to the light? A. I picked it up myself first, about a half a point on the port bow.

"Q. On the port bow? A. Yes, sir.

"Q. Did anybody report it to you? A. No—the night watchman afterwards.

"Q. He reported it to you afterwards? A. Yes, sir.

"Q. What did you do when you saw the light? A. I got a pair of glasses, and was on top of the house looking at it. I was expecting it to come down wing and wing. I was afraid of it coming down that way.

"Q. How long did you watch her? A. Well, I could not say. I think about two minutes.

"Q. What did you do? A. After watching it, I thought she was across my bow, and I hollered down to my wheelman 'Hard-a-starboard.' I told the quartermaster to put it hard-a-starboard.

"Q. It was a green light that you saw? A. Yes, sir.

"Q. How did that bring her green light? A. About anywhere from a point to a point and a half on the starboard bow.

"Q. How long did you continue on that course? A. Now, I could not say, sir. It was not very long.

"Q. What happened next? A. Well, all of a sudden I saw the green light went out altogether.

"Q. What happened? A. Then a red light flared up.

"Q. What happened then? A. After seeing her, I told the quartermaster to put the wheel hard-a-port.

"Q. How long was it from the time the red light flared up until the time of the collision? A. Well, a minute at the outside. She was right close aboard of us then, sir.

"Q. Right close aboard? A. Right close aboard.

"Q. What order did you then give? Did I understand you to say that you told the quartermaster to put the wheel hard-a-port? A. When I seen his red light first, I told the quartermaster to put the wheel hard-a-port, figuring it would clear him that way, but, then I could not clear him that way. I would have cut him right in two, and I told the quartermaster to put the wheel hard-a-port.

"Q. You say 'Hard-a-port.' You mean 'hard-a-starboard'? A. Hard-a-starboard the last time.

"Q. How rapid, if at all, did those orders follow each other? A. Well, the first order, there might have been a minute's interval between hard-a-starboard and hard-a-port.

"Mr. Whipple: Q. Hard-a-starboard and hard-a-port, what do you mean by that?

"Mr. Frank: Just a minute. You have a right to cross-examine the witness.

"Q. Between hard-a-port and the second hard-a-starboard? A. No, sir; the first.

"Q. Well, I mean between the second? A. Well, the wheel was not hard-a-port before I shifted it to hard-a-starboard.

"Q. You shifted the wheel hard-a-starboard? A. Yes, sir.

"Q. How long was that before the collision? A. That was almost at the collision.

"Q. Then when these orders were given, as I understand you, you were in such a position that you did not know how you could avoid her and you were trying to avoid her in some way? A. Yes, sir.

"Q. And were doing the best you could? A. Yes, sir.

"Q. What did you do with the engines? A. I backed the port engine full speed and slowed the starboard engine.

"Q. How long was that before the collision? A. That was when we were almost at the collision point. The ships had almost come together.

"Q. Did you notice whether she swung in or swung out? A. No, sir; I did not."

It is apparent, we think, from this testimony of the appellant's own witnesses, as well as from other evidence in the record, that the steamer, although aware of the approach of the schooner in ample time to have gotten out of her way, did absolutely nothing to do so until a collision was imminent, when one order after another order was given in such rapid succession as to be ineffective.

In respect to the lights upon the schooner, there was positive testimony to the effect that both her green and red lights were bright and in place, and, although there was evidence on the part of the appellant tending to the contrary, the finding of the trial court was against the appellant.

The judgment is affirmed.

NORTHROP v. COLUMBIAN LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. February 7, 1911.)

No. 2,114.

1. EVIDENCE (§§ 343, 353*)—COMPETENCY—UNRECORDED DEED.

The failure to record a deed to lands in Georgia, in that state, does not make the original deed inadmissible as primary evidence, nor a copy thereof, under proper circumstances, inadmissible as secondary evidence, nor does the fact of its registration in a foreign state affect the admissibility of either the original or a copy.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1324-1330, 1420-1431; Dec. Dig. §§ 343, 353.*]

2. EVIDENCE (§ 374*)—PROOF OF EXECUTION OF DEED—ADMISSIBILITY OF SECONDARY EVIDENCE.

When the subscribing witnesses to a deed deny or forget their attestation, other evidence, direct or circumstantial, may be resorted to for proving its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1583, 1584, 1587-1612; Dec. Dig. § 374.*]

3. ACKNOWLEDGMENT (§ 6*)—DEFECTIVE ACKNOWLEDGMENT—EFFECT.

Under the law of Georgia, a deed signed and delivered is effective to convey title, although not so acknowledged as to be entitled to record under Code Ga. 1863, § 2668.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 46; Dec. Dig. § 6.*]

4. EVIDENCE (§ 343*)—PROOF OF LOST DEED—COPY OF OLD RECORD.

An owner of land in Georgia in 1857, conveyed it with other property for the benefit of creditors by an assignment which gave the assignee power to sell and convey. In 1874 the assignee made a deed to the land under which defendant claimed, while plaintiff, who is a son of the assignor and brought action to recover the land in 1902, claimed under the will of his father, made a few days before his death in 1865, which devised the land. Among the papers of the testator was found after his death a deed, shown by the testimony of witnesses familiar with his handwriting to have been signed by the assignee, purporting to have been executed in 1864, and to reconvey the land to the assignor. Such deed was recorded in the office of the register of deeds of Charleston county, S. C., in 1868, but was afterwards lost or destroyed, never having been recorded in Georgia. The persons whose names purported to have been signed as attesting witnesses were produced, but, in the absence of the original deed and after such lapse of time, were unable to remember that they signed as witnesses, although their place of residence and other facts showed that they might have done so. *Held*, that under the rule relating to ancient documents and copies of old records, recognized by the courts of Georgia, and which would have rendered the deed itself admissible after 30 years, a duly certified copy of the South Carolina record was admissible, in connection with other evidence as tending to prove the execution and delivery of such deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1315-1330; Dec. Dig. § 343.*]

5. EVIDENCE (§ 230*)—ADMISSIONS BY GRANTOR OF LAND.

Statements made by a grantor of land before he executed the deed and while the title was in him are admissible against his subsequent grantee, but statements or declarations made after his execution of the deed are not so admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 835-851; Dec. Dig. § 230.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. WILLS (§§ 487, 490*)—CONSTRUCTION—EVIDENCE IN AID OF CONSTRUCTION.

The rule is now unquestioned that extrinsic evidence in aid of the interpretation of wills is admissible for the purpose of showing the object of the testator's bounty, the property devised, and the quality of interest intended to be given, and evidence may be received as to every material fact relating to the person who claims under the will, to the property devised, and as to the circumstances of the testator and his family and affairs.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1023, 1026–1032, 1047–1057; Dec. Dig. §§ 487, 490.*]

7. WILLS (§ 487*)—CONSTRUCTION—EXTRINSIC EVIDENCE TO SHOW EXTENT OF INTEREST OF DEVISEE.

A provision of a will requesting the executors to have the property of the estate, and of another estate in which some of the children of the testator had an interest valued by competent persons appointed by them, the extent of the interests of the other children in land devised to be determined by such valuation was directory only, and the failure of the executors to have the valuation made does not defeat the rights of the latter children under such devise, but the value of the respective properties may be shown by any other competent evidence.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1023, 1026–1032; Dec. Dig. § 487.*]

8. EJECTMENT (§ 115*)—TITLE TO SUPPORT ACTION—INTEREST IN UNDIVIDED TRACT.

A plaintiff in ejectment, claiming under a will, is entitled to recover to the extent of his interest in the land, although it is less than the whole which he sues for.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 373; Dec. Dig. § 115.*]

9. EXECUTORS AND ADMINISTRATORS (§ 291*)—TITLE TO SUPPORT ACTION—DEVISEE—GEORGIA STATUTE.

The provision of the Georgia statute (Civ. Code 1895, § 3319 et seq.) that a devise of land does not pass title until the devise has been assented to by the executors is for the purpose of keeping the property subject to the testator's debts, and, if from the lapse of time there is a presumption that there were no debts, the consent of the executors may be presumed, and the devisee may maintain ejectment to recover the land from an adverse claimant without proof of formal consent.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 291.*]

10. VENDOR AND PURCHASER (§ 245*)—BONA FIDE PURCHASERS—NOTICE.

A debtor made a general assignment of all his property for the benefit of creditors in 1857; the deed containing power of sale, and expressly providing that, after payment of the debts, the assignee should hold the remaining property in trust for reconveyance to the assignor. The schedules attached showed the value of the property to be several thousand dollars in excess of the debts. In 1874 the assignee sold and conveyed certain land covered by the assignment. Held, that the purchaser and his grantees were charged with notice of the terms of the assignment and put on inquiry as to the right of the assignee to make the sale; that in an action of ejectment against a grantee by a devisee of the assignor, claiming under a prior unrecorded deed of the assignee reconveying the property, it was a question for the jury whether the lapse of time before the conveyance under which defendant claimed in connection with the other facts shown was sufficient to raise a presumption that the debts secured had been paid, and that, if such fact was found, defendant was not protected as a bona fide purchaser without notice.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 612; Dec. Dig. § 245.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

11. WILLS (§§ 733, 747*)—TITLE TO SUPPORT ACTION—ACTION BY DEVISEE—NECESSITY OF PRIOR PROBATE OF WILL.

Both at common law and under Civ. Code Ga. 1895, § 3357, a devise of real estate takes effect upon the death of the testator, and the passing of title is not dependent upon the probating of the will. As the vesting of title in the devisee is not delayed until the probate of the will, the fact that the will was not probated till after suit was brought does not make the plaintiff's action subject to the objection that it is based on a title acquired subsequent to the bringing of the suit.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846, 1918-1933; Dec. Dig. §§ 733, 747.*]

12. COURTS (§ 368*)—FEDERAL COURTS—FOLLOWING STATE DECISIONS.

While the law of the state in which land is situated, either statutory or by decision, governs as to its alienation and transfer by deed or will, where there is an inconsistency in the decisions of the highest court of the state, and an action has been brought in a federal court to recover land in reliance on the law of the state as it was then established by decision, the court is not bound to follow a later decision which would deprive the plaintiff of his right of action.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 951; Dec. Dig. § 368.*]

13. WILLS (§§ 733, 747*)—TITLE TO SUPPORT ACTION—PROBATE OF WILL AFTER SUIT BROUGHT.

Under the law of Georgia, established by decision and as it had existed for many years, a devisee of land in that state, by a will executed in conformity with its laws and probated in a sister state, could maintain ejectment to recover such land, although the will had not been probated in Georgia. Plaintiff brought such an action in a federal court, claiming as devisee under a will duly executed and probated in South Carolina, pending which action the Supreme Court of the state overruled its former decision, and held that such an action could not be maintained until the will had been probated in Georgia. Thereupon, and before trial, plaintiff had the will probated in Georgia, and its probate was offered and received in evidence. *Held*, that such probate related back and confirmed plaintiff's title as of the date of the testator's death, and was sufficient to support the action.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846, 1918-1933; Dec. Dig. §§ 733, 747.*]

In Error to the Circuit Court of the United States for the Southern District of Georgia.

Action at law by George P. Northrop against the Columbian Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

James N. Talley and Eldridge Cutts (John W. Haygood, Andrew H. Heyward, and R. J. Bacon, on the brief), for plaintiff in error.

George W. Owens and Samuel B. Adams, for defendant in error.

Before PARDEE and SHELBY, Circuit Judges, and TOULMIN, District Judge.

SHELBY, Circuit Judge. This is an action of ejectment for land situated in Georgia brought by George P. Northrop against the Columbian Lumber Company. The Circuit Court sustained objections to evidence offered by the plaintiff, and directed a verdict for the defendant. These rulings present the questions for decision here.

Both parties deraign title from Claudian B. Northrop, who was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

seised in fee of the land long before 1857. On January 5, 1857, he conveyed the land by deed of assignment to Edward P. Milliken, in trust, to secure debts. This deed conferred full power on Milliken to sell and convey the land. On May 19, 1874, Milliken, as assignee, conveyed the land to Groover, Stubbs & Co., and their title passed to the defendant, the Columbian Lumber Company, by mesne conveyances. If Milliken, when he conveyed the land on May 19, 1874, had not previously parted with or been shorn of the right to convey, then the title has unquestionably passed to the defendant.

The plaintiff claims that on August 6, 1864, Milliken reconveyed the land to Claudian B. Northrop. If this is true, Milliken had no title to convey in May, 1874, and the defendant has acquired none. Claudian B. Northrop died on February 26, 1865, having a few days before made his last will devising the land. The plaintiff claims as devisee under the will. Unless Milliken did reconvey the land to Claudian B. Northrop, the latter's will could not vest title to it in the plaintiff. It is clear, therefore, that the trial court rightly directed a verdict for the defendant if no legal evidence was produced from which the jury might reasonably have found that Milliken did reconvey the land to Claudian B. Northrop. The question of the execution and delivery of the reconveyance is the central and controlling question of fact upon which the case will ultimately be determined.

When the plaintiff offered a certified transcript of the reconveyance in evidence, the defendant objected to it because it was not a transcript from the proper Georgia court, and because it "is not attested as required by the Georgia law, not being either attested by or acknowledged before a commissioner of deeds from the state of Georgia, or a consul or vice consul, or the judge and clerk of a court of record." The plaintiff stated that the transcript was offered in connection with the other evidence, direct and circumstantial. The court sustained the objection, and the transcript of the reconveyance was rejected as evidence.

This ruling raises the first question to be considered.

[1] 1. The reconveyance by Milliken to Claudian B. Northrop was dated and purported to have been executed on August 6, 1864. It was recorded in the office of the register of mesne conveyances in Charleston county, S. C., February 22, 1868. It was never recorded in Georgia in the county where the land was situated. If the deed had been so executed as to authorize its recordation in Georgia and had been duly recorded there in the proper county, its loss being shown, a copy from the registry would have been admissible in evidence. Georgia Code 1895, § 3630. Not having been recorded as required by the Georgia laws, it gains nothing as an item of evidence or as a muniment of title from the registration laws of that state. Its being recorded in another state does not make the deed a muniment of title in Georgia; nor does the fact of its registration in a foreign state, unaided by other evidence or circumstances, make it admissible in evidence. But the failure to record it in Georgia does not make the original deed inadmissible as primary evidence, nor a copy thereof, under proper circumstances, inadmissible as secondary evidence.

[2] The two witnesses to the execution of the deed by Milliken were produced; but, in the absence of the original deed which, apparently, they had signed as witnesses, and after the lapse of so many years, they could not remember the fact that they had signed as witnesses. The place of their residence and other facts showed that they might have so signed. When the subscribing witnesses deny or forget their attestation, other evidence, direct or circumstantial, may, of course, be resorted to to prove its execution. *Reinhart v. Miller*, 22 Ga. 402, 416, 68 Am. Dec. 506; *Buchanan v. Simpson Grocery Co.*, 105 Ga. 393, 31 S. E. 105; *Standback v. Thornton*, 106 Ga. 81, 31 S. E. 805. This rule is recognized by statute. Georgia Code 1895, §§ 5245, 5246.

The existence of the original reconveyance was proved by several witnesses who were acquainted with the handwriting of Milliken, and who swore it was signed by him. The evidence shows that the deed was among the papers of Claudian B. Northrop after his death, and that it came into the hands of one of his executors, and was delivered by the executor to a nephew of the deceased. That it cannot be found or produced is well proven by the executor, the nephew and others. The parol evidence is such, therefore, as would fully justify the finding that an original deed was executed by Milliken to Claudian B. Northrop, that it was delivered to him, and that it has been lost or destroyed and cannot be produced. This evidence on the issues in the case would be for the jury. It is inconsistent with the right of Milliken to make the subsequent conveyance as assignee. Can it be denied that any evidence of the existence of such a deed of reconveyance, after its date, would tend to support and confirm the evidence cited? The certified copy offered shows that such a deed was recorded and examined in the South Carolina office in 1868. It could not have been copied in the records there unless a writing purporting to be such deed was produced and placed in that office. If the plaintiff had produced the apparent original deed, it never having been recorded or copied, it would not have been so conclusive as to the existence of such a paper in 1868 as is this record. The apparent original deed could be more easily fabricated than this record, and, while now there might be a motive for the fabrication, apparently there could have been none when the record was made. Discussing the admissibility of a copy of an old record, made inadmissible as such by the charge of forgery under the Texas statute, the court said:

"The record made in 1843 evidences with more certainty than the original deed would, if produced, that the deed was more than 30 years old; for skillful, indeed, would be the spoliation of a record book which could not be detected." *Holmes v. Coryell*, 58 Tex. 680, 688.

And the copy was held admissible under the general rules of evidence notwithstanding the statute.

A copy of a lost deed not recorded in the proper county was received in evidence in *Van Gunden v. Virginia Coal & Iron Co.*, 52 Fed. 838, 3 C. C. A. 294, in connection with other evidence, as tending to prove an issue in the case. In *Webster v. Harris*, 16 Ohio, 490, a certified copy from the office of the county recorder of an instrument not re-

quired to be recorded was received in evidence to prove its contents; it being shown that the original was lost. It has been held that a certified or examined copy of an instrument is the "next best" evidence when the instrument is lost. 2 Elliott on Evidence, § 1266. Various circumstances and facts reasonably tending to show the existence, execution, or delivery of a deed, its loss having been proved, have been held admissible in evidence. Sicard v. Davis, 6 Pet. 124, 8 L. Ed. 342; Payne v. Ormond, 44 Ga. 514; Terry v. Rodahan, 79 Ga. 278, 5 S. E. 38, 11 Am. St. Rep. 420; Emanuel v. Gates, 53 Fed. 772, 3 C. C. A. 663; Burdick v. Peterson (C. C.) 72 Fed. 864.

But there is another and a stronger reason why this record is admissible. The deed purports to have been executed more than 40 years ago, more than 38 years before this suit was brought, and was recorded 34 years before the suit. If the original deed had been produced by the plaintiff—it being more than 30 years old—in connection with the other evidence in this case tending to show its execution and delivery, it would have been admissible, under the familiar rule relating to ancient documents, without further proof, regardless of the question of its record. King v. Sears, 91 Ga. 577, 18 S. E. 830. When the alleged ancient original is lost, and an ancient purported copy is offered, made by private hand, the copyist being unknown or dead, it seems to have been long accepted that the copy may be received under the ancient document rule. 3 Wigmore on Evidence, § 2143, p. 2910. The record in the South Carolina office, which, in effect, was offered, is an ancient copy. The reason for its admission is stronger than the reasons for admitting a copy made by private hand, because it is entitled to some consideration as an official statement, and the long publicity of it has given opportunity for correction and opposition. "Accordingly, there has been a general disposition, on one ground or another, to accept such an ancient record, though otherwise inadmissible, as sufficient, after the lapse of time." 3 Wigmore on Evidence, § 2143, p. 2911. In Baeder v. Jennings (C. C.) 40 Fed. 199, 215, Mr. Justice Bradley held that a deed, although recorded in the wrong office, was admissible under the rule as to ancient documents.

[3] As to the objection that the reconveyance was not shown by the parol evidence to have been duly acknowledged: If it was signed and delivered, it was effective; for, conceding that it was not so executed as to entitle it to record under the Georgia statute (Georgia Code 1863, § 2668), it may have been sufficient, if attested by one witness, two witnesses, or even without a witness, to have transferred the title from Milliken to Claudian B. Northrop. Johnson v. Jones, 87 Ga. 85, 13 S. E. 261; Lowe v. Allen, 68 Ga. 225; King v. Sears, 91 Ga. 577, 18 S. E. 830; Howard v. Russell, 104 Ga. 230, 30 S. E. 802.

We are of opinion that the objections to the transcript should have been overruled.

[4] 2. The record shows the exclusion of a letter written by Milliken that tended to prove that he had knowledge of the existence of the release or reconveyance, and also the exclusion of some admissions or statements made by him on the subject. Since we hold that

the certified copy of the release itself is admissible in evidence, the evidence of the admissions may not be offered again, or, if offered, may meet with no objections. [5] It is sufficient, therefore, to say that the rule is well established that the statements of a grantor of land, made before he executed the deed and while title was by hypothesis in him, are receivable in evidence against any grantee claiming under him. 2 Wigmore on Evidence, § 1082. His admissions or declarations after he had executed the deed would not be received against his grantee. These familiar rules are adopted by the statute. Georgia Code 1895, § 5193.

[6] 3. Formerly, we might now say anciently, it was the rule that the law should fix the meaning of the will and of other written documents without reference to the circumstances of the testator or makers of the document. The history of the evolution of the law resulting in the modern rule is well stated in 4 Wigmore on Evidence, § 2470. The rule now is unquestioned that extrinsic evidence in aid of the interpretation of wills is admissible for the purpose of showing the object of the testator's bounty, the property devised, and the quality of interest intended to be given. Evidence may be received as to every material fact relating to the person who claims under the will, and to the property devised, as to the circumstances of the testator and his family and affairs, so as to lead to a correct decision of the quantity of interest the claimant is entitled to by the will. This is true as to every disputed point respecting which it can be shown that a knowledge of extrinsic facts can aid in the right interpretation of the will. 4 Wigmore on Evidence, § 2470; 2 Underhill on Wills, § 909.

The third item of the will is as follows:

"I give, devise and bequeath all of my lands in the state of Georgia to my wife and children, to be distributed among them according to law for the distribution of an intestate's estate in the state of Georgia; provided, however, that in case the children by my first marriage should ever receive their shares of the real estate situated in the state of New York to which they are entitled upon my death, then I direct that the portion of my Georgia lands which would descend to my children shall be so distributed or divided that the shares of my children by my second marriage shall be equal in value to the shares of my other children together with their shares in the New York estate, so far at least as the Georgia land may be adequate to effect this equalization of their estate among my children; and in order to this end I desire as soon as may be convenient that the New York estate and the Georgia lands be valued by proper and competent persons to be appointed by my executrix and executors, or such of them as may qualify within one year of my death. If the children's portion of the Georgia lands was not of equal or greater value than two shares of the New York estate, it would then all belong to the children by my second marriage."

The plaintiff proved, or offered to prove, that the testator was twice married. By his first marriage there were surviving him seven children; by his second marriage two children. His first wife died the owner of valuable real estate situated in New York. The testator had a life estate as tenant by the courtesy in this property, and at his death it would become the property of his seven children by his first marriage. At the date of the will the Civil War was in progress. The testator was a citizen of South Carolina, and at that time—1864—he could not be sure that the New York property would be received at

his death by those entitled to it as the heirs of his first wife. It is at least indicated by the values placed on the Georgia lands and by the estimated value of the rentals of the New York real estate found in the schedule of assets attached to the deed of assignment that the New York real estate greatly exceeded in value the Georgia lands. These are facts showing the situation of the testator and the condition of his estate, and they were admissible in evidence in aid of the interpretation of his will and as showing the share of the plaintiff. If the seven children of the first marriage received the New York property, by the terms of the will they were not to share equally in the Georgia lands with the two children of the second marriage; and, if the New York property was of certain value in excess of the Georgia property, all of the latter was to belong to the children of the second marriage. This is shown by the last lines of the third item:

"If the children's portion of the Georgia lands was not of equal or greater value than two shares of the New York estate, it would then all belong to the children by my second marriage."

There were only two children of the second marriage. One died in infancy. The plaintiff is the other.

[7] We cannot sustain the defendant's contention that the failure of the executors to appoint "proper and competent persons" to value the property is fatal to the plaintiff's right of recovery. The executors could not defeat the will by such failure. The provision is merely directory, and, if the values were so well known as to make the formal valuation unnecessary, it might be dispensed with, the devisees consenting by acquiescence.

The fact that no such persons were appointed by the executors, and that no formal valuation was made, could be shown by parol. Cowan v. Corbett, 68 Ga. 66, 70; Vizard v. Moody, 117 Ga. 67, 43 S. E. 426.

If there is record proof that the children of the first marriage received the New York property, it would be the best evidence; otherwise, the fact may be proved by parol.

If it be true that the New York property was of such value in comparison with the value of the Georgia property that, by the terms of the will, the two children of the second marriage would be given all the Georgia property, we see no reason why that fact cannot be proved by any competent evidence. It is a fact susceptible of proof by parol.

The question of the inheritance of the share of the deceased child of the second marriage need not now be considered. That is, of course, controlled by the Georgia statutes.

[8] In any view of the case, without regard to the value of the New York property, there is no construction that could be placed on the will that would show that the plaintiff was not entitled to some interest in the land. If on the full development of all the facts it should appear that he was not entitled to the whole estate sued for, he could at least recover such share as was shown to be vested in him. Lewis v. McFarland, 9 Cranch, 151, 153, 3 L. Ed. 687; Note to Balance v. Rankin, 54 Am. Dec. 415, 416; Warvelle on Ejectment, § 124.

[9] 4. It is contended that the direction of the verdict should be sustained because it is not shown that the executors of the will assented to the devise before the suit. Georgia Code 1895, § 3357. It is true that all property, both real and personal, by statute, being assets to pay debts, no devise passes title until the assent of the executor is given to such devise (*Id.* § 3319); but the assent of the executor may be presumed from his conduct (*Id.* § 3320). The purpose of withholding the vesting of the devise in the devisee is to make it subject to the testator's debts. If, from the lapse of time, a presumption was created that there were no debts, no reason would exist for withholding the vesting of the devise, nor for refusing to permit the devisee to sue, and the consent of the executor might be presumed. *Flemister v. Flemister*, 83 Ga. 79, 81, 9 S. E. 724. The devisee plaintiff would, of course, be entitled to prove the assent of the executor by any legal evidence.

[10] 5. The defendant claims that it is an innocent purchaser without notice, and that, therefore, the direction of the verdict was right. It is true that the record of the deed in South Carolina afforded no notice to subsequent purchasers of the land in Georgia. Failing to record the deed in the proper office in Georgia would make it lose its priority over a subsequent duly "recorded deed from the same vendor, taken without notice of the existence of the first." Georgia Code 1895, § 3618. The essential elements that constitute a bona fide purchase are a valuable consideration, the presence of good faith, and the absence of notice. If the defendant is chargeable with notice of the prior conveyance, the fact that it was not recorded is immaterial. If it is chargeable with notice that Milliken as assignee had no right to make the sale under the assignment at the time he did make it, the defendant could not defend as an innocent bona fide purchaser. If it appears that a party is chargeable with knowledge or information of such facts as are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would lead to a discovery of the conflicting claim, or would lead to a discovery that the proposed vendor had no right to sell, then the inference arises that he acquired the information constituting actual notice. 2 Pomeroy's Eq. Jur. (3d Ed.) § 597. It is sufficient to charge him with notice of the infirmity in the title he is about to acquire. The deed of assignment from Northrop to Milliken and the deed from Milliken to Groover, Stubbs & Co. are links in the defendant's chain of title, and the defendant is, of course, chargeable with notice of their contents. The deed of assignment made in 1857 embraced not only the Georgia lands, but all of Northrop's property, which consisted of real estate situated in South Carolina, personal property, and the income arising from real estate in New York. The estimated value of the property, as shown by the schedules attached to the assignment, was \$93,000; the amount of the debts secured, \$62,920.84. In the schedules the Georgia lands were estimated at \$10,000. The estimated value of the assets exceeded the amount of the debts \$30,079.16, and, if the slaves are omitted, the excess would still be \$14,129.16. An assignor may, of

course, overvalue his property and underestimate his debts, but on the face of this assignment it does not appear improbable that the property assigned, excluding the Georgia lands, would be sufficient to pay the debts secured. The assignment conferred on Milliken the authority to sell all the property at public or private sale to pay the debts, and then we find this express provision:

"After all the said debts shall have been paid in full then In Trust to reconvey to the said Claudian B. Northrop the surplus if any shall remain of the estate hereby assigned."

The deed of assignment itself gives notice that it is the duty of the assignee to reconvey the remaining property after the debts are paid. Milliken, as assignee, did not sell the Georgia land till May 19, 1874; that is, 17 years, 4 months, and 14 days after the execution of the assignment to him. The long delay is at least significant. Would it not, in connection with the terms of the assignment, naturally suggest inquiry? If 20 years had elapsed, there would have arisen a presumption that the debts had been paid. A like presumption may arise in a shorter time when connected with other circumstances. Each case must rest upon its own circumstances. The question of the presumption of payment within a less time than 20 years should be left to the jury. 2 Jones on Mortgages, § 916; 2 Wharton on Evidence, § 1360; Angell on Limitations, § 11; 3 Elliott on Evidence, § 2577. If the facts are such as to charge the defendant with notice that the debts were paid when the assignee sold the land to pay them, he could not be held to be a purchaser in good faith.

In view of the fact that this case will be remanded for a new trial, it is inexpedient to comment further on the evidence relating to this point. We have referred to it sufficiently to indicate on what our opinion is founded that the court was not justified in directing the verdict on the theory that the defendant was to be protected as an innocent purchaser without notice.

[11] 6. It is contended that the direction of a verdict for the defendant should be sustained because the will had not been probated in Georgia prior to the bringing of the suit.

This contention, it is urged, is sustained by the well-settled principles that a plaintiff in ejectment must recover on the strength of his own title, and cannot rely on the weakness of that of his adversary. And that the plaintiff must recover, if at all, upon the state of title that existed at the beginning of the suit; that evidence of any after-acquired title is wholly inadmissible, as was correctly held in Deas v. Sammons, 126 Ga. 431, 55 S. E. 170; following Johnston v. Jones, 66 U. S. 209, 224, 17 L. Ed. 117. In this connection the defendant relies on Chidsey v. Brookes, 130 Ga. 218, 60 S. E. 529, where it is held that a devisee under a will executed and probated in another state cannot maintain a suit to recover land adversely held in Georgia until the will has been probated in Georgia.

[12, 13] To determine whether or not these contentions are conclusive against the plaintiff's right to recover, we must inquire (a) whether plaintiff's title under the will accrued before or after he

brought his suit; and (b) whether this case is controlled by *Chidsey v. Brookes, supra.*

(a) The testator died before the suit was brought and the will was probated in South Carolina, but it was not probated in Georgia till after the action was begun. To sustain the view that the plaintiff relies on an after-acquired title, it must be held that the title did not pass by the will until it was probated in Georgia.

At common law, which prevails in Georgia except where changed by statute, the probate of a will devising real estate was unknown. Just as a deed vested title on delivery, a will vested title at the testator's death. The title which passed by the will was, of course, not dependent upon or delayed for the probate of the will when there was no provision for its probate. As to the vesting of title, the will was effective from the date of the testator's death. And, in the absence of statutes requiring probate, a will was proved like other written instruments by calling the witnesses to it, or by secondary evidence when primary evidence could not be had.

It has already been held in this circuit, Pardee, Circuit Judge, speaking for the court, that a devise of real estate takes effect upon the death of the testator, and its operation is not postponed to the time of proving the will in the state where the land lies. *White v. Keller*, 68 Fed. 796, 15 C. C. A. 683. The Georgia statute is to the same effect:

"A will takes effect instantly upon the death of the testator, however long the probate may be postponed." Georgia Code 1895, § 3257.

This is merely confirmatory of the common law as to titles. *Hill v. Hill*, 88 Ga. 612, 616, 15 S. E. 674. The statutory requirement that a will should be probated does not relate to the vesting of title. It is a means of authenticating the instrument as evidence. It dispenses in many cases with other proof of the instrument that would be required at common law. The probate is not the source or foundation of title. The title is derived from the will. The probate, therefore, has relation to the time of the testator's death—the time when the right under the will accrued. *Hall's Lessee v. Ashby*, 9 Ohio, 96, 34 Am. Dec. 424; *Crusoe v. Butler*, 36 Miss. 150; *Whitehead v. Taylor*, 10 A. & E. 210, 37 Eng. C. L. R. 95; *Smith v. Milles*, 1 T. R. 475. In *Sutphen v. Ellis*, 35 Mich. 446, 448, Cooley, Chief Justice, said:

"On the second point there is no difficulty. When the will was probated, it affirmed the title of the beneficiary under it from the time of the death (*Blamire v. Geldart*, 16 Ves. 314; *Sweet v. Chase*, 2 N. Y. 73; *Terrill v. Public Admr.*, 4 Bradf. Sur. [N. Y.] 245); and the probate would relate back so as to make valid whatever she had done previously, and which, under the will after probate, she would have had the right to do."

We conclude, therefore, that whatever title was conferred on the plaintiff by the will relates to the date of the testator's death, and not to the date of the probate of his will. It follows that the rule as to after-acquired title is not applicable.

(b) We have now to inquire whether the instant case is controlled by *Chidsey v. Brookes, supra*, and whether that decision justified the Circuit Court in directing a verdict for the defendant.

There is no doubt about the correctness of the defendant's contention, as has been often held by this court, that we must look to the law of the state in which the land is situated for the rules which govern its alienation and transfer by deed or will. It is not questioned in this case that the will is in proper form and was executed before the requisite number of witnesses to comply with the Georgia statutes as to devises of real estate. The controversy bears on the question of the probate of the will.

After the death of the testator in South Carolina, the will was duly probated in that state on September 12, 1865, and this action was brought on July 10, 1902, before the probate of the will in Georgia. The will was duly probated in Georgia in March, 1909, before the trial, which occurred in July of that year. The contention is that the failure to probate the will in Georgia before bringing the suit is fatal to the plaintiff's right to recover. The statutes of Georgia relating to foreign wills are quoted in *Knight v. Wheedon*, 104 Ga. 309, 30 S. E. 794. It is sufficient to say that since 1886 (Acts Ga. 1886, p. 32) provision has been made for the probate of wills made by residents and citizens of other states devising real estate situated in Georgia. Since 1886 the Legislature has made several changes in the law, but they are referred to in the case last cited as simply changing "the law of evidence on the subject." As we have indicated, no denial is made that the will was executed and probated in conformity to the Georgia statutes. It is useless therefore to quote them.

In 1860 the Supreme Court of Georgia, in *Doe v. Roe*, 31 Ga. 593, held that a will probated in the state of Maryland may be a good muniment of title to real estate in Georgia, even though the will was neither probated nor recorded in the latter state. In *Kerr v. White*, 52 Ga. 362, 370, decided in 1874, the court said:

"To make out the case, it is to be shown that the will is executed according to the laws of Georgia. This is admitted. Its probate in Tennessee makes it a good muniment of title in this state."

These decisions were concurred in by all the judges, and were in full force and recognized as the law of the land at the time the plaintiff brought his suit. Under these decisions, the probate of the will in South Carolina was all that was necessary. This condition of law was not peculiar to Georgia, but existed in other states. In *Long v. Patton*, 154 U. S. 573, 14 Sup. Ct. 1167, 19 L. Ed. 881, the court held that in Illinois a will probated in Virginia is as available in proof as if probated in Illinois. We, of course, recognize the rule that the probate of a will in one state does not establish its validity as a will devising real estate in another state, unless the laws of the latter state permit it. *Robertson v. Pickrell*, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049. When the plaintiff brought his suit before probate in Georgia but after probate in South Carolina, the law, as declared by the court of last resort in Georgia, was that a foreign will probated and recorded in a sister state was a good muniment of title to real estate in Georgia, "even though the will was neither probated nor recorded in this state." The plaintiff, relying on these cases; brought his suit, and afterwards, in 1907, the decision in *Chidsey v. Brookes*, *supra*, was rendered, ex-

pressly overruling *Doe v. Roe*, *supra*. If the last decision was in direct conflict with the plaintiff's right to recover, this court would be required to decide which of the conflicting decisions should control this case. Ordinarily we would follow the last ruling. When there is inconsistency in the opinions of the state court, the general rule is that the federal courts will follow the latest settled adjudications in preference to the earlier ones. 4 Fed. Stat. Anno. p. 519, and cases there cited. But, when rights are acquired under existing state law and decisions of the state's highest court, the federal courts are not required to follow later decisions in conflict with such rights. *Loeb v. Columbia Township Trustees*, 179 U. S. 472, 493, 21 Sup. Ct. 174, 45 L. Ed. 280. And the Supreme Court has declined to follow a single decision of a state Supreme Court, it "being opposed to the entire course of previous decisions in that state." *Hardin v. Jordan*, 140 U. S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428. We are not considering the question whether *Chidsey v. Brookes* announces a correct rule. We assume that it does. But it clearly changes an existing rule established by the Georgia Supreme Court, on which the plaintiff relied when he brought his suit. If the rule announced in the last case presented a barrier to the rights which the plaintiff had previously asserted, we would, under the circumstances, be reluctant to hold that it should be held applicable to this case.

There are distinctions, however, between the instant case and that of *Chidsey v. Brookes*. It is there held that a devisee under a will executed and probated in another state cannot maintain a suit for land in Georgia until the will has been probated in Georgia. The will in that case had never been probated in Georgia either before or after suit was brought. Here, the plaintiff, relying on the existing law of the state, brought the suit before probating the will in Georgia, but, after a different rule was announced, the will was probated in Georgia before the trial and its probate offered and received in evidence.

Bleidorn v. Pilot Mt. M. & C. Co., 89 Tenn. 166, 172, 15 S. W. 737, was an ejectment suit where the plaintiff claimed under a will that had been probated in New York. The objection urged by defendants was that it was never probated in Tennessee "until some years after the institution of this action." Referring to this objection, which raised the exact question presented in the instant case, Lurton, J., speaking for the court, said:

"Pending this litigation this will was duly proven and recorded in this state, and a copy of the record admitted as evidence without objection. The effect of this registration was to confirm and perfect the title of complainants, and this confirmation relates to the date of the execution of the will. It was not the requirement of a new title after suit brought, but the confirmation of a defective title. The effect of the recording of the will was not to confer a title as of the date of the registration or probate, but to vest and confirm title as of the date of the testator's death."

There is nothing in *Chidsey v. Brookes* in conflict with this ruling that the probate of the foreign will is effective although made after the beginning of the action.

The plaintiff proceeded under the law as it existed, which authorized him to sue and to rely on the foreign probate; and when a new

rule was adopted, requiring probate within the state where the land lies, he had the will probated in the state. The new decision should not deprive him of the benefit of his action brought lawfully under the rule that existed at the time he sued. He should at least be permitted to comply with the new rule announced. If it be conceded that ordinarily a will should be probated in the state where the land lies before suit is brought to assert title conferred by the will, yet, when a rule exists allowing suit and recovery by virtue of the foreign probate, and plaintiff acts under such rule, his suit should not be defeated by the announcement of another rule, or, at least, he should be allowed to comply with the new rule after it is announced, although his compliance is subsequent to his action, but before the trial.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

SUTHERLAND et al. v. PEARCE.

(Circuit Court of Appeals, Ninth Circuit. April 10, 1911.)

No. 1,932.

1. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—DOCKETING OF CASE—RULES OF COURT.

The purpose of Circuit Court of Appeals rule 16 (150 Fed. xxix, 79 C. C. A. xxix), requiring plaintiff in error or appellant to file the record with the clerk before the return day, and authorizing defendant in error or appellee to have the cause dismissed for the failure so to do, is to enable appellee or defendant in error to secure the dismissal of an appeal or writ of error where it becomes apparent that appellant or plaintiff in error is not prosecuting his appeal, or writ of error, diligently, under the rules of the court, or that the appeal or writ of error has not been taken or sued out in good faith.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

2. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—DOCKETING OF CASE—RULES OF COURT.

An appellant granted an appeal on June 18th from an adverse decree rendered June 1st, preceding, gave on June 6th a supersedeas conditioned on his prosecuting the appeal to effect and answering the damages that might be awarded against him. A citation returnable July 20th was issued June 20th. The time for the return of the citation was extended to September 20th. The time within which to prepare a bill of exceptions was extended to November 20th. Appellant obtained an order giving him 40 days from October 1st in which to perfect his appeal. A bill of exceptions was signed September 15th and filed on October 17th. On October 26th appellant filed a praecipe with the clerk directing the forwarding of the transcript of the record, and he assisted the clerk in the preparation thereof. The court granted a motion for a new citation made returnable January 27th following. The record was filed January 24th. *Held to justify the refusal to dismiss the cause under court rule 16 (150 Fed. xxix, 79 C. C. A.).*

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

3. EXCEPTIONS, BILL OF (§ 39*)—TIME FOR ALLOWANCE.

An order of the trial court allowing appellant four months from June 1st within which to prepare and file for allowance his bill of exceptions on appeal is complied with where he filed with the court for allowance a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

bill of exceptions which was signed by the judge on September 15th following, and which was filed with the clerk on October 17th.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 54-56; Dec. Dig. § 39.*]

4. APPEAL AND ERROR (§ 536*)—RECORD—BILL OF EXCEPTIONS.

Under Code Civ. Proc. Alaska, § 223, providing that the statement of the bill of exceptions when settled and allowed shall be signed by the judge and filed with the clerk, and thereafter deemed a part of the record, a bill of exceptions allowed and signed by the judge, and filed with the clerk, is a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2402, 2403; Dec. Dig. § 536.*]

5. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—CITATION—JURISDICTION.

A citation to the appellate court is not jurisdictional of the cause on appeal, but is jurisdictional of appellee, and its purpose is merely to give notice to appellee that an appeal will be prosecuted, so that he may appear and be heard.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

6. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—CITATION—JURISDICTION.

Where the time within which to return the record into the Circuit Court of Appeals as provided by the original citation had expired, the trial court could, on appellee having notice, grant a new citation as against the objection to an extension of the time for the return of the citation on the ground that the appeal was then pending in the Court of Appeals.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska.

Action by Charles H. Pearce against W. J. Sutherland and another. There was a judgment for plaintiff, and defendants appealed to the Court of Appeals (183 Fed. 1023). Motion to vacate and set aside a decree of dismissal granted and cause set down for hearing.

See, also, 186 Fed. 787.

W. C. Sharpstein, for appellants.

G. C. Israel, J. A. Hellenthal, and Grant H. Smith, for appellee.

Before MORROW, Circuit Judge, and VAN FLEET and DIETRICH, District Judges.

MORROW, Circuit Judge. This cause was docketed in this court on January 3, 1911, by counsel for appellee under rule 16 (150 Fed. xxix, 79 C. C. A. xxix) of this court, and dismissed upon the production of a certificate from the clerk of the District Court for the District of Alaska, Division No. 1, dated December 17, 1910, reciting the entry of a decree in favor of the appellee on June 1, 1910; the allowance of an appeal on June 18, 1910; the issuance of a citation on June 20, 1910, returnable July 20, 1910; the entry of an order extending the time for the return of the citation to September 20, 1910; the entry of an order on September 8, 1910, extending the time within which to prepare and present a bill of exceptions to November 20, 1910. The certificate further set forth that no further order or orders enlarging or extending the time within which to transmit the record in the case to this court, or within which to docket the case in this

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

court, or extending the time within which to return the citation, or the transmission of the record and the docketing of the case in this court, had been filed or entered in the office of the clerk of the District Court for the District of Alaska, Division No. 1. The inference to be drawn from the facts recited in this certificate was that the appeal was not being prosecuted in good faith, but for delay, and that it had been abandoned by the appellants, and upon this showing the appeal was ordered dismissed by this court.

Rule 16 is as follows:

"1. It shall be the duty of the plaintiff in error or appellant to file the record thereof and docket the case with the clerk of this court at San Francisco, California, by or before the return day, whether in vacation or in term time. But for good cause shown, the justice or judge who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed, upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to file the record and docket the case after the same shall have been docketed and dismissed under this rule, unless by order of the court."

[1] The purpose of this rule is to enable the appellee or defendant in error to secure the dismissal of an appeal or writ of error where it becomes apparent by a proper showing that the appellant or plaintiff in error is not prosecuting his appeal or writ of error diligently under the rules of the court, or that the appeal or writ of error has not been taken or sued out in good faith, but only for the purpose of delay.

[2] In the present case the certificate of the clerk omitted certain important proceedings which were had in the court below prior to December 17, 1910, the date of the certificate. These proceedings appear in the record now on file and by affidavits on the present motion. The certificate omitted to recite that the appellants on June 6, 1910, had given a supersedeas bond in the court below in the sum of \$30,000, conditioned that they would prosecute the appeal to effect and answer all damages that might be awarded against them. It omitted to recite that an order was entered on September 26, 1910, "that defendants have forty days additional time from October the 1st, 1910, in which to perfect their appeal." It omitted to recite that a bill of exceptions in the case was signed on September 15, 1910, and that this bill of exceptions was filed with the clerk of the court on October 17, 1910. The certificate further omitted to recite that the appellants on October 26, 1910, filed a præcipe with the clerk of the court directing him to prepare and forward a transcript of the record to this court, and that the præcipe enumerated the documents of which this transcript was to consist. Had these recitals appeared in the clerk's certificate, this court would have been informed that appellants were prosecuting their appeal, and that seven weeks prior to the date of the clerk's certificate he had been directed by the appellant's præcipe to prepare a transcript of the record for this court. It appears, further,

that the appellants undertook to assist the clerk in the preparation of this transcript by supplying him with office copies of such papers as they had copies of, and, by reason of delay in preparing the transcript, the appellants on December 23, 1910, gave the appellee notice of a motion that the clerk be allowed to withdraw a duplicate copy of the bill of exceptions from the files and incorporate the same in the transcript. A motion was also made at the same time for the issuance of a new citation. It appears that these motions were heard on December 24, 1910; attorneys for appellee being present and opposing the same.

The objection was made and urged against these motions that the time within which a bill of exceptions might be presented had expired on November 20, 1910; that the time for the return of the citation had expired on September 20, 1910; and that the court was without jurisdiction to make the orders mentioned in appellants' motions for the reason that the cause was then pending in this court on appeal. On December 28, 1910, the District Court made an order granting appellants' motions for a new citation, and made it returnable January 27, 1911, and made an order that the bill of exceptions be made part of the record on appeal. Upon the hearing of this motion no mention was made by attorneys for appellee that they had prior to that time procured a certificate from the clerk upon which they proposed to move this court for the dismissal of the appeal for a failure to file the record in time, and the clerk himself, who was in court at the time, made no mention of this certificate. It appears, further, that, while this motion was being presented to the court below, the attorneys for appellants had no intimation that a motion for the dismissal of the appeal in this court was contemplated by the appellee, and, when counsel for appellee appeared in this court with the certificate of the clerk dated December 17, 1910, no mention was made of the subsequent proceedings in the court below wherein the time for the return of the citation had been extended to January 27, 1911, nor was there any intimation whatever that the court below had taken any action in the case subsequent to the date of the clerk's certificate. This was a suppression of information which this court was entitled to receive from the appellee when the motion for a dismissal was made; and, had these facts been presented to this court at that time, it would have justified the court in refusing to dismiss the cause under rule 16. *Hardeman v. Anderson*, 4 How. 640, 11 L. Ed. 1138; *Hogan v. Ross*, 11 How. 294, 13 L. Ed. 702.

[3] The objection is renewed here as made in the court below that the bill of exceptions was not made a part of the record in the case until December 28, 1910, and it is claimed that this was after the time for filing a bill of exceptions had expired. We do not consider this objection well taken. The court entered an order on June 1, 1910, that the defendants should have four months within which to prepare and file for allowance their bill of exceptions on appeal. This time expired on October 1, 1910. The defendants complied with this order, and filed with the court for allowance a bill of exceptions which was signed by the judge on September 15, 1910, and this bill of exceptions

allowed by the court was filed with the clerk of the court on October 17, 1910. We think this was a compliance with the order of the court. It was filed for allowance prior to October 1, 1910.

[4] But it is further objected that the bill of exceptions was not made part of the record until December 28, 1910. Section 223 of the Alaska Code of Civil Procedure provides:

"The statement of the bill of exceptions when settled and allowed shall be signed by the judge and filed with the clerk, and thereafter it shall be deemed and taken to be a part of the record of the cause."

The statute made the bill of exceptions part of the record.

It is further objected that the time for returning the record into this court as provided by the citation expired on September 20, 1910, and the court had no jurisdiction on December 28, 1910, to extend the time to January 27, 1911.

[5] A citation to the appellate court is not jurisdictional of the cause. It is jurisdictional of the appellee or defendant in error, and its purpose is to give notice to the appellee or defendant in error that an appeal or writ of error will be prosecuted so that he may appear and have a hearing if he so desires. *Martin v. Buford*, 176 Fed. 554, 100 C. C. A. 159; *Lockman v. Lang*, 132 Fed. 4, 65 C. C. A. 621.

[6] The appellee had notice in this case that an appeal had been taken to this court for he appeared by counsel in the District Court on December 24, 1910, and objected to an extension of the time for the return of the citation on the ground that the appeal was then pending in this court.

The record was filed in this court on January 24, 1911. This showing is clearly sufficient to justify this court in setting aside the order of dismissal, and setting the case down for a hearing on the May term calendar.

And it is so ordered.

SUTHERLAND et al. v. PEARCE.

(Circuit Court of Appeals, Ninth Circuit. April 10, 1911.)

No. 1,947.

1. APPEAL AND ERROR (§ 351*)—TIME TO APPEAL—STATUTES.

Under Code Civ. Proc. Alaska § 506, requiring the taking of an appeal within one year after entry of judgment, a second appeal taken within the year to preserve appellant's rights on appeal, notwithstanding the dismissal of a prior appeal, is taken in time, and, where the prior appeal is lost, the second appeal becomes effective.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 351.*]

2. COURTS (§ 405*)—CIRCUIT COURT OF APPEALS—ORDER GRANTING SUPERSEDES—STATUTES.

Under Rev. St. §§ 1007, 1012 (U. S. Comp. St. 1901, pp. 714, 716), requiring plaintiff in error or appellant to give security within 60 days after rendition of judgment, or afterwards with the permission of a justice of the appellate court, a justice of the Circuit Court of Appeals may, on the application of appellant taking a second appeal after the dismissal of his first appeal, permit him to give a supersedeas bond after the expiration

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the 60 days; the dismissal of the first appeal being due to the failure of the clerk of the trial court to send up the record in due season.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 405.*]

Appeal from the District Court of the United States for Division No. 1 of the District of Alaska.

Action by Charles Pearce against W. J. Sutherland and another. There was a judgment for plaintiff, and defendants appeal. Motion to set aside an order granting supersedeas denied.

See, also, 186 Fed. 783.

W. C. Sharpstein, for appellants.

G. C. Israel, J. A. Hellenthal, and Grant H. Smith, for appellee.

Before MORROW, Circuit Judge, and VAN FLEET and DIETRICH, Disitrcit Judges.

MORROW, Circuit Judge. The appeal in this case docketed as No. 1,932 having been docketed by counsel for appellee and dismissed on January 5, 1911, upon the production of the certificate of the clerk of the District Court of Alaska reciting certain proceedings in that court, and this court having adjourned to the first Monday in February, the appellants filed a petition in the District Court of Alaska for a second appeal on January 24, 1911, and the appeal was on that day allowed. A cost bond in the sum of \$500 was thereafter given and filed by the appellants. On the same day application was made to Judge Morrow of this court in San Francisco to fix the amount of a supersedeas bond on the second appeal. An order was accordingly made fixing such bond in the sum of \$30,000. Under this order a supersedeas bond was filed February 7, 1911, in the District Court of Alaska, approved by Judge Lyons of that court.

[1] Under section 506 of the Alaska Code of Civil Procedure, the time for taking an appeal from the decree of June 1, 1910, will not expire until June 1, 1911. The second appeal was therefore taken in time, and, if it should turn out that the first appeal was lost, such second appeal would become effective. This second appeal appears to have been taken for the purpose of preserving whatever rights appellants might have on proceedings on appeal notwithstanding the dismissal of the first appeal. An order having now been made by this court setting aside the dismissal of the first appeal and restoring that appeal with its supersedeas bond, it is not necessary to make any final order at this time with respect to the order granting supersedeas on the second appeal. The order will be allowed to stand until the appeal in the first case is heard on the merits.

[2] But as the motion is made by the appellee to set aside the order granting the supersedeas on the second appeal upon the grounds, among others, that more than 60 days had expired after the entry of the final judgment and decree in the said action in the court below before this supersedeas bond was made, the court will indicate its views with respect to that feature of the motion. Section 1007 of the Revised Statutes (page 714, U. S. Comp. St. 1901) provides that, in any case where a writ of error may be a supersedeas, the defendant

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

may obtain such supersedeas by serving the writ of error by lodging a copy thereof for the adverse party in the clerk's office where the record remains within 60 days, Sundays exclusive, after the rendering of the judgment complained of, and giving the security required by law on the issuing of a citation. It is further provided that, if he desires to stay process on the judgment, he may, having served his writ of error, give the security required by law within 60 days after the rendition of the judgment, or afterwards with the permission of a justice or judge of the appellate court. By section 1012 (page 716) the provisions of this section were made applicable to appeals. It was under the last provision of section 1007 that the supersedeas order now complained of was made by a judge of this court on January 24, 1911, on the ground that it appeared from the showing made that an appeal had been taken from the decree within 60 days after the entry of the decree in the District Court and the clerk of the District Court had failed to send up a record in due season upon the first appeal.

In *Slaughterhouse Cases*, 10 Wall. 273, 291, 19 L. Ed. 915, the court said:

"Power to issue a supersedeas to a judgment rendered in a subordinate court does not exist in this court where the writ of error is not sued out and served within 10 days (extended to 60 days by section 11, Act of June 1, 1872, c. 255, 17 Stat. 198) from the date of the judgment, except where the aggrieved party is obliged to sue out a second writ of error in consequence of the neglect of the clerk below to send up the record in season, or where the granting of such a writ is necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district."

We think the facts in this case bring it squarely within the statute and within the rule stated in the foregoing case. The motion to set aside the order granting the supersedeas is therefore denied.

This case, however, will be set for a hearing with the first appeal on the May calendar without prejudice to the right of the appellee to make such motion at that time as he may be advised with respect to this appeal, and the orders herein made.

It is so ordered.

BLISS v. WASHOE COPPER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. March 6, 1911.)

No. 1,738.

1. APPEAL AND ERROR (§ 1022*)—REVIEW—FINDINGS OF FACT BY MASTER APPROVED BY TRIAL COURT.

Findings of a trial court, made on conflicting evidence, and affirming those of a master before whom the witnesses testified as to the damage done to farmers by smoke and fumes from a smelter, especially where both the judge and the master had the benefit of a personal inspection of the premises, are to be taken as presumptively correct, and will not be reversed by an appellate court, unless some serious or important mistake has clearly been made in the consideration of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.*]

²For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

2. NUISANCE (§ 23*)—ENJOINING LAWFUL BUSINESS—COMPARATIVE INJURIES.

Complainant, the owner of a farm, which he rented, situated in Deer Lodge Valley, Mont., brought suit to enjoin the maintenance and operation by defendants of the Washoe Copper Smelter, on the edge of the valley, on the ground that the fumes and the sulphur and arsenic precipitated from the smoke from the smelter injured the crops and forage on the farm and poisoned the stock thereon, as well as on the other farms in the valley within what was called the "Smoke Zone," and made it a public nuisance. The suit was really brought in behalf of a large number of farmers who were joined in an association. The trial court found, affirming findings of a master, that some injury had resulted to complainant's and other farms in the valley prior to 1903 for which defendants had paid, but that in such year they had reconstructed the plant at large expense adopting the best known methods for the purpose, and with the effect, of lessening such injury, and that since that time the property of complainant and of the other farmers within the Smoke Zone had been affected only in a very slight degree; that the smelter had been built at a cost of nearly \$10,000,000 and treated 7,000 tons of ore per day, being two-thirds or more of that produced in the Butte district; that its output of copper was from 17 to 20 per cent. of all that produced in the United States; that the operation of the smelter and the mines tributary thereto constituted one of the chief industries of the state on which a large part of the population of Butte and Anaconda depended, directly or indirectly, for a livelihood and the farmers of the valley for a market; that no better location, if as good, could be found elsewhere in the state for the smelter; and that its closing or removal to a distance would necessitate the closing of most of the mines, owing to the low grade of the ore. *Held*, that on such facts, and under the rule that in such cases it is proper to consider all the facts and circumstances to determine the equities, including comparative damages, the granting of the injunction would necessarily operate contrary to the real justice of the case, and that it was properly refused.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 55-59; Dec. Dig. § 23.*]

Appeal from the Circuit Court of the United States for the District of Montana.

Suit in equity by Fred J. Bliss against the Washoe Copper Company and the Anaconda Copper Mining Company. Decree (167 Fed. 342) for defendants, and complainant appeals. Affirmed.

The appellant, a citizen and resident of the state of Idaho, commenced this suit in the court below on the 4th day of May, 1905, against the appellees, each of which is a corporation of the state of Montana, to obtain an injunction permanently restraining them from operating a large smelting plant known as the "Washoe Smelter," situated about a mile and a half southeast of the city of Anaconda, Mont., and from there treating certain ores containing poisonous substances. In his bill the complainant alleged: His ownership of 320 acres of land situated in Deer Lodge Valley, Mont., and about 5 miles in a northeasterly direction from the said smelter. That during the year 1902 the defendant companies constructed the smelting plant mentioned on the south slope of Deer Lodge Valley contiguous to a large farming neighborhood, consisting of over 100 square miles of improved farming lands, all of which is in that portion of Deer Lodge Valley affected by the smoke and fumes from the said smelter, and which portion is in the bill designated as the "Smoke Zone." That at all times prior to the construction of the Washoe Smelting Plant the portion of the valley designated as the "Smoke Zone" was a rich and fertile farming country, well watered, and well adapted to raising sheep, cattle, horses, and other live stock, as well as producing large and valuable yields of wheat, timothy, clover, alfalfa, wild hay, and such other grains and cereals as can be profitably grown in that latitude, and was

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

also well adapted to the raising of profitable crops of berries, garden truck, vegetables, and other farm products, for all of which there was a ready sale at profitable prices. That a large number of the farmers referred to settled in the valley as early as 1865, and proceeded to cultivate, fence, and improve their lands, and to build many good substantial homes there, and it became a rich and prosperous neighborhood, and would continue to be such but for the acts of the defendants complained of. That the farmers residing in the "Smoke Zone" number over 100, and own and possess over 50,000 acres of improved tracts, keeping thereon a large amount of stock, horses, cattle, and swine, pursuing the business of farming as a means of livelihood. That all of said farmers are similarly situated as the complainant and are similarly affected by the smoke and fumes from the said smelting plant. That during the summer of the year 1903 the defendants remodeled their said smelting plant, completing such remodeling about September 1st of that year by constructing a large brick stack and connecting it by large flues with the smelting plant, since which time they have been and are now engaged in mining and producing large quantities of ore, amounting to about 7,000 tons a day, which ores contain large quantities of arsenic, sulphur, antimony, copper, and other noxious and poisonous substances, and which ores the defendants there treat, reduce, and refine, thereby causing large quantities of sulphur, sulphuric acid, sulphurous acid, arsenic, copper, and other noxious and poisonous substances to be freed and to be carried through the flues connected with the smelter to the smelter stack and there discharged into the atmosphere, which noxious and poisonous substances are carried by the winds and air currents over, above, and upon that portion of the Deer Lodge Valley known as the "Smoke Zone," and upon the land of the complainant, depositing large quantities of sulphurous acid, sulphuric acid, sulphur dioxide, arsenic, antimony, copper poisons, and other noxious and poisonous substances over the said "Smoke Zone," and more especially upon the complainant's said land, poisoning, burning, and dwarfing the crops growing on the land during the summer season of 1904, and poisoning all the soil in the "Smoke Zone" and the hay, grasses, and grain growing thereon, poisoning all the live stock in the said valley, causing large numbers of horses, sheep, and cattle and swine so poisoned to sicken and a great many to die from the effect of the poisoning, to the extent that the land in the said "Smoke Zone" is rendered wholly worthless for stock raising or farming purposes, so long as the defendants continue to operate their said smelter in the treatment of said ores. That the said precipitations of said poisonous and noxious substances from the said smelter fumes and smoke are insidious and cumulative, and great damage is done before the farmers are aware of the presence of the said poisonous and noxious substances so precipitated, as its presence is only shown by general sickness of live stock, and the general burnt, stunted, and dwarfed condition of the crops and vegetation. That each year, if the smelter continues to be operated, the soil of the said "Smoke Zone" would become more highly impregnated with such poisonous substances, and that finally no crop or vegetation can be produced there. That more than \$2,000,000 worth of real and personal property, owned by the farmers, is situated in the "Smoke Zone," and is now being damaged by the smelter fumes and the poisonous ingredients contained therein, and will ultimately be entirely destroyed by the continued operation of the said smelter. That the homes of the said farmers will be destroyed, and that they will be compelled to migrate. That the poisonous ingredients contained in the fumes of the said smelter have killed nearly all the trees in the "Smoke Zone," and have killed and injured the trees and timber for many miles around the plant, rendering Deer Lodge Valley and the country adjacent to the smelter "barren and desert like." That the rental value of the complainant's land prior to the construction and operation of the said Washoe Smelter was \$1,000 per annum, and that its present value will not exceed \$300 per annum, because of the said noxious and poisonous substances precipitated thereon from the smoke and fumes of the said smelter. That the complainant's land prior to the acts complained of was of the value of \$12,000 and was capable of producing large quantities of hay, grain, and other farming products of good quality, and will continue to do so but for the alleged wrongful acts of the defendants, which have al-

ready damaged his land to the extent of \$20 an acre. That the crop season of Deer Lodge Valley commences about the 1st of May and continues until about October 1st, and that if the said smelting plant continues in operation during the summer season all the crops in the "Smoke Zone" will either be destroyed or be so injured in quality that they cannot be consumed or sold, and that the damages which will be caused by its continued operation are of such a nature that it would be incapable of correct computation, and that neither the complainant nor the other farmers referred to have any adequate means of arriving at the damages which may be hereafter sustained by the lands and the crops growing thereon. That, in order to prepare damage suits for trial, it is necessary to procure chemical tests of the lands and grasses, as well as the smoke emitted from the smelter, and to procure the services of veterinary surgeons to examine the live stock affected and dying from the mineral poisons emitted from the smelter, and to procure chemical analysis of portions of animals infected by said poisons, and which have died as a result thereof. That it requires several thousand dollars to prepare a suit for trial on the part of any one farmer, and that, as such actions at law would greatly multiply, it would be difficult to obtain qualified jurors to try them, and the expense thereof would be so great that the complainant would be unable to institute or maintain such actions. That each crop season will bring new causes of action in favor of the complainant, with the other farmers mentioned, against the defendants, growing out of the continued operation of said smelter, and that the defendants will continue its operation and alleged wrongful acts complained of unless restrained from so doing.

In an amendment to his bill, the complainant alleged, among other things: That the defendants pretend that the business of smelting and reducing the ores of the character of those being treated at the Washoe Smelter has been carried on at substantially the point where that smelter is located for a period of more than 20 years; whereas, the complainant charges the truth to be that no smelting has been carried on at or near the point where the said Washoe Smelter is constructed at any time prior to its construction there, and that the smelting plant operated by the Anaconda Mining Company and the Anaconda Copper Mining Company, designated as the "Old Works," was constructed at a point north of and one mile distant from the said Washoe Smelter, on the north side of Warm Springs Creek Canyon, where the prevailing winds during the operation of the smelting plant constructed by the Anaconda Mining Company was westerly and northerly over the mountains and foothills lying adjacent to the aforesaid "Smoke Zone," and precipitated the sulphur, sulphuric acid, sulphurous acid, arsenic, copper, and other noxious and poisonous substances, which were freed from the ores being treated at the said Old Works, upon the foothills and mountains lying northerly and westerly, and adjacent to that portion of Deer Lodge Valley termed the "Smoke Zone," and that no known damage was caused by the operation of the smelting plant known as the Old Works. That the site of the Old Works is and was a fit and convenient place for the construction and operation of the said Washoe Smelting Plant for the reason that the prevailing winds are northerly and westerly over the foothills and mountains, and cause no damage to the complainant or to any property situated in that portion of Deer Lodge Valley referred to as the "Smoke Zone." That the defendants further pretend that no protest or objection was made to the construction of said Washoe Smelter, but that the truth is that the complainant and the other farmers residing in the "Smoke Zone" had no knowledge or notice that the prevailing winds would carry the smoke and fumes from the said Washoe Smelter over the lands situated in the "Smoke Zone," but believed that they would carry the said smoke and fumes from said smelter in the aforesaid northerly and westerly direction over the mountains and foothills, as had been done during the operation of the Old Works. That the defendants pretend that the city of Anaconda is the most suitable and appropriate place for the operation of their said smelting plant; whereas, the complainant alleges that several large copper smelting plants are being operated in the state of Montana, treating the same kinds and classes of ore as are now being treated in the said Washoe Smelter, without objection or litigation, and where little or no damage can be done, as the said smelting plants are not situated contiguous to or near

any farming country—that is to say, at the city of Butte, at the city of Great Falls, and at the city of Helena—and that there are numerous places in the state of Montana where smelting plants could be operated similar to the said Washoe Smelter, for the treatment of such ores, without damage or injury to the adjacent country. That the defendants allege that they have used all reasonable means to prevent the damage complained of; whereas, the complainant alleges the fact to be that the poisonous substances complained of can be precipitated and impounded at the said Washoe Smelter, with very little extra cost to the defendants in the treatment of their ores.

The defendants by their answer admit the construction of the Washoe Smelter in the year 1902, at the place mentioned in the bill, and its subsequent continuous operation, except during a period of several months in the summer of 1903, during which its operation was discontinued while the plant was being remodeled and connected with certain large, newly constructed flues, and the new smokestack thereafter referred to. Defendants admit the remodeling of the plant as stated in the bill, which they allege cost many millions of dollars; the reason for such remodeling and expenditure being alleged substantially as follows: That after the Anaconda Copper Mining Company had abandoned its old works, hereinafter referred to, and transferred its operations to the Washoe Smelter, complaint was made by nearly all of the farmers within the territory referred to in the bill as the "Smoke Zone" that such large quantities of sulphur, arsenic, copper, and other obnoxious substances were discharged in the air through the several smokestacks with which said smelting plant was then operating that the crops and live stock within such territory were being poisoned and injuriously affected, to the great damage of their owners, and that claims for damage, on account thereof, to the amount of several hundred thousands of dollars, were presented by such ranchmen to the Anaconda Copper Mining Company; and that inasmuch as the ores being treated were copper ores, and were known by the defendants to contain large quantities of copper and some quantities of sulphur and arsenic, the defendant Anaconda Copper Mining Company investigated the complaints, and, although not satisfied that any considerable damage was being caused as claimed, nevertheless compromised and settled such claims, paying out on such settlements an amount exceeding \$300,000. That in the course of such investigation the said company became satisfied that, by the construction of large flues with dust chambers and the erection of a new stack upon a high elevation at some distance from the smelting plant, a very large percentage of the substances theretofore escaping into the air and by the farmers claimed to be damaging to their stock and crops could be retained and prevented from escaping and being carried over or upon the lands of the farmers, and that, for the purpose of effecting that result and of avoiding any damage to lands, animals, or crops within the territory referred to as the "Smoke Zone," the said remodeling of the plant was effected and the use of the old smokestacks discontinued. That the effect of the remodeling and the use of the new flues, dust chambers, and the new smokestack was to discontinue and prevent the discharge into the atmosphere of a very large part and most of the dust and other substances complained of which had theretofore been discharged into the air from the smokestacks. That some quantities of the substances mentioned are still discharged into the air through the new smokestack, and that the smoke therefrom containing such substances is carried and disseminated by air currents over a very large area of country, including at times the territory referred to in the bill as the "Smoke Zone"; but the defendants deny that such substances are carried or disseminated over the said lands in quantities sufficient to injure in any degree whatever the lands, vegetables, live stock, or other property within any of the territory mentioned, and deny that the operation of the said Washoe Smelter, since its remodeling, has occasioned any inconvenience, discomfort, annoyance, or loss of any kind to the complainant or to any other persons residing or owning property within the territory referred to as the "Smoke Zone," and deny that the continued operation of the said plant will or can injuriously affect in any manner such persons. That the defendants have, regardless of cost, adopted the best and most modern appliances and means and methods of treating and reducing the ores which are treated at their

smelting plant, not only for the purpose of effecting the greatest possible saving of the valuable contents of such ores, but also to prevent possible annoyances and injury to the inhabitants and property owners of the territory referred to in the bill, and aver their willingness to continue to do all within their power to effect such results in the future. That there is at the present time no method known by which ores of the character now being treated by the said smelting plant can be treated with less contamination of the air or less discharge into the air of the substances complained of, and they deny that there has been any negligence in the construction or operation of their said plant.

The defendants admit that the said Washoe Smelting Plant has been and is being operated by the defendant Anaconda Copper Mining Company, and deny that it has ever been operated, or that any ore has ever been treated at it by the defendant Washoe Copper Company, and they admit that the defendant Anaconda Copper Mining Company has treated, in addition to its own ores, the ores of other corporations and ores purchased by it. They deny that the Deer Lodge Valley, or any portion thereof, designated in the bill as the "Smoke Zone," was ever a rich or fertile farming country. They allege that the soil of the valley is for the most part thin and poor, and that it is in many places heavily charged with alkali, and they deny that it is well adapted to stock growing, but admit that some parts of the said valley are fairly adapted to the growth of hay, vegetables, and to the care of live stock. The defendants admit that since the 1st day of September, 1903, the defendant Anaconda Copper Mining Company has been treating and reducing at the Washoe Smelter large quantities of ore, upon some days as much as 7,000 tons, though not always so much, and that the ores so treated contain much copper and some quantities of arsenic and sulphur. They deny that any considerable or injurious quantities of sulphuric acid, sulphurous acid, sulphur dioxide, arsene, antimony, copper, or of any one of such substances, or of any other noxious or poisonous substances, have been deposited upon the lands of the complainant, or upon any other lands within the territory described as the "Smoke Zone," or that any crops in the year 1904 were, on account of any such deposit or the operation of the said smelting plant, poisoned, dwarfed, burned, or in any manner injured, or that any live stock died or was made sick, or was to any extent injured by reason of any of the substances aforesaid escaping from the said smelting plant, or that the Deer Lodge Valley, or any portion thereof, has been rendered worthless, or to any extent affected for stock raising or for farming purposes, or that the same will be to any extent affected for such uses by the operation of the said smelting plant. They deny that \$2,000,000 of real and personal property are situated within the said "Smoke Zone," and allege that the total value of all personal and real property within that territory is less than one quarter of that sum. They deny that the Deer Lodge Valley, or the country adjacent thereto, is barren or desert like as the result of the operation of the said smelter, or from any cause. They allege they do not know and cannot state what the rental value of the complainant's land was prior to the construction and operation of their smelter, or what it now is. They deny that the said land, or that any of the land mentioned, has been rendered less profitable or useful by reason of the descending thereon of the smoke or fumes from their smelter, and deny that the products of such lands have been rendered in nutritious or unwholesome for feeding purposes, or that the market value thereof has in any respect been impaired or affected. They allege that during the time mentioned in the bill all products of the lands within the territory described as the "Smoke Zone" have found a ready market and have been disposed of at high prices when offered for sale. They admit that unless restrained by injunction the operation of their smelter will be continued as at present, and allege that each of the defendants is solvent and amply able to respond in damages to the full extent of many times the total value of all of the lands and of all of the personal property within the said "Smoke Zone." They deny that, in case any damage should at any time be sustained by the owner of any property within that territory, it will be necessary for the person so damaged to expend any large amount of money or be at any great trouble or expense in making proof of such loss, even if litigation should be

necessary; and they further aver that the defendant Anaconda Copper Mining Company is not only able, but willing without litigation, to pay all damages which have been or may be sustained to property, arising from the operation of the said smelter, when reasonably satisfied that such damages have been caused.

Further answering, the defendants aver: That the business of smelting and reducing of ores of the character now being treated at the said Washoe Smelting Plant has been carried on extensively at Anaconda, in Deer Lodge county, and at substantially the point where the said Washoe Smelter is located, for a period of more than 20 years, and without any complaint or objection upon the part of the complainant or of any farmers or property owners within the territory called the "Smoke Zone" prior to the year 1902. That the business now being carried on by the defendant Anaconda Copper Mining Company, as stated, has been carried on by it continuously since the year 1895; the same being conducted prior to the year 1895 at certain works erected about the year 1884 and in subsequent years, by a Montana corporation known as the Anaconda Mining Company. That a great majority of the residents of Deer Lodge Valley and of the said "Smoke Zone" have become such since the construction of such works by the Anaconda Mining Company. That, prior to the construction of such works by that company, the residents of Deer Lodge Valley were few in number, widely scattered, and practically without any market for their farm or other products, or for their live stock. That about the year 1884 the Anaconda Mining Company was the owner of large and valuable mining claims in the vicinity of the city of Butte, in Silver Bow county, Mont., which claims were being extensively worked and were producing large bodies of ore, and that it became necessary that extensive reduction works be constructed for the treatment of such ores, and that the point where the city of Anaconda now stands was selected as a fit and appropriate place for the construction of such works because of the natural facilities offered for the conduct of the business of smelting ores, and without any objection or protest on the part of the complainant or his predecessors in interest, or of any other persons residing anywhere within the Deer Lodge Valley, the Anaconda Mining Company expended, with the knowledge upon the part of all of such persons at the time of such expenditure, the sum of several millions of dollars in the construction of such works. That upon their completion, and about the year 1884, the Anaconda Mining Company began to treat, and continuously thereafter and down to the year 1895, and the transfer of the said works to the defendant Anaconda Copper Mining Company, did treat, several thousands of tons of ore per day at said works. That said ores were of substantially the same character, containing the same substances as the ores now being treated, and that there was during the whole of such operation discharged into the atmosphere from the smokestacks of the said works sulphur, arsenic, copper, and the substances generally complained of by the complainant which, during all of said time, were carried by the currents of air, as the same now are, over the land of the said valley and the lands of the said "Smoke Zone" without objection, protest, or complaint on the part of the owners thereof. That from time to time, from the year 1884, down to the time of the erection of the said Washoe Smelter, many repairs, additions, and improvements were made to the old works, many hundreds of thousands of dollars being expended in the making thereof, all with the knowledge of and without any objection upon the part of the owners of the land alleged in the complaint to belong to the complainant, or owners of other lands in the valley, and without any suggestion of damage on the part of any of such persons on account of such smelting operations. That, at the time of the commencement of the erection of such old smelting works, the present site of the city of Anaconda was vacant, unoccupied land; but that, in consequence of such works and the employment of many men in and about the same, a village was founded which grew into the present city of Anaconda, wherein, according to the best information of the defendants, resides now a population of from 10,000 to 12,000 people. That the growth of the city of Anaconda has been gradual, and the same has been mainly caused by the continued conduct of such smelting business. That nearly the whole of the population of the city of Anaconda is dependent directly or indirectly for means of subsistence

upon the continued operation of the said Washoe Smelter. That nine-tenths of the inhabitants of said city of Anaconda would be compelled to remove from the same in order to obtain a livelihood if said smelter should be permanently closed. That the city is substantially built, and that many hundreds of thousands of dollars have been expended in the construction of permanent homes by residents of the city and in the erection of public buildings. That there is no reason to believe that any of the inhabitants of that city would have established their homes there if the same had not been selected, as above stated, by the defendant Anaconda Mining Company for the conduct of its said smelting business. That the city of Anaconda has furnished, since the year 1884, the principal market for the products of the Deer Lodge Valley. That nearly all of the hay, alfalfa, grains, and vegetables produced since that date in said valley find a ready market, at high prices, in said city of Anaconda, and that the continual enlargement of the market at Anaconda, as a result of the growth of the city and the increase of such smelting operations, has led to corresponding increase in the production of the crops in the Deer Lodge Valley, and particularly in that part thereof called the "Smoke Zone," with a corresponding increase of revenue to the owners of such lands. That, aside from the city of Anaconda, the only near market for any of the products of the said valley is the city of Butte, in the county of Silver Bow, Mont. That in the year 1895 the defendant Anaconda Copper Mining Company was organized for the purpose of acquiring the properties of the Anaconda Mining Company aforesaid, and in said year all of the properties and rights of the Anaconda Mining Company were, for a valuable consideration, sold and conveyed to the Anaconda Copper Mining Company, which at once entered into the occupation and possession of the same, and continued the aforesaid business of mining and smelting ores. That the smelting of ores was continued, without substantial change, by the Anaconda Copper Mining Company at the old works until the completion of the Washoe Smelter in the year 1902, when it leased of the Washoe Copper Company said smelting plant for the purpose of continuing its aforesaid business, and, after entering into the possession of the Washoe Smelter in that year, said Anaconda Copper Mining Company has continued the said business of conducting its smelting operations at the Washoe Smelter. That, having transferred its smelting operations to the Washoe Smelter, the Anaconda Copper Mining Company took down and demolished the old works, and now has no other available means of smelting or reducing the ores mined by it or by the other companies afterwards referred to than by the use of the Washoe Smelter. That the construction of the Washoe Smelter occupied several years of time and involved an expenditure of several millions of dollars. That the facts and transactions already stated were, as they occurred, well known to all of the inhabitants of the Deer Lodge Valley, to the complainant, and to his predecessors in title. That the capital stock of the Anaconda Copper Mining Company is owned by many hundreds of persons residing in many states of the Union, and in foreign countries, who have acquired and paid for the same with knowledge of the long and continued conduct of such smelting business at Anaconda, and of the fact that the same had been so long conducted without protest or objection on the part of the owners of lands in the vicinity, and in the belief that the said business would be permitted to continue without protest or objection. That the ores treated at the Washoe Smelter are mined in the vicinity of the city of Butte, mainly from mines owned by the Anaconda Copper Mining Company, the Trenton Mining & Development Company, which has succeeded to the properties formerly owned by the Colorado Smelting & Mining Company, the Butte & Boston Consolidated Mining Company, the Parrot Silver & Copper Company, and the Washoe Copper Company. That, in addition to the ores mined by these companies, some other ores and some custom ores are smelted. That the city of Butte has a population of 60,000 people, or about one-fifth of the entire population of the state of Montana, and has grown from a small mining camp, having a population of a few hundred people, within the last 30 years, owing to the opening up and development of its copper mines. That the entire population of the city of Butte depends directly or indirectly upon the continued operation and production of said mines for their means of livelihood. That the mines aforesaid

employ many thousands of persons, and in addition thereto a great number of persons have established different branches of business and industry in the said city of Butte, all of which said business is dependent upon the continued operation of the mines. That the city is substantially built, and many millions of dollars have been spent by the inhabitants of the city in the erection of permanent business blocks and residences in said city. That, since the erection of the reduction works by the Anaconda Mining Company at Anaconda, the value of the product of the Butte mines has exceeded the sum of \$500,000,000, and at the present time the product of the said mines has a value of about \$45,500,000 per annum. That about three-fourths of all of the ores mined at Butte are treated and reduced at the Washoe Smelter, and that if the latter should be closed no present means exists by which such ores could be treated, and their production would need to be discontinued. That all of the country surrounding the city of Butte and the city of Anaconda is mountainous in character, sparsely settled, offering means of livelihood to but a comparatively few people. That the area of agricultural land is very limited, and the market for such products as are raised upon such agricultural lands is practically limited to the cities of Butte and Anaconda. That there are employed in the said reduction works, and in the mines of the companies above specially named, an average of about 8,000 men per month, all of whom are absolutely dependent for their livelihood and continued employment upon the continued operation of said mines and smelter. That the said mining companies and the said smelting plant pay to the men employed therein more than \$7,000,000 per annum, and that the said mining companies expend approximately \$1,500,000 per annum for coal, more than \$1,000,000 per annum for coke, more than \$200,000 per annum for lime rock, approximately \$500,000 a year for lumber, \$500,000 a year for machinery, and \$350,000 a year for freight. That a large percentage of the said supplies are furnished from mines, factories, mills, and quarries located in the state of Montana, all of which furnish employment to additional thousands of men residing in different parts of the state, and that to a very large extent the state of Montana outside of the cities of Butte and Anaconda is dependent for its continued prosperity and industry upon the continued operation of said mines and said reduction works. That neither the said Anaconda Copper Mining Company nor any of the said companies, if prevented from reducing and smelting its ores at the said Washoe Plant, can find any more suitable place in the state of Montana to conduct the business of smelting or reducing ores, or any other place within the said state where the said industry could be carried on with less injury to agricultural lands or to persons or property than where the same is now located, and that if it were necessary to remove the said ores from the state of Montana to reduce, or dispose of the same, the cost of such removal would be so great that further mining of such ores would become impracticable, and that it would be necessary to discontinue such mining business. That the city of Anaconda is the county seat of the county of Deer Lodge. That the total assessed value of the real and personal property of said county for the year 1904 was \$8,120,826. That of such amount the sum of \$4,058,573 was assessed against the property of the defendants. That the granting of the injunction prayed for would render all of the property of the defendants within said county valueless and would cause such a depreciation in other property now subject to assessment that it would be impracticable to continue the county organization of the county of Deer Lodge with such sums as might be raised by the assessment of the property therein. That the city of Butte is the county seat of the county of Silver Bow. That, of the taxes annually collected in that county, about 40 per cent. is collected from the assessment of the mines and the net proceeds of the mines therein. That the county of Silver Bow furnishes about 25 per cent. of the total taxes collected by the state of Montana, and that, if the relief prayed for by the complainant be granted, all the property within the county of Silver Bow would be depreciated to such an extent as to seriously impair the revenue of the state and to render impracticable the continuance of the local county government. That the granting of the relief prayed for would work permanent and irreparable injury to the complainant and to all others owning property within the territory called the "Smoke Zone," which injury would re-

sult directly from the destruction of the market for the products of such lands and in loss of market value to the lands, and that the damages which would be sustained by the complainant and the owners of such lands would, with respect to each of said persons, be greatly in excess of any possible damage that they may sustain by reason of the continued operation of the said Washoe Smelter as it is now being operated. That the complainant, his predecessors in title, and all other owners of land within the territory designated as the "Smoke Zone," have for years stood by and watched the growth and development of the said smelting industry, the investment of millions of dollars by the said corporations in the development of the said mines and the construction of said smelters, the investment by citizens of Anaconda and Butte of millions of dollars in the development and permanent growth of those cities, with full knowledge thereof, and well knowing that the ores so being mined and treated contained copper, sulphur, arsenic, and other substances complained of, and that the process of treatment necessarily caused elimination and discharge into the atmosphere of such substances, well knowing what, if any, effect such discharge did and would have upon vegetables and animal life and the productiveness of the soil, and well knowing that said sums were being continually invested, and that the amount so invested was continually increasing; and yet they have failed and neglected during all of said years, until, as above stated, to complain, protest, object, or in any manner notify such corporations or persons of any damage sustained, or any objection upon their part to the conduct of such business, well knowing that said corporations and persons were constructing such works, developing such mines, erecting such buildings, making such improvements, and investing their money therein in the belief and in reliance upon the acquiescence of any consent to the continued conduct of such mining and smelting business and upon the part of the complainant, his predecessors in title, and all other owners of land or personal property within the territory designated the "Smoke Zone." And that the complainant is and ought to be barred and estopped from claiming relief in equity by reasons of his laches and delay in the premises.

Further answering, the defendants deny that no smelting has been carried on at or near the point where the said Washoe Smelter has been constructed, prior to its construction. They deny that there has been any substantial difference between the location of the old works of the Anaconda Mining Company and the Anaconda Copper Mining Company and the site of what is designated in the bill and the answer as the "Washoe Smelter," and allege the fact to be that the old works were situated upon the north-easterly side of Warm Springs Canyon, and that the Washoe Smelter is on the southerly side of that canyon; that the said site of the Washoe Smelter was selected by the defendants as a more suitable smelting site than that of the old site for the reason that the elevation of the ground was and is higher and the gases and smoke emitted by the defendants in the operation of the said smelter would be less likely to be disseminated in such manner as to cause injury to the complainant, or to any other farms within the territory designated in the bill as the "Smoke Zone." The defendants admit that no appreciable damage was done by the operation of the smelting plant constructed by the Anaconda Mining Company and known as the "Old Works," and allege that no known damage is caused by the operation of the said Washoe Smelter. They admit that the site of the old works is and was a fit place for the construction and operation of a smelting plant, but deny that the present site is any more unsuited for the erection and operation of the smelter than was the site of the old works. The defendants deny that the complainant and the farmers residing in the "Smoke Zone" had no knowledge or notice that the prevailing winds would carry the smoke and fumes over the lands situated in the "Smoke Zone," and allege the fact to be that the conditions of the operation of the said smelter were well known to the complainant and to all the other farmers residing in the "Smoke Zone" at the time when the defendant Washoe Copper Company began the construction of said smelter, and that, notwithstanding such knowledge of the conditions which would attend the operation of said smelter, no protest was ever made by the complainant or by any of the farmers residing within the Deer Lodge Valley. The defendants deny that there has been any sub-

stantial change in the treatment of ores since the completion of the Washoe Smelter from what there was in the smelting of ores by the Anaconda Mining Company and the Anaconda Copper Mining Company at the old works; aver the fact to be that, in so far as any change has been made, the changes have all been for the purpose of improving the system of smelting so as to effect greater savings of the valuable contents of the ores treated at the said smelter, and for the purpose of relieving, in so far as it is possible to do so, the operation of the smelting plant from any annoyance or injury to those who reside in the neighborhood of the said smelter, and particularly within the area of what is known as the "Smoke Zone."

The defendants admit that several copper smelting plants are being operated in the state of Montana, and that some of such plants are treating practically the same kind of ores as are being treated in the Washoe Smelter. They deny that such treatment is attended without objection or litigation, and aver that nearly all of the smelters of the state have been subject to annoyance, harassment, and unfounded litigation upon the part of persons similarly situated as are the farmers in the "Smoke Zone." They deny that at the city of Butte, the city of Helena, the city of Great Falls, or elsewhere in the state of Montana, the smelting operations could be carried on any more conveniently or with less damage to the adjacent country than at the site of the said Washoe Smelter. They deny that the natural conditions are such that a smelting plant of the capacity of the Washoe Smelter could be operated at the city of Butte, or at the city of Helena, or at the city of Great Falls, for the reason that there is insufficient water supply in those places, and that the other conditions surrounding the locality are such as would preclude the operation of a smelting plant of the character and size of the Washoe Smelter. They deny that arsenic, sulphuric acid, sulphurous acid, or any of the other deleterious substances mentioned in the bill can be precipitated or impounded at said smelting plant at any cost or with better results than the defendants are now doing at the site of the said smelter. The defendants deny that the suspension of operations of the Washoe Smelter would not cause serious interference with the residents of the state of Montana, or with the revenues of that state, or the counties of Deer Lodge or Silver Bow. They deny that, in the event of the granting of the injunction prayed for, the suspension of operations would be temporary and of short duration. They deny that the moving of the said smelting plant to the site of the old works, or to any point in the state of Montana, could be done without damage to the inhabitants of the state, and deny that it would be possible to move the said plant from one point to another, and aver that, by reason of the character of its construction, the entire plant would be practically destroyed, in the event of the defendants being compelled to move; that only a small portion of the entire cost of the said plant consists of materials, machinery, etc., which is portable; and that by far the greater percentage of the cost of constructing the said plant consists of masonry work, erection of smelters, foundations, buildings, and other appurtenances necessary for carrying on and conducting the said plant, the value of which would become totally lost if the defendants or either of them were obliged to move to some other place.

Replication having been made by the complainant, the cause was referred by the court below to its standing master in chancery, to take the evidence therein, and to report his findings of fact thereon as advisory to the court. This was done, resulting in the taking of the testimony of a vast number of witnesses on behalf of the respective parties, the introduction in evidence of a vast number of exhibits on behalf of each party, the personal inspection of the premises by both the master and the trial judge, accompanied by the counsel for the respective parties and by some of the expert witnesses on each side, and, finally, after elaborate argument by the respective counsel, findings of fact were made by the master, which were, in the main, approved by the judge, and in the ultimate decision of the trial court in favor of the defendants.

The findings of the master were as follows:

"At the time of the filing of the bill of complaint in this cause, the complainant, Fred J. Bliss, was, and now is, a citizen and resident of the state

of Idaho, and has been since the 21st day of March, 1903, and now is, the owner in fee simple, and in possession of the following described lands and premises, situated in Deer Lodge Valley, county of Deer Lodge, state of Montana, to wit: The west one-half of the northwest quarter of section 26, and the east one-half of the northeast quarter of section 27, and the east one-half of the southeast quarter of section 22, and the west one-half of the southwest quarter of section 23; all in township 5 north, range 10 west of the principal meridian of Montana; containing in all 320 acres.

"(2) The defendants, the Anaconda Copper Mining Company and the Washoe Copper Company, were at the time of the filing of the bill of complaint in this cause, and now are, corporations created and existing under the laws of the state of Montana, with their domiciles in said state. During the year 1902, the defendant Washoe Copper Company constructed a large smelting plant on section 12, township 4 north, range 11 west, in Deer Lodge county, Mont., on the slope of the mountains west of the Deer Lodge Valley, about 1½ miles southeast of the city of Anaconda, and contiguous to a large farming and grazing region in said valley, which smelting plant is known as the 'Washoe Smelter,' and is situated about 5 miles in a southwesterly direction from the before mentioned lands of the complainant. The Washoe Copper Company, defendant, ever since has been, and now is, the owner of said smelter; and the Anaconda Copper Mining Company, defendant, is and has been at all of the times since the construction of said smelter engaged in operating the same in the reduction and treatment of ores.

"(3) The business of smelting and reducing ores of the character now being treated at the 'Washoe Smelter' has been carried on extensively at Anaconda, Deer Lodge county, Mont., for a period of more than 20 years, without any complaint or objection whatever on the part of the residents or property owners of the Deer Lodge Valley prior to the year 1902.

"(4) The said business now being carried on by the Anaconda Copper Mining Company, defendant, has been carried on by it continuously since the year 1895; the same having been conducted and carried on prior to the year 1895 at certain works, known as the 'Old Works,' erected in the years 1883 and 1884 by a corporation organized under the laws of the state of Montana, under the name 'Anaconda Mining Company.' In the year 1895 the defendant Anaconda Copper Mining Company acquired all the properties and rights of the Anaconda Mining Company, and at once entered into the possession and occupation of the same, and since that time has continued the aforesaid business of mining and smelting ore. Briefly stated, the facts are as follows:

"About the year 1884 the Anaconda Mining Company was the owner of large and valuable mining claims in the vicinity of the city of Butte, Silver Bow county, Mont., which claims were being extensively developed and worked, and producing large quantities of low-grade ores, and it became necessary that extensive reduction works be constructed for the successful treatment of the same. A large portion of said ores were and are low-grade in character, over 90 per cent. of said ores were and are of such character that, in order to reduce the same and extract the metal contents thereof, it was and is necessary to first concentrate the same by the use of large quantities of water, and that without such concentration of said ores it would be impossible to operate said mines at a profit. Prior to the location of said 'Old Works' at Anaconda, Mont., extensive investigations were carried on throughout the state of Montana, for the purpose of locating points where sufficient water could be obtained, and other natural facilities afforded for the operation of such works, and the point where the city of Anaconda now stands was selected as the most fit and appropriate place for the construction of such works because of the facilities there afforded for the treatment and reduction of said ores. That without any objection or protest on the part of the complainant or his predecessors in interest, or any other persons, the Anaconda Mining Company proceeded to construct said smelting works, and expended in connection therewith large sums of money aggregating several millions of dollars, and, upon the completion of said works in the year 1884, said company began to treat and continuously thereafter, down to the year 1895, and the transfer of said works to the defendant Anaconda Copper Min-

ing Company, did treat several thousand tons of said ores per day at said works, which said works were located upon the north bank of Warm Springs creek at a point one mile northerly from the present 'Washoe Smelting Plant.' That from time to time from the year 1884, down to the time of the erection of the 'Washoe Smelter,' many repairs, additions, and improvements were made to the 'Old Works,' and many hundreds of thousands of dollars expended in making thereof, all to the knowledge of, and without objection on the part of, the owners of the land now owned by the complainant or other landowners in the Deer Lodge Valley, and without any suggestion or claim of damage on account of such operation of said smelter. At the time of the construction of said 'Washoe Smelter,' it was deemed necessary to construct a new smelting plant upon modern and more economical lines than said 'Old Works' had been constructed, for the purpose of reducing said ores of the defendant companies and other mining companies, mined at the city of Butte, Mont., and investigation into available sites within the state of Montana was made, and after a thorough investigation the present site of the 'Washoe Smelter' was determined upon as being the most available and suitable site in the state of Montana for said purpose, and the 'Washoe Plant' was constructed by said Washoe Copper Company for the purpose of taking the place of the said 'Old Works,' and to continue the reduction of said ores in a modern and more economical manner. Having transferred its smelting operations to the 'Washoe Smelter,' the Anaconda Copper Mining Company took down and demolished the 'Old Works,' and now has no other available means of smelting or reducing the ores now being treated and smelted by it than the use of the 'Washoe Smelter.' The construction of the 'Washoe Smelter' occupied several years of time and involved the expenditure of about \$9,500,000.

"(5) The said ores treated and smelted as aforesaid since the year 1884 at Anaconda, Mont., have been and are sulphide copper ores containing large quantities of sulphur and arsenic, certain quantities of which substances, in various forms, during the processes of smelting said ores, have been, and now are being, released and discharged into the atmosphere and disseminated by the changing air currents over various and indeterminate areas of territory.

"(6) That ever since the construction of the said Washoe Smelter the defendants have been and now are engaged in mining large quantities of said ores amounting to several thousand tons per day, all of which said ores have been treated and smelted in said Washoe Smelter for the purpose of obtaining the metal values therefrom.

"(7) That during the period of time from between the 1st day of February, and about the 1st day of September, of the year 1903, the defendants remodeled the said smelting plant and reduction works, known as the 'Washoe Smelter,' and completed such remodeling by the 1st of September, 1903, by construction of a large brick stack and connecting the same by means of flues with said smelting plant. That, at the said 'Washoe Plant,' prior to the said remodeling thereof, the said sulphur and arsenic fumes emanating therefrom were carried out into the atmosphere by means of four chimneys, each about 225 feet in height, and constructed on a level with said smelting plant approximately, so that the said emanations discharged into the air at a height very little above said smelting plant, and close to the buildings in which they were produced. The said stacks in use before said remodeling, as aforesaid, were of the same general character and construction as those in use at any other smelting plant where similar ores were being reduced at that time.

"(8) That during the period between February 1, 1902, the date of the first operation of the Washoe Plant by the defendant Anaconda Copper Mining Company, and the 1st day of February, 1903, when the construction of said new flues and stack was commenced, complaint was made by many of the farmers and ranchmen within the said Deer Lodge Valley that such large quantities of sulphur and arsenic were discharged into the air, through the several smokestacks with which said smelting plant was then operated, that the crops and live stock within said valley were being injuriously affected and poisoned to the great damage of the owners thereof, and claims

for damages on account thereof, aggregating in amount several hundreds of thousands of dollars, were presented by said farmers and ranchmen to the defendant Anaconda Copper Mining Company. That, as the said ores being treated in said smelting plant were known to contain quantities of sulphur and arsenic, the defendant Anaconda Copper Mining Company investigated said matter, and, upon its investigators reporting that damage was being done to said farmers and ranchmen, the said Anaconda Copper Mining Company compromised and settled the said claims, paying out on said settlement an amount exceeding the sum of \$330,000. That with the intent to prevent, if possible, any further damage being caused, or further claims for damage being made, the said Anaconda Copper Mining Company, at great expense, caused to be made, by the best and most competent expert assistance obtainable, investigations to determine methods and means by which the said noxious substances could be caught and retained from the said gases and smoke to as large an extent as possible, and to so scatter and disseminate the remainder that escaped that, if possible, no damage might be caused thereby. As a result of such investigations, it was determined that the best feasible method of accomplishing such purpose was by the construction of large flues with dust chambers for the purpose of collecting the solid particles, as far as possible, from the said smoke, and by the erection of a high stack upon an elevation at some distance from the smelting plant aforesaid, in order that the said fumes escaping into the atmosphere might be discharged at as high an elevation as possible, and thus become widely disseminated and diluted before coming in contact with any of the ranches in the valley.

"In order to carry out the result arrived at by virtue of the said investigations, the use of the old smokestacks at said smelting plant was discontinued, and the defendant companies began the construction of the large stack before referred to, and of enormous flues to connect said stack with the various portions of the smelting plant, wherein gases and other emanations were created in the operation of reducing said ores. That, carrying out the plan aforesaid, an elevation at some distance from the smelting plant was selected upon which the chimney was erected; said chimney being of brick construction upon a concrete base, and of the following dimensions: Height of chimney above base, 300 feet; height of chimney above nearest point in the valley to smelter, about 1,100 feet; diameter of chimney at base, 31 feet and 6 inches; diameter of chimney at top, 30 feet inside. This chimney was connected with the smelting plant proper by a double system of flues running from the base of the chimney toward the smelting plant for a distance of about 1,000 feet. These double flues connected with the chimney at opposite sides at the base of the stack, and are constructed partially by excavating large cuts in the hill, lining the same with brick, and by arched overhead construction, and are 60 feet in width and about 35 feet each in height, inside measurement. At the end of the 1,000 feet of construction of double flues, and connected therewith, is a single flue which is 60 feet in width, and about 35 feet in height. This single flue is about 1,300 feet long, and at the end farthest from the stack is connected with separate flues and dust chambers running to what are known as the reverberatory, the roaster building, the blast furnaces, and the converter plant, respectively; these being the respective plants in which all gases and emanations from the smelting operations are produced. Beneath the main flue and the double flues there has been excavated tunnels through which cars are run, and the flue dust catching capacity of these large flues remains practically unimpaired.

"The respective plants in which the gases and fumes are generated are connected, as aforesaid, with this large dust flue by chambers, and separate flues which are of the following dimensions: Blast furnace chamber is 250 feet long by 40 feet in height, by 40 feet in width; the roaster dust chamber is 290 feet long, by 40 feet in height and 40 feet in width; the converter dust chamber is 260 feet long by 40 feet in height, and 40 feet in width; the reverberatory dust chamber has the same dimensions as the blast furnace flue. All of the smoke and gases and other emanations from the said smelting

plant pass through these various dust chambers and flues up to the main stack, and go to the top of the stack and thence into the atmosphere. This system of flues and chambers was constructed and put into operation at an expenditure by the defendant companies of approximately the sum of \$750,000. In addition to the foregoing improvements, the defendant companies also constructed, adjacent to the large flue heretofore described, an arsenic plant, containing three furnaces for treating arsenic, for the purpose of separating the arsenic from a portion of the flue dust before the flue dust is returned for treatment in the smelting plant, and this arsenic plant has been operating continuously ever since its erection. That as a result of the foregoing improvements, made for the purpose of rendering the smoke and other emanations from said smelting plant harmless in character, it is found that the improvements thus made were constructed along the best known lines for accomplishing the purposes intended, and that the defendant companies have, regardless of expense, endeavored, by these improvements to render the smoke, fumes, and emanations from said smelter harmless. That the steps thus taken by the defendants in this case are far greater and more extensive in character than has been done by any other smelter in existence, and that the effect of the remodeling of said plant and the use of the said flues, dust chambers, and stack is to prevent and discontinue the discharge into the atmosphere of much of the dust containing the substance complained of, which had theretofore been discharged into the air from the smokestacks of the plant, and to disseminate and scatter by air currents at a great height over a large area of country the fumes and whatever dust the same still contained which was not removed therefrom, and that thereby the said smoke, fumes, and emanations from said plant were and are rendered less harmful than was the case before said improvements were made.

"(9) That commencing on or about the 1st day of September, 1903, when said defendants completed the remodeling of said smelting plant, as aforesaid, and ever since said time, the defendant Anaconda Copper Mining Company has been, and now is, treating and reducing in said smelting plant large quantities of said ores, to wit, about 7,000 tons of ore per day; and that said ores so treated and smelted contain much copper and quantities of sulphur and arsenic; and that, as a result of the said smelting operations in reducing the said ores, quantities of sulphur and arsenic in various forms are set free from said ores and are carried out through the flues connected with the said large smelter stack, and by the said stack discharged into the atmosphere.

"(10) That the sulphur, in its various forms, so as aforesaid, set free and discharged into the atmosphere from said smelting plant, has caused no damage or injury, since the remodeling of the said smelter, to the complainant, and is now not causing any damage or injury to the complainant in this case.

"(11) That the arsenic in its various forms, so as aforesaid set free and discharged into the atmosphere, from said smelting plant, has been, and is now being, carried by the winds and air currents over, above, and upon an indeterminate portion of the Deer Lodge Valley, adjacent to the said smelter, including the lands and premises owned by the complainant, and hereinbefore described, depositing at times sufficient quantities of said arsenic on the hay, grasses, and fodders growing thereon to injuriously affect and poison many of the live stock which eat of said hay, grasses, and fodder, and feed at large on the pastures and ranges thereof, causing a number of such live stock so poisoned to sicken from the effects of said poison, so that that portion of the Deer Lodge Valley thus affected is rendered thereby less profitable and less valuable for stock raising and grazing purposes, and the hay, grasses, and other fodders grown thereon rendered less wholesome and less valuable for feeding to any animals than otherwise would be, so long as the defendants continue in the operation of said smelter in their reduction and treatment of said ores, as aforesaid, to discharge into the atmosphere such quantities of arsenic as they have been, and are now, so discharging from their said smelting plant.

"(12) That by reason of the defendants operating the said Washoe Smelter since remodeling the same, and so as aforesaid causing to be emitted from the smokestack of said smelter into the atmosphere such quantities of arsenic in its various forms, with the result therefrom as aforesaid, the complainant has suffered special damage and injury in the sum of \$350; the same being the actual loss suffered by him in the depreciation of the rental value of said land and premises, so caused by the said defendants, during the period mentioned.

"(13) That the said Washoe Smelter is situate contiguous to an extensive farming and grazing neighborhood lying in said Deer Lodge Valley, which is inhabited by a large number of farmers and ranchmen who own or possess many thousands of acres of improved and unimproved farming and grazing lands, and who reside upon said lands as their homes and keep a large amount of live stock, horses, cattle and sheep, thereon, and follow and pursue farming, dairying, and live stock raising as a means of livelihood. That said farmers and ranchmen constitute a large farming and grazing neighborhood, and the said arsenical fumes so as aforesaid emitted from said smelter more or less affect injuriously all hay, grass, and fodder crops of the said lands, and all of said farmers and ranchmen are, more or less, similarly situated as said complainant, and are, more or less, similarly injuriously affected by the said arsenical fumes emitted from said smelting plant.

"(14) That, if the said defendants continue to operate the said Washoe Smelter as heretofore, the said noxious arsenical emanations therefrom will continue to be precipitated and deposited at times upon the hay, grass, and fodder crops grown upon the section of the Deer Lodge Valley heretofore mentioned, including the premises of the complainant, thereby poisoning more or less all such future crops of said lands, and rendering the same more or less noxious and unwholesome food for live stock to the damage of said farmers and ranchmen. That each year and each crop season will bring new causes of action in favor of said farmers and ranchmen and against the said defendants, by reason of loss due to the thereby lessened value of said crops, as forage for animals, and the sickness of live stock consequent upon their grazing upon and eating and ingesting the same, all of which will cause a multiplicity of suits in order to collect damages, which said damages will be difficult of proper computation. That, if said smelter closes operations, the said farms and the farm of complainant, in the course of one year after said poisonous substance should cease to be precipitated thereon, would become free from all noxious effect of said precipitation, as the said arsenical emanations from said Washoe Smelter since September 1, 1903, have in no wise injured or affected the soil of any of said premises or caused any permanent injury thereto.

"(15) That many of the said farmers and ranchmen have settled upon and own the lands, injuriously affected in manner as aforesaid by the said smelter fumes, in the Deer Lodge Valley prior to the year 1870, and have continuously been residents thereon up to and including the present time, and long prior to the conducting of any smelter plant in the said region.

"(16) That there is, and has been at times during the period of operations of the said Washoe Smelter, an abnormal amount of sickness among many of the animals feeding and grazing upon the hay, grasses, vegetation, and pasture growing upon the said injuriously affected portion of the Deer Lodge Valley, to wit, horses, cattle and sheep; said sickness being due to arsenical poisoning caused by the arsenic in various forms in the fumes emitted from said Washoe Smelter and precipitated and deposited on said growing pasture.

"(17) That the said defendants or either of them have not paid any damage which the said farmers and ranchmen have sustained, as aforesaid, by reason of the operation of said Washoe Smelting Plant since the remodeling of same and the building of said large stack, and the said defendants have at all times and do now refuse to pay any damage which has resulted from the operation of said Washoe Smelting Plant since July, 1903.

"(18) That, prior to the acquiring by complainant of title to the aforesaid premises owned by him, the same had been farmed by complainant's pre-

ecessors in interest continuously since about the year 1866 or 1867. That the lands making up the said farm of complainant are not first-class farming lands in said valley, but are for the greatest part low, moist, and what is known as cold land, and are best adapted for raising wild and redtop hays, stock raising, and dairy purposes, and are not adapted to the raising of timothy or other cultivated hay or grain crops. And that the surface of said lands is irregular and rough, and a considerable portion thereof could not be irrigated, and crops could not be successfully raised thereon without irrigation. That large portions of said premises contain alkali in sufficient quantities to interfere with the successful growing of crops thereon. That said premises have been neglected and not properly farmed and cared for, and in part allowed to run down and to go to waste, and that a considerable portion thereof was plowed up and left without being seeded, and foxtail and other weeds have been permitted to thrive on the said premises, whereby said premises have become greatly depreciated in value.

"(19) That during and prior to the year 1901 the said premises of complainant were worth not to exceed the sum of \$8,000, and since the year 1901, by reason of the neglect and failure to care for the said place, and by reason of the improper farming done thereon, and by reason of the noxious arsenical emanations from said smelter being precipitated upon the hay, grass, and fodder crops grown on said land, the said premises have depreciated in value, and are not now of a value to exceed the sum of \$4,000.

"(20) That about the month of March, 1903, and for a long time prior thereto, the complainant in this case had been a resident of the city of Butte, county of Silver Bow, state of Montana, and had been engaged in the butchery and grocery business at said city. That, on account of the ill health of the said complainant, he became desirous of selling all of the property which he owned in the city of Butte, in order that he might remove from the state of Montana, and that, as part of the transaction by which the said complainant disposed of his property in the city of Butte, the complainant accepted the title to said premises in lieu of the sum of \$8,000, to be applied upon the general transfer of his said property. That at the time when complainant purchased the said property a contract of sale had been made between the predecessor in interest of said complainant, to wit, one Daniel James, and one John Smith, who was at that time in possession of the premises, and under and by virtue of which said agreement the said John Smith was to purchase the said ranch property at a stipulated sum. The said complainant Bliss entered into an agreement with the said John Smith, by which the terms and conditions or the contract of sale were changed so that the said Smith was to become the purchaser from the complainant of said property upon the payment to said complainant of the sum of \$5,000, and assuming the burden of a certain mortgage which had theretofore been given by the predecessor in interest of the complainant, secured by the said premises, in the sum of \$3,000. That, at the time when said complainant purchased and acquired title to the said property as aforesaid, it was the belief of the said complainant that he would be able to sell and dispose of the said property in accordance with the provisions of the contract of sale, which had been entered into with regard to the premises, and that in purchasing the said property the said complainant was moved to do so by his desire to sell his property in the city of Butte. That said complainant did not intend to live, and never has lived, upon the said premises, and that said complainant never did intend to and has not ever attempted to improve or cultivate or farm the same, or to raise any live stock thereon. That, prior to the time when the said complainant purchased and acquired title to the said premises, the said complainant knew that the farmers of the Deer Lodge Valley, including the occupant in possession of the said premises, had made complaints against the defendant companies because of the operation of said Washoe Smelting and Reduction Works.

"(21) That, in the latter part of the year 1904, an association of certain of the farmers and residents of the Deer Lodge Valley, aggregating about 100 in number, was formed for the purpose of procuring evidence and prosecuting claims and suits against the defendants in this action on account of the maintenance and operation of the said Washoe Smelter Plant, and that

one K. D. Smith, the owner of a ranch adjoining the said Bliss ranch, was elected, and acted as, and is still acting as, president of said association. That this action, while brought in the name of the complainant Bliss, was in fact brought by and mainly for the benefit of said Farmers' Association and the members thereof, and that the said Bliss is not, and has not at any time been, a member of said association, and is, so far as is shown by the evidence in this cause, the only person owning farming lands within the smoke affected portion of the Deer Lodge Valley, who was and is a non-resident of the state of Montana. That the said Farmers' Association has selected and presented the evidence in this action, and through assessments levied upon its different members has paid the expenses thereof (which in the preparation and prosecution of this action amounts to a sum in excess of \$40,000), and has controlled through a committee, appointed for that purpose, the action, and all steps and proceedings had therein. That the said Bliss, since the commencement of the action, has paid little or no attention thereto, has not procured or caused to be procured any of the evidence presented herein, has not paid or contributed any portion of the expenses of the same, and has not been familiar with and does not know the nature or character of the evidence presented on his behalf in this said suit. That in the year 1905, prior to the bringing of this action, the said complainant placed the control of the said premises in the hands of the said K. D. Smith, president of the said Farmers' Association, for rental purposes, and that the said premises have been controlled and used by the said K. D. Smith, and permitted so to be controlled and used by complainant, in the interest of said Farmers' Association in the prosecution of this action. That in the month of June, 1906, an offer to purchase complainant's premises hereinbefore described was made to him personally, and complainant asked to name a sum for which he would sell and convey the said premises; but the said complainant refused to name a price for his said property or negotiate in any manner for the sale thereof, giving as a reason for so doing the fact that this action was pending.

"(22) That, at the time of the location and erection of said old smelting works, the present site of the city of Anaconda was vacant and unoccupied land and used mainly for the purpose of grazing sheep and cattle. That in consequence of the construction of such works, and the employment of many men in and about the same, a village was founded which grew into the present city of Anaconda, which at the time of the commencement of this action had, and now has, a population of about 12,000. The growth of the city of Anaconda has been gradual, and has been almost entirely caused by the continued conduct of such smelting business. Practically the whole of the population of the city of Anaconda is dependent, directly or indirectly, for subsistence upon the continued operation of the said Washoe Smelter, and more than nine-tenths of the citizens of said city of Anaconda would be compelled to remove therefrom to obtain a livelihood if said smelter should be closed. The city of Anaconda is substantially and permanently built, and many hundreds of thousands of dollars have been expended in the construction of permanent homes by residents of said city, and in the erection of public and business buildings, and that the property owned by the residents and property owners in said city, exclusive of the defendants, in the year 1906, had an assessed valuation of \$3,300,000. The said homes were established and the said property investments made because of the presence and operation of the said smelting works at Anaconda and in reliance upon the continued operation thereof. That the city of Anaconda has furnished, since the year 1884, the principal market for the products of the Deer Lodge Valley, the hay, alfalfa, grain, vegetables, garden truck, live stock, dairy, and other products of said farms finding ready market since that time at good prices in said city of Anaconda. That, aside from the city of Anaconda, the only near market for any of the products of the said valley is the city of Butte, Silver Bow county, Mont.

"(23) That all of the construction in said Washoe Smelting Plant is of a permanent character, and consists largely in suitable excavations for the foundations of machinery, furnaces, and other appliances used in and about the smelting plant. That, if a more suitable or adaptable location could be

found for the building of said smelter, it would be necessary to construct thereto a railroad system for the purpose of conveying the ores from the mines at Butte, Mont., to the said smelter, and all of the foundations, masonry, construction, and 45 miles of railroad tracks in and about said smelting plant, amounting to many millions of dollars, would be absolutely worthless and destroyed. That the total salvage from said works which could be rescued from a dismantling of the said works would not amount to more than one-tenth of the total construction cost or value of said works, and would not be of the value of more than \$1,000,000. That, in addition to the financial loss which would be sustained, no site could be selected in the state of Montana which would present the same natural advantages for a smelting plant on account of the favorable grade from the mines at Butte to the point of smelting, the topographical features of the country at the works, which permits of the material being handled largely by gravity, and also on the account of the presence of large quantities of coal, water, and lime rock necessary in the economical and profitable operation of such a smelting plant. That, if the defendant companies were obliged to suspend operations in said smelting plant, it would be necessary to select a site at some distant or remote place from the mines which furnish the ore supply for the said smelter, and, on account of the low-grade character of the said ores mined and the increased cost of transportation and handling of such ores, the mining of a very large percentage of the ores now treated at the said smelting plant in the city of Anaconda could not be carried on. That, in the event of the selection of a suitable site for the continuance of said smelting operations, it would require not less than a period of five years, after such site had been selected and transportation facilities had been procured to convey the necessary construction material to such site, to construct such a plant and put the same in operation, and that in the meantime the mines in the city of Butte, which furnished the supply of ore for such reduction works, would have to suspend operations, and would be practically destroyed by reason of such suspension of operation. That the metallurgical processes by which the said ores are being reduced at the said Washoe Smelting Plant is the best process known to science for the obtaining of the valuable contents thereof, and is the only practical process that could be followed in the reduction of such ores; said process cannot be carried on without causing to be released and discharged into the atmosphere certain quantities of sulphur and arsenic; and that no known site exists in the state of Montana where such operation could be carried on with less damage and inconvenience to surrounding property and inhabitants than the present site of said reduction plant; and that, if it became necessary to remove and transport the said ores without the boundaries of the state of Montana, the increased cost of handling the said ores would be such that, because of their low grade character, over 90 per cent. of the same could not be mined or smelted at all.

"(24) That the ores treated at the Washoe Smelter are mainly mined in the vicinity of the city of Butte, and almost wholly from mines owned by the Anaconda Copper Mining Company, the Trenton Mining & Development Company, the Butte & Boston Consolidated Mining Company, the Parrot Silver & Copper Company, the Washoe Copper Company, the Red Metal Mining Company, and the North Butte Mining Company. In addition to the ores mined by these companies, some other ores are smelted for small operators mining at and in the vicinity of said city of Butte.

"(25) That the city of Butte has a population of over 70,000 people, or more than one-fifth of the entire population of the state of Montana, and has grown from a small mining camp with a population of a few hundred people, within the last 30 years; said growth being due almost entirely to the opening up and development of the copper mines of the above-named corporations. That practically the entire population of the city of Butte depends very largely directly or indirectly upon the continued operation of the said mines as their means of livelihood. That, in addition to the many thousands of persons employed in the mines aforesaid, a large number of persons have adopted different branches of industry in the city of Butte, practically all of which said business is dependent to a very large extent upon the continued operation of the said mines. That the said city of Butte is substantially built, and

about \$50,000,000 have been spent by the inhabitants of the city in the erection of permanent business buildings, residences, and public buildings in said city. That about two-thirds of all of the ores mined at Butte and vicinity are treated and reduced at the said Washoe Smelter, and that none of the companies or persons above named and referred to, the ores of which are being treated at said Washoe Plant, has any smelting or reduction plant where the same could be reduced other than at the Washoe Plant, and that, if the said plant should be closed, no means exists by which said ores could be treated, and the closing of said plant would necessarily cause the cessation of two-thirds of the mining operations carried on at said Butte City and vicinity, with a more than proportionate disastrous effect upon the property owners and inhabitants of said city, of whom by far the greatest number would be obliged to leave the city of Butte, and state of Montana, to find employment in their vocations elsewhere.

"(26) That, in addition to the foregoing, there is used in mining and smelting operations of the defendants large quantities of material, such as coal, coke, and lumber, which are supplied from other points than Butte or Anaconda, within the state of Montana, and the supplying of which furnishes employment to a large percentage of the population of the state of Montana, residing in such communities. That the average daily number of men employed directly by the mines shipping their ores to the said reduction works, during the year 1906, was 4,548 men; and the average number of men employed in the reduction works at Anaconda during the same time was 2,500 to 2,600. That, in addition to the foregoing, the railroads operating within the state of Montana derive a large proportion of their entire earnings from the freight handled directly in connection with the operations of the defendant companies, and indirectly in handling the freight shipped into and from the cities of Butte and Anaconda. That during the six months of the year 1906 ending June 30, 1906, the amount of money paid in wages to the men employed directly by the defendant companies and the companies shipping ores for treatment to said reduction works was the sum of \$5,045,582.57, or at the rate of about \$10,000,000 per annum. That the railroad freights paid during the six months of the year 1906 ending June 30th was the sum of \$1,415,890.35, or in an amount equal to approximately \$2,800,000 per year, exclusive of all freight paid upon the product of said reduction works. That the amount paid by said companies in carrying on said operations for material, such as coal, coke, and lumber, largely furnished from different points within the state of Montana, and elsewhere, amounts yearly to the sum of \$4,000,000. That, in addition to the investment of the defendant companies at Anaconda, the defendant companies have invested in necessary development and equipment of their mining properties in Butte the sum of approximately \$50,000,000, which would be entirely lost and destroyed in the event of a cessation of the smelting operations at Anaconda, as would also the values of the ores in reserve which have not as yet been mined, and which amount to an unestimated figure of many millions of dollars.

"(27) The said reduction works since the beginning of operations thereat in the year 1902 alone has expended in labor the sum of \$7,007,304.06; for coal, the sum of \$4,293,455.87; for coke, \$4,012,086.82; for lime rock, \$740,047.37; for machinery, \$1,316,029.83; for lumber, \$53,896.37. That from the time the said smelter began operations up to and including operations for the first six months of 1906 said reduction works has extracted from the ores treated there 590,947.365 pounds of copper, 25,898,554 ounces of silver, and 164,806 ounces of gold. That the copper produced at said smelter is used principally in the manufacture of electrical appliances and machinery and in the manufacture of brass, bronze, and other metals; and the said supply from said smelter has constituted during the various years which said smelter has been operated from 8.2 to 11.5 per cent. of the entire world's supply of copper, and from 17 per cent. to more than 20 per cent. of the entire supply of copper of the United States. That at the present time the demand for copper for use in manufacturing, industrial, and commercial pursuits is extremely great, and there are not now any known sources of copper in the world from which the deficit which would be caused by a suspension of the smelting plant at Anaconda could be supplied, as a result of which widespread distress and

inecnvenience would follow the cutting off of the supply of copper from such works, in addition to the general injury and damage which would be done the state of Montana in particular.

"(28) That the city of Anaconda is the county seat of the county of Deer Lodge, and the total assessed value of the real and personal property of the said county of Deer Lodge in the year 1904 was \$8,120,826. That of such amount the sum of \$4,058,573 was assessed against the property of the Washoe Copper Company and the Anaconda Copper Mining Company, defendants, within said county. That during the years from 1902 to 1906 the defendants in this action have paid upon their property in Deer Lodge county from 51.6 per cent. to 57.4 per cent. during each year of the total amount collected in taxes by said county of Deer Lodge in the respective years. That an injunction against the operation of the said smelting works as prayed for in the complaint herein would render all of said property so assessed, of the Anaconda Copper Mining Company and Washoe Copper Company, practically valueless, and would cause such a depreciation in other property now subject to assessment, with a corresponding reduction in the revenues of said county, that it would be impracticable and impossible to continue the county organization and county government of the county of Deer Lodge with such sums as might be raised by assessments upon property therein, and would result in an abandonment and disorganization of the county government. That the city of Butte is the county seat of the county of Silver Bow. That, of the total taxes collected by the county of Silver Bow for the year 1906, about 30 per cent. thereof was collected from the assessments levied upon the mines and net proceeds of mines, the ores of which are treated at the said Washoe Smelter, and which would be closed down by the closing of said smelter, and that the closing of said smelter would render practically all of said property valueless, and would cause such a depreciation of other property in Silver Bow county now subject to assessment that it might be impracticable and impossible to continue the county organization of the county of Silver Bow with such revenues as said county would be able to obtain, and might cause the disorganization and abandonment of said county government. That the county of Deer Lodge, since 1902, has paid about 6 per cent. of the total taxes collected by the state of Montana for state purposes, and the county of Silver Bow, during said period, about 25 per cent. of the total taxes collected by the state of Montana for state purposes, and that, if the injunction were granted as prayed for in the complaint herein, there would be such a depreciation in the amount of assessable property in said counties subject to assessment for state purposes as to materially impair the revenues of the state of Montana.

"(29) The closing down of the said smelting works at Anaconda would, by the destruction of its principal market, the city of Anaconda, work destruction and irreparable injury to the complainant, and to others owning property within the said Deer Lodge Valley and vicinity, which injury would result directly in the loss of the market for such products of such lands, and that the said lands would be very seriously depreciated in value by such closing, and that the damages which would be so sustained by the complainant and the other owners of such land would, with respect to the closing, be greatly in excess of the damage they would sustain by reason of the continuance of the said smelter as the same is now operated, and that the closing down of the Butte mines, which would be closed by the cessation of operations in said Washoe Smelter, would cause an irreparable injury to the farms of the Deer Lodge Valley by loss of their only remaining near market, and cause a consequent further reduction in the value of said lands.

"(30) That it was stipulated by the parties complainant and defendants, during the presentation of defendants' evidence, and it is therefore found as a fact, that the defendants in this cause are each of them solvent and able to pay and respond for all damages which have been or may be sustained to property from the operation of the said Washoe Smelter.

"(31) That the value of the matter in dispute in this suit exceeds the sum of \$2,000 exclusive of interest and costs."

Most of the findings of the master were approved by the court; they being departed from only to some extent in a few instances, as will be seen from the following excerpt from the opinion of the trial judge:

"The most important of the master's findings are: That the sulphur in the smoke from the smelter stack has caused no damage or injury to the crops on complainant's land since the remodeling of the Washoe Smelter in 1903; but that arsenic was deposited at times upon complainant's farm in a way to injure the fodders grown thereon; that live stock was poisoned from the effects thereof, and that a portion of the Deer Lodge Valley was less valuable for stock raising and grazing purposes than it otherwise would be, by reason of the operation of the smelter; that the complainant, Bliss, has suffered special damage in the sum of \$350, in the depreciation of the rental value of his land; that the farmers in the Deer Lodge Valley constitute a neighborhood; that arsenical fumes emitted by the smelter more or less injuriously affect all hay, grass, and fodder in the neighborhood; that, if the smelter continues as now operated, the future crops will be more or less poisoned, and the live stock will be sickened; but that, if the smelter should close, the effect of the poisonous matter would cease; that there has been no injury to the soil of any permanent character; that in 1901 complainant's land was worth not to exceed \$8,000, and at the time of the suit it was worth not to exceed \$4,000, because of the improper farming done, and because of the injury from the arsenical emanations from the smelter. He finds that in 1904 the farmers of Deer Lodge Valley formed themselves into an association to procure evidence and prosecute claims and suits against the defendants on account of the maintenance and operation of the smelter; that this suit was brought mainly for the benefit of the Farmers' Association; that Bliss himself was not a member thereof; and that the control of this action has been exercised by Smith, president of the Farmers' Association, in the interest of the association. The findings set forth that the present processes used at the Washoe Smelter are the only practical ones that can be followed in the reduction of the ores treated; that there is no site in Montana that could be selected where operations could be carried on with less damage and inconvenience; that the mines in Butte have their ores smelted principally at the Washoe Smelter; that, if the smelter were to close, two-thirds of the mining operations in Butte would stop; that irreparable injury would be done to the complainant and others owning land in Deer Lodge Valley, because of the loss of markets for the products of their lands; that the value of their lands would be depreciated; and that the damage which would accrue to them would be greatly in excess of the damage they would sustain by reason of the continuance of the smelter as it is now operated.

"Thereafter counsel for complainant and for defendants, respectively, filed exceptions and objections to the findings and report of the master. The exceptions amounted, in substance, to this: That some of the findings of fact were against the weight of evidence; that some were not supported by the evidence; that the findings were defective in not covering certain issues; and that some were upon immaterial and irrelevant issues.

"The case, having been referred to the master without the consent of the parties, is conceded to be one where the findings reported are merely advisory, and where the court may adopt the information communicated by the master's findings upon the evidence and may accept the same or disregard it, in whole or in part, according to its judgment, as to the weight of evidence. Such is the rule as declared by the Supreme Court in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, and as recognized by this court when it denied this complainant's motion for an order to require the master to file his findings of fact without setting a time to receive exceptions to his report. *Bliss v. Anaconda Copper Mining Co. et al.* (C. C.) 156 Fed. 309.

"Having accepted the view, therefore, that the case is for final decision upon the pleadings and proofs, counsel for the respective parties in their elaborate and able arguments have addressed themselves to the whole record, referring, however, to many of the findings of the master as correct and acceptable to both sides, yet alluding to others as foundation aids only upon the issues involved, not casting the burden upon either of the parties in their exceptions, and not, like the findings of an independent tribunal, to be taken as presumptively correct, only to be disturbed where clearly in conflict with the weight of the evidence upon which they were made.

"These considerations are the law applicable to the method of approaching the investigation of the record. The learned master himself took this view of the effect of the reference; and it is just to him to say that his work has been of such a helpful character that counsel, throughout their arguments, have recognized the vast amount of painstaking study which he has evidently given to the testimony, and have accorded to his findings the most respectful attention.

"Two hundred and thirty-seven witnesses testified. The evidence covered a very wide scope, reaching out, not only to the substantive question whether the single complainant, Bliss, has suffered special injury because of the smelter fumes blowing over his land, but whether, as a truth, because of the fumes blowing over the farms of others, injury has been done, and the Washoe Smelter is a public nuisance, as defined by the law.

"Farmers and stock raisers from within the neighborhood of the Deer Lodge Valley gave evidence as to what they observed or knew, and scientists of the widest experience advanced their views in the general and technical diseases of live stock, and in agriculture, chemistry in its various technical branches, toxicology, pathology, pathological histology, anatomy, botany, bacteriology, zoölogy, mineralogy, metallurgy, and in forestry.

Exhaustive examinations of each technical expert followed careful special study and preparation in the particular subject testified to, and nearly every assertion claimed to rest upon scientific learning and research was challenged by cross-examination and disputed by experts produced upon the opposite side. Under the circumstances, we can well understand that jealous regard which many of them observed for nicety of distinction, and why, too, a number of them were exceedingly cautious in declining to give opinions which called for expert knowledge one whit outside the technique of their respective specialties. Among the expert witnesses who testified may be mentioned: Prof. Joseph Blankenship, of the Agricultural College of Montana; Prof. Charles A. Doremus, of New York; Prof. M. J. Elrod, of the University of Montana; Dr. Robert J. Formad, of the United States Bureau of Animal Industry; Prof. W. D. Harkins, of the University of Montana; Dr. M. E. Knowles, State Veterinarian of Montana; Dr. Duncan McNab McEachran, of the Canadian government veterinarian service; Dr. V. A. Moore, of Cornell University; Dr. Leonard Pearson, of the University of Pennsylvania and State Veterinarian of Pennsylvania; Dr. D. E. Salmon, formerly head of United States Bureau of Animal Industry; Dr. Harry Snyder, of the University of Minnesota; Dr. Ralph E. Smith, of the University of California; Dr. Theobald Smith, of Harvard University; Dr. R. E. Swain, of Leland Stanford, Jr., University; and Prof. F. W. Traphagen, of the Colorado School of Mines.

"Exhibits, more than 800 in number accompany the record. There are numerous specimens of bones, animal tissue, consisting, in part, of stomachs, noses, sections of arteries, livers, kidneys, etc.; flue dust; or normal and abnormal plant life of the Deer Lodge Valley; and of portions of trees and shrubs; while hundreds of photographs were used to illustrate varieties of conditions relevant to the issues.

"To enter upon a detailed statement of the testimony, which alone covers over 25,000 pages, would be to extend this opinion far beyond what is necessary. It would require copious extracts from the direct and cross examinations of many witnesses. Conflicts of reason would have to be set forth, apparent and real inconsistencies would have to be pointed out at length, and the train of reasoning which formed the bases for the seriously conflicting conclusions, and sometimes irreconcilable difference of opinion among scientific witnesses, could only be well and fairly set forth by lengthy and exact quotations from the elaborate, technical explanations. Therefore, to reduce the facts directly to as brief a statement as the record reasonably justifies, I have thought it proper to adopt the substance of those findings of the master which have not been excepted to, and in a narrative way of my own simply to state the case and to comment thereon as the weight of evidence warrants.

"The Deer Lodge Valley in Montana, where complainant's lands are situated, lies north and west from Butte, and northerly and easterly from Ana-

conda. The valley is high (over 5,000 feet in altitude), between two ranges of the Rocky Mountains. It is generally regarded as extending from the Northern Pacific Railroad, near Garrison, southerly toward Butte for a distance of about 40 miles. Its average width is about 10 miles. The mountains about the valley have been extensively exploited by prospectors and miners. Settlements were made as far back as 1864, and during the years thereafter ranches were taken up by stockmen and farmers, so that now the valley is quite well settled; many farmers owning lands and homes therein. In the earlier days stock raising was the principal occupation of the ranchmen, but from 1880 on, as settlement increased, the ranges became poorer, fences became more common, larger herds of range stock were driven out to more open ranges, and, in a great measure, since about 1881, diversified farming has superseded stock raising. The valley is quite well watered, and is generally adapted to dairying and stock farming, and to the growing of hay, grain, alfalfa, and such garden produce as grows in the mountain valleys of this latitude. The city of Anaconda is in the southwesterly part of the valley upon Warm Springs creek, a mountain stream, that flows into the Deer Lodge river. The Washoe Smelter, which is said to be the cause of injury to complainant and others, stands on a slope of the mountains west of the valley, a mile and a half southeast of the city of Anaconda.

"In 1883 and 1884, a corporation styled the Anaconda Mining Company, not a defendant, operated a smelter near to the site of the Washoe Smelter. The Anaconda Mining Company owned valuable properties in the vicinity of Butte, about 30 miles distant from Anaconda, and was working and developing mining claims, which produced large quantities of low-grade ores, only capable of successful treatment by reduction works. These ores were in large part of such a character that in order to reduce the same, and extract the metal contents thereof, it was necessary to concentrate the same by the use of large quantities of water. It being deemed necessary for the Anaconda Mining Company to construct reduction works, extensive investigations were made by its agents for the purpose of fixing points where sufficient water could be obtained, and other natural facilities afforded for the operation of such proposed works, and a place near where the city of Anaconda now stands was chosen as the best site.

"The Anaconda Mining Company, without objection on the part of any one, proceeded to construct its smelting works, and expended in connection therewith several millions of dollars. In 1884, when the works were completed, the company began to treat, and did treat, down to the year 1895, thousands of tons of ore per day. The works of the said company were located upon the north bank of Warm Springs creek, at a point one mile in a northerly direction from the present Washoe Smelter, and are spoken of throughout the testimony of the witnesses as the 'Old Works,' in contradistinction to the Washoe Smelter. Between 1884 and 1895, the Anaconda Mining Company operated the works, but in 1895 transfer of the property was made by the Anaconda Mining Company to the Anaconda Copper Mining Company, a defendant herein.

"Thereafter it was determined by the defendants to construct a new smelting plant upon more modern and economical lines than the old works had been constructed upon, for the purpose of reducing the ores mined by the defendant companies and other mining companies at Butte. Investigation was had, and the present site of the Washoe Smelter was chosen as being the most available and suitable within Montana, and the Washoe Smelter was constructed by the Washoe Copper Company, defendant, for the purpose of taking the place of the old works, heretofore referred to. The Anaconda Copper Mining Company transferred its smelting operations to the Washoe Smelter, and thereafter demolished the old works, and at the time of the hearing of the testimony in this suit had no other available means of smelting or reducing the ores then being treated and smelted by it than the Washoe Smelter. Several years were consumed in erecting the Washoe Smelter, and about \$9,500,000 expended in its construction. The ores treated and smelted at Anaconda since 1884 are sulphide copper ores, containing large quantities of sulphur and arsenic, quantities of which substances, in various forms during the processes of smelting, have been and are being released and dis-

charged into the atmosphere, and disseminated by the changing air currents over various and indeterminate areas of territory. About 7,000 tons of such ores are being treated each day at the Washoe Smelter.

"Between February and September, 1903, the defendants remodeled the Washoe Smelting Plant. Before the remodeling, the sulphur and arsenic fumes had been carried out into the atmosphere by means of four chimneys, each of which was about 225 feet in height, and constructed on a level approximately with the smelting plant; but, in the remodeled construction, defendants built a large brick stack, and connected the same by means of flues with the smelting plant. Prior to 1902 there never was any complaint by farmers or property owners that there was any damage being done by the smelter fumes.

"Between February, 1902, and February, 1903, when the construction of the new flues and stack was commenced, many of the farmers of the Deer Lodge Valley complained that such quantities of sulphur and arsenic were discharged into the air through the several smokestacks, with which the smelting plant was then being operated, that the crops and live stock in the valley were being poisoned and injuriously affected, to the great damage of the owners. Claims for damages on account of such poisoning, aggregating several hundreds of thousands of dollars, were presented by the farmers to the defendant Anaconda Copper Mining Company. The company's representatives investigated the matter, and reported that damage was being done to the farmers, whereupon the defendant Anaconda Copper Mining Company made settlements and paid out to different persons sums amounting in all to more than \$330,000. The company, intending, as far as possible, to prevent any further damage, and any further claims for damage, had investigations made to determine methods and means by which the noxious substances emanating from the ores in smelting could be caught and retained from the gases and smoke, and that the remainder might be so scattered and disseminated as to cause no damage, if possible. As a result of such investigations, it was determined that the best way to accomplish the purpose was to construct large flues with dust chambers to collect the solid particles, so far as possible, from the smoke, and to erect a high stack upon an elevation at some distance from the smelting plant, in order that the fumes escaping into the atmosphere might be discharged at as high an elevation as possible, and thus become widely disseminated and diluted before coming in contact with any of the soil in the valley.

"In order to carry out the results reached through the investigations, the use of the old smokestacks at the smelting plant was discontinued, and the defendant companies began to build a large stack, and to construct enormous flues to connect the stack with the various portions of the smelting plant wherein gases and other emanations were created in the operation of reducing the ores treated. In the execution of the plans, an elevated point was chosen as the site for the chimney, and a new chimney was put up, 300 feet above base, and at an elevation of about 1,100 feet above the Deer Lodge Valley proper. The diameter of the chimney at its base is 31 feet and 6 inches, and its diameter at the top 30 feet inside. The chimney is connected with the smelting plant proper by a double system of flues running from the base toward the smelting plant for a distance of about 1,000 feet. These double flues are connected with the chimney at opposite sides, at the base of the stack, and are constructed partly by excavating cuts in the hill, lining the same with brick, and by arched overhead construction, and are 60 feet in width and about 35 feet in height. At the end of the 1,000 feet of construction of double flues, and connected therewith, is a single flue, which is 60 feet in width and 35 feet in height. The single flue is about 1,300 feet long, and at the end farthest from the stack is connected with separate flues and dust chambers, running to what are known as the reverberatory, the roaster building, the blast furnaces, and the converter plant, respectively; these being the several plants in which all the gases and emanations from the smelting operations are produced. Under the main flue and the double flues, tunnels have been excavated, through which cars run, and the flue dust catching capacity of these large flues remains practically unimpaired.

"The respective plants in which the gases and fumes are generated are

connected with this large flue by dust chambers and separate flues, which are of the following dimensions: A blast furnace chamber 250 feet long by 40 feet in height, by 40 feet in width; a roaster dust chamber 290 feet long, 40 feet in height, by 40 feet in width; a converter dust chamber 260 feet long by 40 feet in height and 40 feet in width; a reverberatory dust chamber of the same dimensions as the blast furnace flue. All of the smoke and gases and other emanations from the smelting plant pass through these various dust chambers and flues up to the main stack, and go to the top of the stack, and thence into the atmosphere.

"There is a dust catcher at the rear of the blast furnace building, the McDougall building, and the converter building, its purpose being to remove the dust from the smoke, the dust being removed for its valuable metal contents, and to prevent its going out to do damage to land.

"The company also constructed an arsenic plant adjacent to the large flue, containing three furnaces, with a capacity of about 10 tons each, for treating arsenic, for the purpose of separating the arsenic which collects and settles in the main part of the flue from a portion of the flue dust before the flue dust is returned for treatment to the smelting plant.

"Arsenic is a by-product of the ores treated for commercial purposes. The portion of the dust which is high, about 90 per cent. in arsenic, goes to the arsenic plant, and as much as 2 tons a day is collected and sold for commercial purposes. The portion of the dust not treated for arsenic, approximately 160 tons daily, goes directly back to the reverberatory smelting furnaces in the form of flue dust and is treated for the extraction of copper, silver, and gold. Some of the arsenic found in the ores treated in the blast furnaces and roasters goes out in slag, and part in volatile substances that is left in the smoke goes up the chimney and out into the air.

"The only possible conclusion from the evidence is that, as a result of these briefly described improvements, the defendants built their plant in accordance with the best-known methods and processes for accomplishing the purposes intended, and that the endeavor of the defendants has been, through these methods, to render the smoke, fumes, and emanations from the smelter harmless. Furthermore, as the case is submitted, the evidence discloses that the steps taken by the defendants are far greater and more extensive in character than those taken by any other copper smelter, and that the effect of the remodeling of the plant and the use of the flues, dust chambers, and stack described has been to prevent and to discontinue, proportionally to the ore treated, the discharge into the atmosphere of much of the dust containing the noxious substances complained of, which, before the improvements, had been discharged into the air from the smokestacks of the plant; and that a resulting effect has been that the fumes and whatever dust the same contains, which was not removed therefrom, have been disseminated and scattered by air currents at a great height over a large area of country, thus rendering less harmful in proportion to the ores treated the smoke, fumes, and emanations from the plant than was the case before the improvements were made.

"Profs. Swain and Harkins, expert chemists, made some experiments by Pitot tubes, introduced for 10 hours into the big stack 50 feet above the base, to ascertain the volume of smoke thrown out from the stack every 24 hours, and the milligrams of arsenious oxide contained in one cubic foot of the smoke. But Prof. Swain stated, in substance, that it was impossible to carry out the experiments as attempted by him, without introducing some errors, and that the slightest mistake in the chemical analyses in trying to arrive at the amount of arsenic would be multiplied by millions and millions. So much depended, too, in the experiments, not only upon accuracy in obtaining velocity and the ratio of volume of the sample taken to the total volume going out of the stack, but also upon the character of ore treated and upon the temperature and other conditions at the very time of the experiments, that the court is not warranted in saying what was the exact volume of gas, and what its correct analysis is; and, as the case develops, it does not become of great importance.

"At this point we may well turn to the evidence concerning complainant's relation to the case. He owns 320 acres of land about five miles east-

erly from the Washoe Smelter. Before he acquired his farm it had been occupied and cultivated by his predecessors in interest since about the year 1866 or 1867. The lands of complainant's farm are not of the best class of lands in the Deer Lodge Valley. They are known as cold lands; are in part low, and moist and partly contain alkali; are best fitted for raising wild and redtop hays, for stock grazing and for dairy purposes; and are not very well adapted for crops of timothy or other cultivated hay or grain. Moreover, the complainant has not taken good care of his premises, but has permitted them to run down, and has allowed a part of the land to remain without seeding, so that foxtail and other weeds have been allowed to grow, to the substantial depreciation of the value of the land.

"Mr. Bliss acquired his farm in this way: About March, 1903, while he was in business in Butte, his health was not good, and he desired to leave the state of Montana. In making business arrangements looking to that end, he accepted title to the farm in Deer Lodge county, in lieu of the sum of \$8,000 to be applied upon the general transfer of his property. When he bought the farm, a contract of sale had been made between his predecessor in interest and the complainant, a man named Daniel James and one John Smith, who was at that time in possession of the farm, and who had used it for pasture purposes, under and by virtue of which said contract the said Smith was to purchase the ranch at a stipulated sum. The complainant, Bliss, entered into an agreement with Smith, by which the terms and conditions of the contract of sale were changed, so that Smith, instead of becoming a purchaser from James, was to become a purchaser from complainant, upon payment to the complainant of \$5,000, and assuming the burden of a certain mortgage which had theretofore been given by the predecessor in interest of the complainant, secured by the said premises, in the sum of \$3,000. It was in this way that the valuation of \$8,000 was put upon complainant's farm. The valuation, however, was a fair one in 1903, though since then the value has fallen to about \$4,280. The investment in the farm was made by complainant under the belief that he would be able to sell it in accordance with the provisions of the contract of sale which had been entered into with respect to the property. It was not Mr. Bliss' intention to live upon the place. He never has lived upon it, and never has attempted to improve or cultivate or farm it, or to raise any live stock upon it. Moreover, he knew when he bought that the farmers in the Deer Lodge Valley, including the occupant in possession of the farm, had made complaint against the defendant companies, on account of the Washoe Smelting and Reduction Works.

"Reverting to the value of the Bliss land: Inasmuch as complainant, in 1904, rented the ranch to K. D. Smith for \$750, and the making of some improvements worth about \$200, the rental value of that year was practically 12 per cent. of the then value of the land. Estimating 12 per cent. of the value as a fair rental, if it had not been damaged through any cause, complainant ought to have received \$950 rental in 1905; whereas, the best offer he had in that year was \$500 a year for a two or three year lease. This offer represented 12 per cent. of approximately \$4,200, which sum is therefore a just estimate of the value of the place in 1905 and 1906 and 1907. From these figures it is shown that the depreciation in value of the land was \$3,800, and in rental value \$450 per annum, or a total of \$900 for 1905 and 1906.

"It is very hard to reach a satisfactory conclusion as to the principal special causes for the depreciation in value of complainant's land. Farmers who have known the land for 30 years differ radically; some ascribing the deterioration to poison of fodders by smelter fumes, and consequent danger to live stock and to crops, while others say that the value is reduced because in 1902, 1903, and 1904 the natural hay meadow was plowed and never seeded thereafter; that the land has been neglected, has much alkali, is injured by sunflowers, foxtail, and other weeds; and that there has been no injury at all to the pasture or to animal life thereon by the smelter smoke. The experts also disagree in most positive terms as to the condition of the fodder and the soil. But, after considering the evidence concerning some of the live stock that fed upon the pastures of the ranches in the immediate

vicinity of the Bliss place, together with that bearing upon the condition of some of the animals that were upon the pasture in the Bliss ranch itself, my opinion concurs with the master's in finding that both of the causes ascribed—lack of proper farming and smelter fumes—existed and contributed more or less to the lessened value.

"The fact is deducible, though, that the lesser injury was done by the smelter, and for these reasons: As heretofore stated, when Mr. Bliss bought his land, its principal value was for dairying purposes. It is entirely certain, too, that thereafter, in 1905, while he owned the place, the offer to rent that he received was made by a man who wanted it for a dairy. Now if it were true that the cattle and horses of the dairymen who might rent would be exposed to poison in eating the grass in the pastures, and to the consequent sickness, falling off of milk production, loss of calves, and other effects of ingesting grass or hay that has been poisoned with arsenic, we naturally inquire why it was that Boone, who knew all the conditions that existed about the place in 1904, and whose good faith in offering to rent from Mr. Bliss was beyond question, wanted to rent the farm for dairying purposes and was willing to pay \$500 a year rental for several years. The answer would seem to be a simple one, in the light of ordinary human experience. Common knowledge tells us that the last place a dairyman would seek would be a farm where cattle would be exposed daily to the peril of poison from arsenic in the pasture where they would feed; while, on the other hand, there would be nothing unusual in his taking a farm adapted for pasture and dairy purposes if the only objection was that it had been badly cultivated, or was unsuited for general agriculture. Thus we are irresistibly forced to the conviction that as a fact, viewed from the standpoint of an experienced dairyman, the injury to Mr. Bliss' pasture from arsenic was not of the most serious character; and hence it follows that the larger depreciation must be attributed to some cause other than injury from poisoned fodders.

"And in support of this there is further evidence of telling force: A dairyman named Sweeney, of years of experience in Minnesota and Montana, who also knew the Bliss ranch well, rented part of it, in 1905, from Mr. K. D. Smith, president of the Farmers' Association, and agent of Mr. Bliss. The dairyman testified that he had 68 head of cattle on the Bliss ranch; that they did well; that every milk cow had a calf; that the calves were the 'finest' he had had since he had lived in the valley; that his 60 milk cows gave a general average of $2\frac{1}{2}$ gallons of milk a day, per cow; that the cattle ran in the pasture; that he had lived near the Bliss place since 1903, when the new stack was operated, and had not been injured in any way by smoke; and that he had made money in his business until March, 1906, when he had sold his cattle at \$40 a head to another dairyman named Verlaine, who lived upon an adjoining ranch.

"But, furthermore, Wolfe, a dairyman who was called by the complainant, and who had rented the northern part of the Bliss ranch from Smith, agent, in 1906, admitted that his 24 cows on the Bliss place gave an average quantity of $2\frac{1}{2}$ gallons of milk a day for each cow. He said that he took them up to the stables in the fall, and that he fed them meal and some alfalfa which was raised upon a ranch only a mile away from the Bliss ranch, and that he had lost one calf, which was sick when he went to the place, and one after he went there, and that two of his cows aborted after he went there. It is in evidence that the calf that died after he was on the place had white scours caused by feeding upon sour milk. Still further: Another dairyman named Blaine, who, like the others, concerning whom mention has been made, was familiar with the conditions and locality, and he went to the Bliss ranch in June, 1906; that Wolfe's cattle looked well; that Wolfe wanted \$60 a head for them; that he (Blaine) agreed to buy the cattle from Wolfe at \$55 per head, and tried to rent the Bliss place for dairying; but that Mr. Smith, president of the Farmers' Association, ordered him off the ranch and prevented the consummation of his plans.

"In the light of this evidence, how can the court find that there was very serious injury done to the fodders on the place by arsenic? Much less, too, can a conclusion be reached apportioning the damages.

"No summary of the facts would be complete without reference to the attitude of many of the farmers of Deer Lodge county. Some time during the latter part of 1904, about 100 (approximately one-half) of the farmers and residents of that part of the Deer Lodge Valley, called by complainant the 'Smoke Zone,' adjacent to the city of Anaconda, representing an ownership of over 50,000 acres of land, formed an association for the purpose of procuring evidence and prosecuting claims and suits against the defendants in this action, on account of the maintenance and operation of the Washoe Smelter. Mr. K. D. Smith, who owned the ranch adjoining complainant's place, was elected president, and ever since 1904 has acted as the head of said association. Bliss, this complainant, is not and never has been a member of the said Farmers' Association, and appears to be the only nonresident owning farming lands in the so-called 'Smoke Zone.' Although he is the sole complainant herein, the suit has been prosecuted mainly for the benefit of the members of the Farmers' Association. It appears that, before the present suit was instituted, the farmers, seeking settlement for damage claims, wrote to the representatives of the defendant Anaconda Copper Mining Company. The company, through its agent, replied, asking the Farmers' Association to specify by bill of particulars the damages claimed by each and every farmer who felt that his property had been injured by the smelter fumes. To this letter the Farmers' Association replied at length, demanding cash purchase of their lands before May 1, 1905, in the following language (*italics mine*):

"Anaconda, Montana, March 4, 1905.

"Anaconda Copper Mining Company, Anaconda, Montana—Gentlemen: The Deer Lodge Valley Farmers' Association, consisting of 107 members, representing over ninety per cent. of the lands and property of the Deer Lodge Valley, comprising practically all of Deer Lodge county and the southerly portion of Powell county, did on February 21, 1905, call a meeting of said association to be held at the Willow Glen schoolhouse in Deer Lodge county, at which nearly all the members of the said association were present. The undersigned committee, consisting of nine members, were duly elected by said meeting for the purpose of receiving all claims for damages resulting from the operation of your smelting plant, known as the Washoe Smelter.

"At said meeting it was understood by all the members of said association that they would present their claims for the lowest cash settlement which they would be willing to consider by way of compromise for all of said damages and that said committee should be empowered to exclude any unjust claim or claims for damages, as well as reduce the amount of any claims which would be considered too high after an investigation by said committee. * * *

"The claims which the committee approved are presented for settlement after a very careful investigation, and, as the committee was selected from all portions of the valley, the committee were in a position to pass on most of these claims from personal knowledge of the property of the claimants. In fixing the damage, if any part or portion appeared unjust or was in doubt, the committee eliminated that part or portion of such claim. It would therefore follow that the committee would not care to consider any counter proposition from your company on approved claims.

"As to the claims which are presented without recommendation, if your company does not see its way clear to adjust them on the basis on which they are presented, you are at liberty to enter into personal negotiations with these claimants. These personal negotiations, however, and the delay arising therefrom, shall not in any manner interfere with the association from filing suits in equity and bringing actions at law for damages, it being the sense of the association, as expressed through the committee, that unless an early settlement can be reached, that suits in equity will be filed and actions at law commenced, which would not prevent a settlement unless the company should consider such action on the part of the farmers to be a withdrawal of the offer of compromise. No suits of any character will be filed before the 7th day of April, 1905, but from that date it will be optional with the members of the association to institute legal proceedings unless the

company has signified, through its proper officers, acceptance of the settlements proposed.

"Claims have been presented for damages aggregating \$2,300,000.00 as the damages actually sustained by members of this association. These claims have been reduced to about \$1,750,000.00 and for this amount the committee has instructed suit to be brought in the individual names of the parties, unless a settlement is reached.

"The cause of this reduction has been owing to the fact that the company settled with most of the farmers two years ago for personal damages; that claims for damages to crops and personal property have been eliminated except for the past two years, excepting in three instances, which are N. J. Bielenberg, Quinlan Bros., and August De Rosier. These claims have been included for a greater period than two years for the reason that no settlement was reached between these parties and the companies two years ago. The farmers, however, contend, after having been advised by counsel, that five years is the statutory period in which actions for damages of this character can be maintained. Whether or not the company will accept this contention will be immaterial, for the reason that all claims except the three mentioned have been restricted to the two year period.

"All unjust, inequitable and slight claims for damages have been rejected. This also accounts for the difference between \$2,300,000.00 and \$1,750,000.00.

"When the farmers were called upon to place the lowest cash valuation of the damages which they had sustained, they presented to your committee damages aggregating \$1,536,876.00. Your committee after careful and thorough investigation reduced these claims to \$1,120,731.00 approved claims, and \$127,979.50 claims to be submitted without recommendation. It is understood and agreed that if the company makes settlement of these claims as presented, this includes title to all of this property, including land, water rights and improvements, and that the farmers will surrender possession of these properties not later than November 1, 1905, provided settlements are made and money paid on or before May 1, 1905.

"The real property damage included in this settlement consists of 60,525 acres of patented lands, together with all water rights and improvements, all being under fence, and generally all improved farms, for which is demanded the sum of \$918,147.00, which insures the company title to all of these lands, water rights and improvements for the sum of 17 cents per acre. The committee also suggests that if a settlement can be reached, that the company shall be allowed in every instance to withhold whatever amount of money may be necessary to perfect title or remove liens or incumbrances. That in a few instances, some of the farmers have indicated that if the company would deed back the land and improvements, they would be willing to allow a certain stated amount by way of reduction in the amount presented, if allowed to keep the property.

"Almost all of the claims for personal property damaged were rejected, as nearly all the stock were settled for two years ago, and the committee refused to allow any damages except on new stock which has been brought into the Deer Lodge Valley since the settlement. In place of any new stock having been brought in, nearly all of the stock has been removed from the valley, owing to the general sickness and death of the stock.

"The committee also desires that no settlement be made with the individual members of the association, and that in the event of a settlement that the same be made through the Daly Bank & Trust Company, of Anaconda, Montana, through the committee of farmers, as certain advances, attorney fees and expenses had been incurred which it would be impracticable to collect if individual settlements were made in the absence of any member or members of the committee: * * *

"The farmers are anxious to have an early disposition of the matter on the part of the company, as they will attempt to protect the coming crop provided settlements cannot be made.

"The committee by way of explanation, desires to call the attention of the company to the fact that the farmers have not presented their claims for damages since the settlement two years ago up to the present time, for the reason that when said settlement was made, the company promised and

the farmers believed that the construction of a large stack would prevent further injury and the farmers decided to wait until they became fully satisfied as to what would be the result of the operation of the smelter after the construction of a large stack. It has now become apparent to the farmers of Deer Lodge Valley that stock raising and farming cannot exist there so long as the smelter is being operated on its present large extensive scale, and treating the class and character of ores which are produced by the mines of Butte. The farmers also feel that, having settled in the valley long prior to the smelting plant, they have prior rights which the smelting interests are bound to respect, and which should be taken into careful consideration by your company in attempting to reach an amicable settlement.

"The members of the association and the committee have kept constantly in view the fact that the company, in operating its smelter, has at all times used the latest and most improved methods for smelting, and that the damages which have arisen have been the natural and usual result of the smelting operations. That the company two years ago made prompt settlement of the damages which had been occasioned by the operation of the smelter; that the company immediately thereafter spent a large sum of money in good faith in attempting to avoid further damages to the farmers of Deer Lodge Valley. The farmers have at all times been anxious to remain on good terms with the smelting interests, fully realizing the importance of the mining industry to the state of Montana, and that mining cannot be conducted without smelting and the conducting of smelting plants, and that there is not a single farmer who is a member of this association who is desirous of in any manner interfering with the operations by the company of its mining properties or its smelting plant, until it becomes apparent that the company intends to continue its smelting operations without regard to the total destruction of the stock raising and farming interests of the Deer Lodge Valley.

"Acting in view of these important considerations, the committee has felt that the farmers should stand at least one-third of the entire loss accruing to them by reason of the operation of your smelting plant, in order that an amicable settlement between the farming interests and the smelting interests may be reached. It has therefore been the effort of the committee in adjusting these claims to present them at approximately two-thirds of the damages sustained, and not to approve a claim where the individuals would not submit to the one-third reduction."

"This letter was signed by nine persons, as members of a committee of the Farmers' Association.

"The defendants appear to have made no reply at all to this demand, and this suit was instituted on May 4, 1905. It does not appear that any action at law has ever been filed by complainant, or that any judgments for damages have been obtained by any members of the Farmers' Association, though two or three suits are pending for damages claimed to have been done before the new stack was built. It is a circumstance that, although no member of the Farmers' Association is a party to this suit, yet the association has been directly responsible for the presentation of the evidence, and through assessments levied upon its different members has raised funds through a committee. Bliss, the complainant, prior to bringing this suit, put his farm in the hands of Mr. Smith, president of the Farmers' Association, for rental purposes, appears to have paid little attention to the matter, and has not contributed any portion of the expenses of conducting the same, except the rent of his ranch which was turned over to his counsel. He has really given control to the Farmers' Association, in the interest of prosecuting this suit, and has allowed his name to be used to try a 'test case,' admitting that he is the person through whom the other farmers are trying to establish their contentions.

"Mr. Bliss himself refused to consider an offer of purchase made to him in June, 1906, by an agent of the defendant, having given as a reason for such action the pendency of this suit, and that he had yielded management of his place to Mr. K. D. Smith, and to Mr. Clinton, who was counsel for the Farmers' Association.

"Now, inasmuch as we have ascertained that some damage, the amount of which is not susceptible of correct ascertainment from the evidence, has been done to the complainant's farm by the operation of the Washoe Smelter, attention is next appropriately addressed to what, if any, abnormal conditions existed in the Deer Lodge Valley before the evidence in the present suit was submitted, which are due to acts of these defendants? It is established that there was more or less spotting on the vegetation, caused by the smoke from the stack. The spotting is explained by one of the expert botanists as due to the dropping of substances in the smoke stream on the vegetation, which kill the immediate section they fall upon. Technical botanists disagree radically as to the extent of the area so spotted; some called by defendants confining it to within five miles of the stack, while those called by complainant say it was observable as far away as 13 miles northwesternly. By the botanical evidence, including the exhibits, it is made apparent how very difficult to distinguish between the spotting of vegetation by sulphur and certain other injuries, for instance, alkali, sun scald, insect, hail, or fungus growth. To one unskilled in technical plant life, the only way to resolve the divergent views of the scientists is to form an opinion of the existing conditions, as they actually appeared to intelligent, practical farmers and dairymen, and as practical agricultural results may reflect upon the matter, and then to consider and correlate the scientific evidence to such conditions. This I have done with great care, and my best judgment is that there has been no substantial injury done to Mr. Bliss' land, or to the crops thereon, by the sulphur discharged into the atmosphere since the big stack was built, and that there has been no general, substantial, harmful effect from the smoke upon the quantity of the crops produced upon the Bliss or other lands, and that no permanent injury has been done to complainant's or other lands in the valley. There was evidence showing past injuries to coniferous timber on the hills back of the smelter, and it was made quite clear that damage is now being done in the hills right back of the smelter along Mill creek, where the smoke spreads through a draw, the bottom of which approaches the level of the top of the chimney. But, apart from this special damage in this immediate vicinity, the weight of the evidence is to the effect that the principal damage to timber was done before the new stack was operated—some by fumes, and some, which is attributed to smoke, was done by fires at different times in years gone by.

"Let us now briefly inquire into the conditions of animal life upon the farms within a few miles of the smelter. After the Washoe Smelter commenced to operate, many horses, that were in pastures in the valley, suffered from sore noses. The sore noses were observed in some horses on the Bliss ranch. Stated in ordinary language, the sore nose ailment consists of a sort of ulcer, from one to three inches in length, on the septum in the direction of the upper lip, and appears as if it were produced by a burn, or an irritating medicinal blister, or acid; the ulcer often containing a large piece of dead skin tissue, in a few instances involving the lining membrane of the nose and penetrating the partition between the nostrils. The horses affected, generally speaking, also had garlicky breaths, rough coats, and suffered from diarrhea; some were thin; some were quite easily exhausted; and many appeared to be unthrifty. The ulcers would heal with ordinary stable care, and the animal would nearly always recover if taken away from the valley pastures. Numbers of horses so affected were killed for examination, and post mortem investigations disclosed lesions affecting the stomach, intestines, liver, kidneys, spleen, heart, respiratory organs, and membranes of the brain. Chemical analyses of certain animal tissues were also made by experts, and more or less arsenic trioxide found. Many cattle were affected. None of the cattle had sore noses; witnesses saying that this was because cattle can clean their nostrils with their tongues, while horses cannot. Some of the symptoms manifested in cattle were garlicky breaths, rough coats, coughs, tucked-up bellies, scouring and drooling. Eliminating the sore nose, the lesions found in the cattle examined after death were generally similar to those found in the horses. In one of a number of steers that had been kept by defendants for experimental purposes upon the Bliss pastures, which was killed for examination by Dr. Formad, of the government

service, there were found vascular changes, epithelial changes, and connective tissue changes which were evidently caused by irritant poison.

"By again reasoning from facts seen and testified to by plain witnesses, and weighing what things were so actually seen with what experts have said and with what experiments have been made, out of the mass of evidence I must conclude that the lesions observed were caused by the irritant or corrosive poison arsenic. This arsenic was deposited to a greater or lesser extent upon the fodders of the pastures, and when ingested by live stock caused ailment and sickness. The most rational view is that the volume of the smoke stream with its arsenic contents is at times carried by air currents upon the lands adjacent to the smelter; that sometimes the volume is much more dense than at other times, depending upon atmospheric conditions; but that when the smoke is dense and low there is a precipitation of more or less arsenic upon the fields; that a sufficient quantity is precipitated to poison the pastures; and that animals feeding thereon are poisoned. Naturally, owing to variable winds, there is no rule of distribution of the smoke, so that there is no uniform extent of the results of the smoke upon animal life. Hundreds of animals which grazed in the vicinity near to the smelter have never shown the slightest symptoms of poison; cows in the city of Anaconda have thrived in the highest degree; perhaps but a few animals out of a large number grazing in the same field have been affected at all. Yet, after all, when the facts as well as expert opinions are assembled and harmonized, the strength of the whole proof is such that it practically excluded any general cause for animal *unthriftness* other than arsenical poisoning.

"But, while the conclusion just reached is the only accurate one under the evidence, still it must not be taken that it has been arrived at without overruling a strong challenge to every single issue pertaining to live stock conditions. To some of these matters it is proper to advert briefly. For instance, it is not to be inferred that the complainant has sustained his contention that the sickness in animals has been fatal, or that it has been so general through the Deer Lodge Valley as to make the raising of live stock either impossible or unprofitable in all parts thereof. Complainant called as witnesses less than half of the farmers in the Farmers' Association; whereas, defendants introduced the testimony of a number of farmers, not members of the association, who have lived for years in the vicinity of the smelter, within the so-called 'Smoke Zone,' and who said that they had had no trouble with their stock or crops since 1903, and that their ranches were profitable. Nor can it be doubted that, upon the cross-examination of many of complainant's witnesses, it developed that there had been not a little confusion between live stock conditions which existed prior to 1903 and those that have existed since. These dates are most material, because without doubt great damage was done by the smoke before 1903 (partly to remove the cause of which the smelter was remodeled, and the high stack built), and because the gist of the present suit is to close the smelter to prevent future damage reasonably certain to continue.

"It would appear, too, as showing that the sickness is not fatal, that notwithstanding the somewhat abnormal condition of animal life that has existed since 1903, the percentage of death rate among live stock through the valley in 1906 was normal, in that, out of about 9,384 head of cattle and 1,632 horses accounted for, the total loss was 54 cattle and 38 horses. Animals seem to sicken slowly, and often fail to show their true condition without careful examination. As apposite to this statement, the student of animal diseases and of pathology and toxicology will be especially interested in reading of the elaborate experiments made by the experts in the case, and will be enlightened by the precision of learning displayed in their testimony. But it is the whole evidence, lay and expert, practical and theoretical, that has led to the finding of arsenical poisoning, as heretobefore ascertained.

"A fair conclusion of the fact is that there has been exaggeration by some of the complainant's witnesses of conditions since 1903, and, as already indicated, much carelessness of statement in defining injury done before and since the new stack was put into use. It is to be remarked, too, that the evidence tends to show an improvement in animal conditions in 1906 over 1905, but exactly why this is so does not appear. It may be that there is

less stock near to the smelter, and that the animals that were poisoned in 1903, before the new stack was built, continued to be ill through 1904 and 1905, and then recovered, or it may be that in 1906 defendants, by the construction of another arsenic furnace, or otherwise, took additional measures to eliminate arsenic from the flue dust at the smelter. No satisfactory reason can be gathered, and the mere fact that there was a betterment was left standing, not to be overlooked, though among the things that aid in final solution.

"Fortunately, I have been helped to a better understanding of much of the testimony in the record—indeed, of the whole case—by a visit of two days to the valley, during which time I rode many miles in an automobile in various directions from the smelter. The trip was made in August, 1905, in company with the master in chancery, counsel for complainant and defendants herein, and one or more expert witnesses for the respective litigants. As I had asked the several counsel to call my attention to anything they thought worthy of particular notice, it is fair to say that I had an excellent opportunity to gain a general, though, of course, somewhat superficial, insight into conditions. Upon the first day, which was bright, the smoke from the big stack rose high into the air, and seemed to be carried far away, so high that its diffusion would seem to have been too general to do injury to any land; but on the second day the weather was rainy and the clouds were lower. The smoke then was more dense, and its stream was carried down toward the Bliss ranch and southerly, and northerly for a few miles toward the center of the floor of the valley, and was there dissipated. The trip impressed one main thing very firmly upon me that neither the eye nor the training of an experienced or scientific agriculturalist was required to ascertain. It was that the allegation of complainant's bill, to the effect that the Deer Lodge Valley and the country adjacent to the smelter is barren and desert like, is grossly inaccurate. It is true that the land and vegetation lying within, say, a quarter of a mile of the smelter, is visibly affected. But outside of this limited area there was the appearance of healthy, natural conditions of successful cultivation and of such crop growths as are usually seen in the valleys of the state. The harvest was going on. We saw hundreds of healthy looking shade and fruit trees about farm houses, while the grain fields and pastures looked as others in Montana generally do during or just after harvest. We walked over a portion of complainant's place, noticed the foxtail and inferior quality of the grasses growing; and, except for the smoke on the second day, there was nothing in the physical appearance of the complainant's farm or the valley that indicated unusual or abnormal conditions. Prof. Jones, of Utah, one of the botanical experts, representing complainant, showed me some spots on vegetation just beside the smelter, and in gardens upon ranches and also upon some leaves of trees growing on a ranch about 10 miles away, which he said were due to smoke. I saw spots also upon apples on the trees at another ranch; but there is evidence tending to show that the marks on the fruit were due to hail. We saw cattle and horses in the fields and particularly noticed a number of fine looking cows within the pasture on complainant's place. My attention was also called to several horses that had been driven into a corral at the Staffanson ranch for me to see; one or two had sore noses, and one or more sick and paralyzed; but just when these animals became sick is uncertain, for a witness called by the defendants testified concerning them as follows:

"Q. Did you see some horses that were exhibited to Judge Hunt that had sore noses on that trip? A. I saw a bunch of horses in Mr. Staffanson's corral that they had picked especially, I think, for Judge Hunt's benefit, that they showed there, and I saw Dr. Cheney point out a black horse that we paid Hi Staffanson the full price for as a horse being 'smoked,' when Judge Hunt was with us. Q. When had the companies paid for that horse? A. They paid for it some time in 1903, paid Staffanson. Q. Was this collection of prize horses the derelicts that had been left over from 1902 and 1903? A. I know some of them were. There was a brown mare from Tom Boland's, that we paid Duncan for. That was one of the left over horses. And several there from Mr. Staffanson's I could not name them, that had been set-

tled for. They had evidently picked every poor horse in the country that they could get, and brought to that corral. They did not show any good ones, though there were some in the stable.'

"I also saw a small band of cattle that were at a corral in another part of the valley. A few of them looked unthrifty and as if they had not shed their winter coats.

"The purely equitable defenses next demand attention. To particularize some facts: When the site of the old works was chosen, the land now occupied by the city of Anaconda was vacant and unoccupied; but, at the time of the commencement of the construction and the employment of many persons in the construction work, a community was established, and in time the city of Anaconda grew until it now has a population of about 12,000. This city owes its growth and prosperity to the conduct of the smelting business at the Washoe Smelter, and its population is dependent for subsistence, directly or indirectly, upon the continued operation of the smelter. It is a well-built city, where many people have made homes for themselves; has a superior class of business buildings; and had an assessed valuation in 1906 of \$3,300,000. The people living there have made their investments, believing that the smelting works would continue to operate, and, as would be natural, the products of the Deer Lodge Valley—hay, vegetables, garden truck, grain, alfalfa, live stock, and other farm products—have generally found ready market at good prices in Anaconda. In 1905, though, there were some complaints made against Deer Lodge Valley hay, and sales were not as ready as they would have been had buyers not believed the hay was 'smoked'; but in 1906 there was quick sale for it all at current market prices.

"It is proven that, even if the defendants could find a more suitable location for the smelter in order to avail themselves of it, a new railroad track system would have to be built to convey the ores from the mines at Butte, and, in the construction of new works which would take five years to build, the salvage from the present plant would not be worth more than a million dollars. Furthermore, the natural advantages for a smelting plant, on account of the favorable grades from the mines at Butte to the Washoe Smelter, and on account of the water and lime rock and other facilities necessary in the economical and profitable operation of a smelting plant, could not be found elsewhere, and, as a result, transportation cost would be increased, and mining of a very large percentage of the ores now treated at the Washoe Smelter could not be successfully carried on. No known site exists in Montana where the operations of the Washoe Smelter can be carried on with less damage and inconvenience to surrounding property and inhabitants than the present site.

"As further evidence of the importance of the defendants' works to the communities of the state, it is proven that the total assessed valuation of the property in Deer Lodge county, within which Anaconda is situated, in 1904, was \$8,120,826; that of such amount \$4,058,573 was assessed against the property of the defendants; that from 1902 to 1906 the defendants have paid more than 51 per cent. of the total taxes of the county; and that if an injunction were to be issued, as prayed for, the property of the defendants would be practically valueless, and necessarily there would be such a reduction in the assessable property within the county as to make it impracticable to continue the county organization of Deer Lodge county.

"To show the great harm that would be done by the closing of the smelter, it is established that Butte, with a present population of over 70,000, has grown within the last 30 years from a mining camp, because of the development of the copper mines, many of which belong to and are operated by the defendants herein. Practically the whole population of Butte depends upon the continued operation of the copper mines, and about two-thirds of all of the ores mined at Butte are treated and reduced at the Washoe Smelter.

"The effect of stopping the works at Anaconda would be to deprive Silver Bow county, wherein Butte is situated, of at least 30 per cent. of the total taxes collected, and as a consequence there would be a great depreciation in the value of all property in that county, which is now subject to assessment,

and that, because of the revenues paid to the state by the counties of Silver Bow and Deer Lodge, the income of the state would be materially affected.

"It is in evidence, also, that the defendants use vast quantities of coal, coke, and lumber, which are supplied from points within Montana, other than Butte and Anaconda, and that in supplying them employment to a large percentage of the population is furnished; that during 1906 there were 4,548 men employed in the mines which furnished ore to the Washoe Smelter; that in the same year there were about 2,500 men employed in the reduction works; that the railroads operating within Montana derive their earnings largely from the freight handled in connection with the operations of the defendant companies; that in the first six months of 1906 the defendant companies paid to the men employed directly by them, including the money paid out by the companies which ship ores for treatment to the Washoe Smelter, over \$5,000,000; that the railroad freight paid during the first six months of 1906 exceeded \$1,400,000; and that the defendant companies paid out for material, largely furnished from different points within Montana and elsewhere, yearly amounts of about \$4,000,000.

"As further evidence of the magnitude of the interests involved, it appears that the defendants' works, since 1902, have expended over \$7,000,000 in labor, over \$4,000,000 for coal, over \$4,000,000 for coke, over \$740,000 for lime rock, over \$1,300,000 for machinery, and over \$53,000 for lumber; that up to June 30, 1906, the ores treated at the Washoe Smelter yielded over 590,000,000 pounds of copper, over 25,000,000 ounces of silver, and over 164,000 ounces of gold; and that annually from 17 to 20 per cent. of the supply of copper in the United States has been produced by the Washoe Smelter."

R. L. Clinton and C. M. Sawyer, for appellant.

C. F. Kelley and L. O. Evans, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] The enormous record in the case, consisting as it does of about 25,000 printed pages, renders it wholly impracticable to review the evidence in detail. We have, however, given the record the careful consideration the importance of the case demands and deserves. Upon every essential point relied upon by the complainant the evidence is conflicting in the extreme sense. We regret that it is not practicable to set forth examples of this, and, indeed, undertook to do so, but found that it could not be done with any reasonable limit to the opinion. We shall therefore confine ourselves to a brief statement of the reasons upon which we base our judgment. While there is much evidence on behalf of the complainant tending to sustain his allegations in respect to the damage done to his land and stock by emanations from the defendants' smelter, as well as to that of many farmers within that portion of Deer Lodge Valley referred to as the "Smoke Zone," and as to the alleged continuing and destructive effect of such emanations, there is also a large amount of testimony and other evidence tending to show that since the remodeling of the Washoe Smelter, in 1903, no appreciable damage has been done by its operations either to the land or stock of the complainant, or to that of the farmers within the zone in question. Under such circumstances, we do not think an appellate court can be reasonably expected to reverse the findings of fact made by the trial judge, substantially confirming those made by the standing master of the court, who had the benefit of seeing the witnesses on the stand, and

especially when both the master and the judge had the benefit of a personal view of the premises.

In *Crawford v. Neal*, 144 U. S. 585-596, 12 Sup. Ct. 759, 762 (36 L. Ed. 552) the Supreme Court said:

"The cause was referred to a master to take testimony therein, 'and to report to this court his findings of fact and his conclusions of law thereon.' This he did, and the court, after a review of the evidence, concurred in his findings and conclusions. Clearly, then, they are to be taken as presumptively correct, and unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand."

To the same effect are the cases of *Camden v. Stuart*, 144 U. S. 104, 12 Sup. Ct. 585, 36 L. Ed. 363; *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Evans v. State Bank*, 141 U. S. 107, 11 Sup. Ct. 885, 35 L. Ed. 654; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821, 36 L. Ed. 649; *Davis v. Schwartz*, 153 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289. Especially should this rule be adhered to where, as in the present case, the trial judge, as well as the master, had the benefit of a personal inspection of the premises. *McCarthy v. Bunker Hill & Sullivan Mining Co.*, 164 Fed. 927-940, 92 C. C. A. 259.

The fairness of the trial judge, as well as of the master, in the trial and decision of the case, is vigorously challenged by the counsel for the appellant, and they urge upon us to protect the farmers in their homes and rights against what they assert to be the wrongs and oppressions of wealthy mining corporations. This court is always ready and willing to do that in all proper cases. The writer is himself a farmer, and has been for more than 40 years; but the fact must be recognized that there are two sides to almost every case—certainly there are two sides to this one—both of which must be carefully considered in order to reach a just result. That, we think from the record, was carefully and impartially done by the learned judge of the court below, as shown by his opinion rendered in the cause. There is nothing in the record tending to show any unfairness either on his part or on the part of the master, and, regarding the former, his fairmindedness and high personal character are well known to us from association with him while he was upon the federal bench in this circuit. The record shows that so anxious was the trial judge to do exact justice between the parties, that after announcing his conclusion that the injunction should be denied, thinking it might be possible for the defendant companies, by the construction of some additions to their plant, or that some new method might be devised and put into effect by which the slight damage which he found to exist from its operation might be reduced or entirely overcome, the court retained the cause for the purpose of taking further testimony in respect to that matter, giving each party an opportunity to present such evidence as they might be able to obtain within a stated time, and after hearing such evidence as was presented by the defendants—the complainant failing to produce any—found that the defendants had taken every precaution possible to prevent any deleterious effects from the operation of their plant, and accordingly entered final judgment.

The record shows that less than one-third of the farmers of Deer Lodge Valley side with the complainant in his contention, and that the testimony of many of the farmers within the "Smoke Zone" is to the effect that since the remodeling of the smelter in 1903 there has been no appreciable damage done to the crops or stock of the farmers in that territory. Counsel for the complainant seem to think that all such witnesses were in some way under the control or in the interest of the defendants to the suit, and, indeed, that all of the testimony of the numerous witnesses, to the effect that since the remodeling of the smelter no appreciable harm has resulted to the crops or stock of the farmers, is either false or entirely unreliable. We cannot so hold. A number of the witnesses for the defendants who, in effect, so testified, are men of national, and some of them of international, reputation in respect to the subjects upon which they testified, and the positions respectively held by them are good evidence of their personal character. And with respect to the farmers who testified on behalf of the defendants, how can we know or be reasonably expected to hold that they are any the less truthful and reliable than the farmers who testified on behalf of the complainant? It has been said that in the nature of things the enormous quantity of sulphur and arsenic thrown into the atmosphere by the stack of the defendants' smelter must find lodgment somewhere, and much reliance is placed by the complainant's counsel on the testimony of his principal chemical expert, Dr. Swain. Without regard to the expert testimony on behalf of the defendants tending to show that it was impossible to ascertain with any degree of accuracy the volume or contents of the smoke stream issuing from the defendants' smelter by reason of its varying physical condition, due to changes of temperature and the different velocities the smoke stream moved in different portions of the stack for various reasons, we make brief reference to some of the testimony of Dr. Swain. He undertook to ascertain the contents of the smoke stream and gave as a result of his experiments the smoke velocity as 55.92 feet per second, the volume of smoke for 24 hours 2,340,000 cubic feet, which he reduced to 2,000,000 cubic feet as eminently fair. He calculated the As_2O_3 for 24 hours as 48,100 pounds, reduced as a reasonable estimate to 44,000 pounds, and gave as analysis of his smoke sample 10.9 millimeters of arsenic per cubic foot of smoke. Being asked how he measured the volume of smoke that he analyzed, the witness answered:

"A. The volume of smoke was determined by inserting into the stack, to a distance exactly equal to the distance we inserted the sampling tube—two iron pipes leading to what is known as 'Pitot tube.' This Pitot tube has one aperture directed downward in the opposite direction to the smoke stream, two other apertures, which are slits inside of the tube, lateral to the smoke stream, and thus connected separately to a glass U-tube carrying ether, and, by using this manometer, we measured the change, for in the ether column we had a measure of the pressure of the moving mass of gas. By using a formula proved to be correct, we converted pressure into terms of velocity feet per second, and then a mathematical calculation based on the temperature of the stack gives the feet per second passing at the point in the stack opposite our apparatus. A simple calculation also gives us the volume per 24 hours thrown out."

He gave as the diameter of the tube through which the smoke was drawn as $\frac{3}{16}$ of an inch, and the diameter of the stack as $33\frac{1}{3}$ feet.

He admitted some errors in his work, and stated that there are necessarily errors in such work, but also testified that he had allowed for errors in his final reasonable estimate. He testified, also, in effect, as stated by the court below, that the slightest mistake in the chemical analysis in trying to arrive at the amount of arsenic would be multiplied by millions and millions. He testified, also, that he did not know in how many different forms arsenic was present in the smoke, and that its ill effect would depend upon the poisonous character of the arsenic and be measured by the solubility of the substance in water and digestive juices. Being asked the question:

"When the smoke would be distributed over the Deer Lodge Valley, so as to envelop the same with the trioxide of arsenic ingredients contained in it, which you have testified to, what, in your opinion, would be the effect or condition arising from the smoke as it passed over and enveloped the Deer Lodge Valley—in so far as this arsenic or trioxide of arsenic is concerned?"

He answered:

"A. I would expect a partial deposition of the solid substance.

"Q. On the lands?

"A. On the surface exposed.

"Q. Well, do you mean by that, Doctor, that a part of the solid bodies and trioxide of arsenic, in whatever form it might be, would remain continuously in the atmosphere, or would it finally all be deposited somewhere?

"A. That is not a reasonable assumption, I think, to believe that it would be permanently suspended; but no man has a measure of the rate of deposition of the finely divided solid particles from the atmosphere.

"Q. Then your opinion would be that sooner or later it was all to be deposited somewhere; that is, precipitated?

"A. That is a perfectly sound and reasonable assumption."

[2] Taking the testimony of Dr. Swain, regardless of that of the expert witnesses of the defendants on the same subject, we think it far too indefinite and uncertain to overcome the findings of the court to the effect that since the remodeling of the smelter in 1903 the emanations have only affected the property of the complainant and the other farmers within the "Smoke Zone" in a very slight degree. Accepting those findings, as we must, we think the judgment denying the injunction prayed for and remitting the complainant to an action at law for such damages as he has really sustained should be affirmed, under the established doctrine of the Supreme Court of the United States and of this court to the effect that in such cases it is proper to consider all of the facts and circumstances of the case in order to determine the equities, including comparative damages, where, as in the present case, it is sought to enjoin a lawful business, and to withhold the writ where it appears that it will necessarily operate contrary to the real justice of the case. See Parker v. Winnipiseogee Lake & Woolen Co., 67 U. S. 545-552-553, 17 L. Ed. 333; New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820; Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956; Georgia v. Tennessee Copper Co., 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038; Mountain Copper Co. v. United States, 142 Fed. 625, 73 C. C. A. 621; McCarthy v. Bunker Hill & Sullivan Min. Co., 164 Fed. 927, 92 C. C. A.

259; Bonaparte v. Camden, etc., R. R. Co., Fed. Cas. No. 1,617; Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301.

The judgment is affirmed.

In view of the importance of the case and the size of the record, we direct that our mandate be stayed for six months to enable the appellant to apply to the Supreme Court for a writ of certiorari should he so desire.

BALTIMORE & O. R. CO. v. TAYLOR.

(Circuit Court of Appeals, Fourth Circuit. March 31, 1911.)

No. 991.

1. NEGLIGENCE (§ 136*)—QUESTIONS FOR COURT OR JURY.

Questions of negligence do not become questions of law for the court, except where the facts are such that all reasonable men draw the same conclusion from them; the court being unauthorized to withdraw the case from the jury unless the conclusion follows as a matter of law that no recovery can be had on any view which can be properly taken of the facts the evidence tends to establish.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 277; Dec. Dig. § 136.*]

2. MASTER AND SERVANT (§ 286*)—DEATH OF SERVANT—RAILROADS—DEFECTIVE ROADBED—NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of a railroad engineer by the collapse of a part of the roadbed as he was passing over it at night, evidence held to require submission of defendant's negligence to the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 286.*]

3. MASTER AND SERVANT (§ 112*)—DEATH OF SERVANT—RAILROADS—MAINTENANCE OF WAY—DUTY OF RAILROAD COMPANY.

A railroad company is bound to use reasonable care to make and maintain its roadbed in a reasonably safe condition for the use of trainmen in operating trains over it, and if it is negligent in this regard, and by reason thereof a trainman is killed while at his post of duty, the railroad company is liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 218-223; Dec. Dig. § 112.*]

4. DEATH (§ 96*)—WRONGFUL DEATH—DAMAGES—STATE LAW.

Where a railroad engineer was killed in West Virginia owing to the collapse of a portion of the railroad company's roadbed, due to the latter's negligence, an instruction that if plaintiff was entitled to recover the jury should find for her such damages as they might deem fair and just, not to exceed \$10,000, was authorized by Code W. Va. c. 103, §§ 5, 6, creating a right of action for wrongful death, and declaring that in every such action the jury may give such damages as they shall deem fair and just, not exceeding \$10,000.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 96.*]

5. MASTER AND SERVANT (§ 217*)—DEATH OF SERVANT—RAILROADS—OPERATION—ASSUMED RISK.

Decedent, a railroad engineer, who was killed by the collapse of a portion of a fill while he was operating a train over the same at night, did not assume the risk of the safety of the track, unless he knew its dan-

gerous and defective condition, or unless it was so open and obvious that he would be presumed to have knowledge thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 589; Dec. Dig. § 217.*]

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

6. MASTER AND SERVANT (§§ 112, 125, 205*)—INJURIES TO SERVANT—DEFECTIVE ROADBED.

It is the duty of a railroad company to see that its tracks are maintained in a reasonably safe condition, and if a track, though originally constructed in a safe manner, becomes dangerous, and such dangerous condition was not known to an engineer using the track and was not obvious, it did not devolve on him to examine the road, but he could presume that the railroad company had performed its duty, and if it knew or could have known by reasonable care of the unsafe condition of the roadbed, and the engineer was exercising ordinary care when he was killed without knowledge of the defect because of the unsafe condition of the track, the railroad was liable therefor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 218, 243, 547; Dec. Dig. §§ 112, 125, 205.*]

7. MASTER AND SERVANT (§ 157*)—DEATH OF SERVANT—RAILROADS—NOTICE OF DANGER.

Decedent, a railroad engineer, was killed by the derailment of his engine owing to the collapse of a portion of a fill which had become water-soaked during a freshet. The railroad company for three days prior to the accident had suspended operations over the division in question except for work trains, and on the fourth day, on which decedent was killed, operated trains only under special telegraphic orders. On approaching a station and before reaching the fill, decedent received a telegraphic order informing him that the fill was settling and to "run slow." Defendant's trackmen at the point in question, some time prior to the arrival of decedent's train, had knowledge that the fill was in a dangerous condition and that the earth was washed out under the ties; but no effort was made to protect decedent's train or to give him any further warning of the danger, though this might easily have been done by signal. *Held*, that decedent's telegraphic order was not such a warning of the danger as to charge him with notice of the dangerous condition of the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. § 157.*]

8. MASTER AND SERVANT (§ 289*)—DEATH OF SERVANT—RAILROADS—CONTRIBUTORY NEGLIGENCE.

In an action for the death of a railroad engineer by the collapse of a fill, whether he violated his orders to "run slow" over the fill held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

9. MASTER AND SERVANT (§ 278*)—DEATH OF SERVANT—DEFECTIVE ROADBED—CARE REQUIRED.

Where decedent, a railroad engineer, was killed by the collapse of a fill, and there was evidence that the fill was improperly constructed in the first instance, and that, prior to ordering decedent to take a train over the track, the railroad company had knowledge that the fill was sinking and was in a dangerous condition, such facts were sufficient to justify a finding that the railroad company in the exercise of ordinary care should have kept a watchman at that point day and night in order to observe and record any change in the fill and notify the operatives of trains approaching the same of its condition.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 278.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

- 10. MASTER AND SERVANT (§ 185*)—INJURIES TO SERVANT—FELLOW SERVANTS.**
Whether a servant, by whose negligence another servant is injured, is a fellow servant, depends on whether the negligent servant was engaged in performing a nonassignable duty of the master or the work of an ordinary servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 385; Dec. Dig. § 185.*]

- 11. MASTER AND SERVANT (§ 198*)—DEATH OF SERVANT—RAILROADS—ENGINEER AND TRACK FOREMAN—FELLOW SERVANTS.**

Where decedent, a railroad engineer, was killed by the collapse of a fill owing to the negligence of a track foreman employed to superintend the work of maintaining the roadbed and keeping it in proper repair, decedent and such foreman were not fellow servants.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 493-514; Dec. Dig. § 198.*]

Who are fellow servants, see notes to Northern Pac. R. Co. v. Smith, 8 C. C. A. 668; Flippin v. Kimball, 31 C. C. A. 286.]

- 12. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT—ASSUMED RISK—BURDEN OF PROOF.**

In an action for the death of a railroad engineer by the collapse of a portion of the roadbed, the burden of proving assumed risk, and that decedent had knowledge of the extraordinary danger, was on the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 892; Dec. Dig. § 265.*]

- 13. MASTER AND SERVANT (§ 265*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

In an action for death of a railroad engineer by reason of a defect in a track, the burden of proving contributory negligence was on the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 893; Dec. Dig. § 265.*]

- 14. MASTER AND SERVANT (§§ 96, 227*)—DEATH OF SERVANT—DEFENSES—ACT OF GOD—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.**

In an action for the death of a railroad engineer due to the collapse of a portion of a fill owing to high water, the court properly charged that if decedent's death was caused by an act of God, to wit, the extreme flood and winds causing the fill to settle and become undermined, which condition reasonable care and attention by defendant could not discover or repair, or decedent's death was caused by contributory negligence, or both causes combined, plaintiff could not recover.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 162, 668; Dec. Dig. §§ 96, 227.*]

- 15. MASTER AND SERVANT (§ 270*)—DEATH OF SERVANT—RAILROADS—OPERATION.**

In an action for the death of a railroad engineer by the collapse of a portion of a fill, the court properly charged that if the sons of the watchman in charge of the watch box near the fill were notified of the dangerous condition, and, neither of them knowing of the approaching train, one went to notify his father and the other to notify the telegraph operator, and both acted as promptly as possible to prevent any accident or damage to passing trains, such facts should be considered in connection with the other evidence on the question of the railroad company's negligence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 270.*]

In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Parkersburg.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Action by Hettie G. Taylor, as administratrix of Harry B. Taylor, deceased, against the Baltimore & Ohio Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This is an action instituted by the administratrix of Harry B. Taylor, deceased, against the Baltimore & Ohio Railroad Company in the circuit court of Wood county, W. Va., from which it was removed to and tried in the Circuit Court of the United States for the Northern District of West Virginia; trial resulting in a judgment for the plaintiff, to which this writ of error has been sued out by the defendant company.

The cause of action is based upon the death of the plaintiff's decedent by the alleged negligence and wrongful acts of the defendant company. Taylor was an engineer in the employ of the railroad company. At the time of his death he had been in such employ as engineer more than five years, having been promoted from the position of fireman. He was 33 years old, was a strong, vigorous man, in good health, of temperate habits, and good character, and left surviving him a wife and one child, a boy 2½ years old.

The railroad company at the time was operating among its other lines one extending from Wheeling to Kenova, in West Virginia, a distance of over 200 miles wholly along the banks of the Ohio river. In January, 1907, the operation of this line of road had been greatly impeded by the high waters of this river, and for the three days prior to the 22d of this month operations had been altogether suspended except as to work trains engaged in the repair. On the 22d, however, the waters had so far receded that operations had been resumed and trains were running under special telegraphic orders between the stations of Parkersburg and Point Pleasant, a distance of about 80 miles, in or near the middle of the line. At or about 1 o'clock in the afternoon of the 23d a special train, consisting of an engine, tender, and 27 freight cars, some of which were loaded with steel rails, was ordered out of Parkersburg yard to proceed down the river or south toward Point Pleasant, subject solely to telegraphic orders. Taylor was engineer on this train. His train arrived at Ravenswood, 33 miles below Parkersburg, some time after 6 o'clock, where orders 25 and 67 were received by its conductor and Taylor, the engineer. Order No. 25 directed reduction of speed to 10 miles per hour between certain points set forth, to 6 miles per hour between certain other points, and then set forth: "Fill at bridge just east of Longdale is settling. Run slow. No water at Letart or Spillman." The station of Letart was 16 miles below Ravenswood and was a telegraphic one. When the train arrived there, the white signal was displayed, indicating that its block was clear, no orders were there for it, and that it was at liberty to go head. Some 2½ miles below Letart (sometimes spoken of as south and sometimes west in the record) was a fill, some 150 feet long and 30 feet high, in the deepest place, which had originally been a trestle; but in 1901 a stone or concrete arched culvert had been put in to allow a small stream to pass through, and the place had been then filled with sand, gravel, and other earth material. Backwater from the river through this arch had filled the low ground both above and below this fill to within a few feet of its top. When Taylor's train reached this fill, it was running at a speed variously estimated at between 10 and 15 miles an hour. When the engine went on it, the fill sank, "squashed out," as the witnesses expressed it, the rear of the engine sank down and overturned, killing Taylor, his fireman, and a brakeman who were at the time on the engine.

The allegations in the declaration in effect charge the railroad company with negligence, in that it did not use due and proper care in maintaining this fill and its roadbed there in a safe and proper condition; did not make proper inspection and tests to ascertain its unsafe and dangerous condition; did not employ suitable and sufficient servants to keep and maintain it in such safe condition; furnished to decedent an unusually large, heavy, and unsuitable engine to operate his train upon the then known condition of the roadbed; that with knowledge of the unsafe and dangerous condition of this fill and roadbed it neglected to inform Taylor thereof, as it could have done in time to avoid the accident, but, on the contrary, displayed the white signal

to him at Letart, which directed him in effect to proceed with assurances of safety.

A demurrer to this declaration was entered and overruled by the court below, and the defendant entered a plea of not guilty; its defense being in effect a general denial of liability, an assertion of disobedience of orders by decedent, and contributory negligence and assumption of risk on his part.

A trial by jury was had, a verdict for \$10,000 damages rendered, a motion to set aside which was made and overruled, numerous exceptions to rulings of the court and to instructions given and refused were taken, and the case is now here for review upon 22 assignments of error.

B. M. Ambler and J. W. Vandervort (Van Winkle & Ambler, on the brief), for plaintiff in error.

Lewis N. Tavenner (V. B. Archer, on the brief), for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and ROSE, District Judge.

PRITCHARD, Circuit Judge (after stating the facts as above). As appears from the statement of facts, it is insisted by the defendant below: (a) That the evidence was not sufficient to sustain a verdict against the defendant; (b) that the decedent assumed the risk incident to his employment; (c) that his own negligence contributed to the cause of his death.

[1] The first assignment of error relates to the refusal of the court below to direct a verdict in favor of the defendant. The general rule bearing upon this point is well stated in the case of *Kreigh v. Westinghouse & Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. In that case the court, among other things, said:

"Questions of negligence do not become questions of law to be decided by a court, except 'where the facts are such that all reasonable men draw the same conclusion from them,' and the case is not to be withdrawn from the jury unless the conclusion follows as a matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

[2] The evidence in this case is such that reasonable men might reasonably differ as to the inferences to be drawn therefrom, and, under these circumstances, we do not deem it necessary to enter into an extended discussion of the facts at this juncture in determining this point, further than to say that a careful consideration of the same leads us to the conclusion that the refusal of the court below to direct a verdict in favor of the defendant was eminently proper.

[3] The second assignment of error is as to instruction No. 2. In this instruction the court told the jury that it was the duty of the defendant company to exercise reasonable care and diligence to make and maintain its track and roadbed in a reasonably safe condition for the use of the engineer in running locomotives over it, and that if the jury believed from the evidence that the defendant company, its agents or servants, had neglected to keep its track, roadbed, and fill in a safe condition, and that by reason of such negligence on the part of the defendant company the plaintiff's decedent was killed by the derailment of his engine while at his post of duty, in the service of the railroad company, then in that event the defendant company would be

guilty of such wrongful act, neglect, and default, and the plaintiff would be entitled to maintain her action, and that the jury should find for the plaintiff such damages as they might deem fair and just, not to exceed the sum of \$10,000. The following citations sustain this instruction of the court: Searle v. Railroad Company, 32 W. Va. 370, 9 S. E. 248; Long Pole Lumber Company v. Gross, 180 Fed. 7, 8, 103 C. C. A. 359; Turner v. Norfolk & Western Railway Company, 40 W. Va. 675, 22 S. E. 83; 3 Elliott on Railroads, § 1297, p. 2046.

[4] That portion of the instruction in which the court told the jury that the plaintiff would be entitled to recover such sum as they might deem fair and just, not exceeding the sum of \$10,000, was based upon the law of the state of West Virginia. Code of West Virginia, c. 103, §§ 3 and 6, read as follows:

"Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof; then, and in every such case, the person who or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first degree, or manslaughter."

"Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportion provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars."

While the court instructed the jury that in no event would the plaintiff be entitled to recover a sum in excess of \$10,000, yet the question as to the actual amount of damages the plaintiff was entitled to recover, under the pleadings and evidence, was properly left to the determination of the jury.

[5, 6] The third and fourth assignments of error pertain to the rulings of the court below in giving instructions 4 and 5, as requested by the plaintiff. Instruction No. 4 relates to the assumption of risk. The court instructed the jury that when the engineer entered the service of the company he did not undertake to assume the safety of the defendant company's track, roadbed, and fills, unless he knew the defective and dangerous condition, or unless the same were so open and obvious that he would be presumed to have knowledge of them. That he did not by virtue of his contract of employment assume any risk incidental to the use of a defective track, or defectively constructed fill, or defective fill, of which defect he was ignorant, unless such defects and imperfections were open to observation, and in that event he would be presumed to know of them.

The court also instructed the jury that it was the duty of the defendant company to see that its tracks were constructed in a reasonably safe manner and maintained in a reasonably safe condition at the place of the casualty. If the track and fill although originally constructed in a safe manner became unsafe and dangerous from any cause subsequently occurring, and the unsafe and dangerous condition

of the same was unknown to the deceased and was not obvious and open to observation, that it did not devolve upon the deceased to examine and inspect the road and fill to ascertain any defects, but that he had the right to presume that the defendant company had performed its duty in respect to maintaining the tracks and fill in a reasonably safe condition.

In the fifth instruction the court stated to the jury that if they should find from the evidence that the track or fill at the place of the casualty were not kept in a reasonably safe condition for use by the engineer, whose duty required him to use said track at the time he was killed by the derailment of his engine, and further that if they should believe from the evidence that the defendant railroad company knew, or might have known, by the exercise of reasonable care and prudence, of the defective and unsafe condition of the roadbed and fill, and if they should further believe from the evidence that the deceased was exercising reasonable and ordinary care for his own safety at the time he was killed, and that he had no knowledge of the defect and danger, either actually or presumptively, as stated in the fourth paragraph of the instruction, and that his death resulted from the unsafe condition of the track, then the plaintiff would be entitled to recover such damages as the jury might deem fair and just, not exceeding the sum of \$10,000.

This instruction very clearly shows the extent to which the deceased assumed the risk incident to his employment, and also properly defines the law as respects the duty the defendant company owed him in the construction and maintenance of its track, and, under these circumstances, we think, is fully sustained by well-established precedents. 4 Thompson, Negligence, §§ 3772, 4261; Long Pole Lumber Company v. Gross, 180 Fed. 7, 8, 103 C. C. A. 359; Patton v. Southern Railway Company, 82 Fed. 979, 27 C. C. A. 287.

[7] It is insisted by counsel for the defendant company that order No. 25, which was delivered to the deceased about two hours before his death, warned him of the risk and danger involved in the trip he was about to make, and that therefore he assumed the same.

It appears from the statement of facts: That at the time this accident occurred the operation of this line had been greatly impeded by the high waters of the Ohio river, and that for three days prior to the time of the accident operations had been altogether suspended except the work trains engaged in repair work. On the 22d the water had so far receded that trains were allowed to run under special telegraphic orders between the stations of Parkersburg and Point Pleasant, a distance of about 80 miles, in and near the middle of the line. That at or about 1 o'clock on the afternoon of the 23d a special train, consisting of an engine, tender, and 27 freight cars, some of which were loaded with steel rails, was ordered out of Parkersburg yard to proceed down the river or south toward Point Pleasant, subject solely to telegraphic orders. The deceased was engineer on this train. When the train arrived at Ravenswood, some time after 6 o'clock, the conductor and engineer received orders Nos. 25 and 67. By order No. 25 the engineer was directed to reduce speed to 10 miles an hour

between certain points and to 6 miles an hour between certain other points. Then appeared the following:

"Fill at bridge just east of Longdale is settling. Run slow. No water at Letart or Spillman."

Notwithstanding the fact that the engineer was directed by this order to run slow at the point where the accident occurred, yet there was no evidence offered by the defendant to show what the words "run slow" were intended to mean. To "run slow" is an indefinite expression, and, in the absence of any evidence as to the interpretation to be given the same, it necessarily follows that the expression means that the engineer is to exercise his own discretion as to the rate of speed he is to run his engine, and this, of course, would depend very much upon the character of the road over which he might be operating his train. For instance, if an engineer should be given instructions to run slow, he would naturally run much slower where the grade was heavy and where slides were likely to occur than he would in a level tract of country where the conditions were altogether different.

It is contended by counsel for plaintiff that, if the defendant company had exercised reasonable care in the inspection of the fill at this place, it could have discovered its unsafe condition, and that had it been in possession of such knowledge it would have limited the speed at that point, so as to avoid the danger to which the engineer was exposed, in the same manner that it did with respect to the other points mentioned in the order, and that therefore the accident was due to the failure on the part of the defendant company to exercise reasonable care in properly inspecting and maintaining its roadbed at this point.

It is admitted that there had been a freshet which had completely submerged the company's track at many points along its line. The fact that the company had ordered its trains run under special telegraphic orders shows that it had knowledge as to the dangerous condition of its track. This was sufficient to put the company upon inquiry as to any defects of construction and any changes that were likely to occur in the condition of the track, and to require at its hands the exercise of reasonable care and caution in maintaining and keeping its roadbed in proper repair.

As we have stated, the deceased assumed the ordinary risk incident to his employment; but, on the other hand, it has been repeatedly held that the servant does not assume any risk occasioned by the negligence of the master except such as are open and obvious or as to the existence of which he has knowledge.

It is alleged in the declaration that the railroad company was negligent, in that it failed to keep the fill at the bridge where the accident occurred in a reasonably safe condition. The duty to keep its roadbed, fills, etc., in good repair and in a reasonably safe condition is imposed upon the master, and this is one of the nonassignable duties—a duty which devolves upon the master at all times, and the failure to perform this duty has invariably been held to be negligence. That the company had notice of the unsafe condition of this fill dur-

ing the early part of the day on which the accident occurred is shown by the evidence. It is true that Section Foreman Finicum testified that he had two or three hands there at work and had done what he could to repair the fill, yet there is evidence which tends to show that the work which was done on that occasion was not of such a character as to strengthen the fill.

A. C. Brown, a witness for the plaintiff, among other things, testified as follows:

"I saw the fill while it was being made. The material of which it was made looked to me like red mud, or red clay. I was there seven or eight times while they were filling it."

Witness Wolf, in referring to the manner of construction of the fill, also testified as follows upon cross-examination:

"About all they had there was some gravel on top of the main arch along this fill. There had been some gravel, and you could just see the red mud from the top. It was not red mud that they put under the ties; the red mud was under that, and they put it there. I stayed up that night to see this train cross there knowing of the water being up, and knowing the conditions of that place it caused me to stay up."

This witness also testified further as follows:

"* * * I was not present when the fill was constructed. I saw it after it was torn down; I could see the material. Never worked at building bridges or fills. I do not speak altogether from the condition of the fill after the train had gone over it. I would not have considered the fill sufficient for a good public road and I have done some road building."

Hiram Rollins, a witness for the plaintiff, also testified as follows:

"I reside at Letart, which is between two and three miles from the fill this side of Longdale. On the night of January 23, 1907, I passed over that fill going down in the forepart of the day near noon, and I came up after night, after the evening train had just passed over. About noon the fill was inundated with water and looked like a part of the track was settling, but the track was out of water from the top of the fill; that is, the rail down to the water, about noon, was about six feet. A couple of men were not far from the fill, Wynn Boston and Clark Ahrent. They were trackmen; had shovels working on the road. In the evening I had been to Racine, Ohio, after a casket for a child, and was waiting for the evening train. The train did not come. I left the outside box and carried the casket. That is the way I came to walk over there in the dark with it. But the moon was shining. It was light enough to see to walk without a light. The fill at that time was impassable. It had slipped out and left about two rails bare to the side of the track. I had to walk on one side next to the river to keep from slipping down into it. The dirt had left the ties and slipped into the water on the side next to the river. The ties were supported by the earth, if they had any support. I hurried on up to the watchhouse and informed the watchman of the condition of the place, and 'to protect it from life and limb.' I was not a railroader, but I knew he ought to know how to protect that hole when he would find out it was there. I found the watchman and others there. I called for the watchman, and he came to the door. I gave him notice of the fill being out of shape for the train to go over it, and told him to protect it. He failed to do that, or he would have kept the train out of it. I knocked at the door and called for the watchman. He came to the door. There was three or four in there, and he informed who he was, and I told him that the fill was giving away, and to go down and protect it. He started up the road to do something he was told to do. I only told him what I had seen. I didn't know that the train was coming, and I do not know whether he did or not. * * *"

Geo. W. Delinger, a witness for the plaintiff, also testified as follows:

"I had been at the watch box before the accident with Floyd Finicum and Henry Delinger, and Henry Finicum. We were having a game of seven-up, playing cards. Hiram Rollins came along and told us, Mr. Finicum, the watchman, that the fill was out of shape; that it was gone for about two lengths middleways of the ties—that is, that the fill had gone in the river two rail lengths to about middleways of the ties. Finicum said he would go home and tell his father about it. Mr. Finicum was employed as a watchman. He was employed to work on the road and was watching at the time. He said that his father told him if anything happened for him to come and let him know. I told him I would go and tell his father, and he said no, that he would go. His father was section foreman, and this son was acting as watchman. I said to him what if a train comes down while you are gone over there, and he said, 'Let her go to hell.' He went on home up the track; passed our house, and I went on up the track to our house. I was not with him after that. He did not leave a lantern sticking or hanging at the watch box."

Notwithstanding the condition of the fill owing to the recent rains, Finicum made no further inspection at this point after 11:30 a. m., but contented himself by having Mr. Boston go about 6 o'clock in the afternoon, who reported that it was not necessary to have a guard or watchman about the fill. He pursued this course despite the fact that it was his duty as section foreman to keep the track in good repair and to observe any change that might occur at the fill on account of the high waters.

Instead of remaining there or having some one go to the fill at stated intervals to observe any change in the condition of the same, the foreman left his son at the watch box with instructions that "if anything happened to let him know." This young man, in utter disregard of the orders which had been given him by his father, in company with some of the neighbor boys, was in the watchman's house engaged in a game of cards, paying no attention whatever to the condition of the fill. While he and his boon companions were whiling away the hours at a game of cards, the unfortunate engineer was rushing on to sudden death, without the slightest warning or intimation as to the impending danger that awaited him. Before the accident occurred and when the watchman had ample time to flag the approaching train, or go to Letart and notify the agent, he, in company with one of his companions, walked up the track in the direction his father lived, without displaying a lantern or any other signal to indicate the condition of the fill, and made not the slightest effort to stop the ill-fated train. When his companion said to him, "What if a train comes along while you are gone over there," his only comment was, "Let her go to hell."

In dealing with the case of the Long Pole Lumber Company v. Gross, 180 Fed. 7, 8, 103 C. C. A. 365, which is somewhat analogous to the case at bar, this court said:

"If, in approaching the bridge, the engineer saw or could have seen, or had knowledge of, the defective condition of the bridge, then under such circumstances the doctrine of assumed risk would apply. Under the foregoing instruction the question as to whether the plaintiff had knowledge of the

dangerous condition of the bridge was submitted to the jury, and the jury by its verdict determined that question in favor of the plaintiff."

In determining this question, we should keep constantly in mind the distinction between a negligent act of operation and the negligent act of the defendant company in failing to perform its duties of construction and maintenance. In the case of *Texas & Pacific Railroad Company v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, the court said:

"An employé of a railroad company has a right to rely upon this duty (to furnish safe cars) being performed, as, while in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from his employer's neglect to perform the duties owing to him with respect to the appliances furnished."

It is true that the engineer was notified that the fill at this point was "settling" and that he must "run slow"; but there was no intimation or suggestion that the fill was likely to give way under the weight of the train. Nor was there any suggestion that at 9 o'clock the condition of the fill was such as to require the presence of the section foreman and his hands, and there was no warning given him by the company to the effect that the fill had become a veritable death trap at the time Rollins passed over it. If the engineer had known the condition of the fill at that time, and he, notwithstanding his knowledge of its condition, had run his train upon it, he would undoubtedly have assumed any risk incident thereto. Instead of the engineer being notified as to the condition of the fill, he was permitted to run his train over the same at a time when he was in utter ignorance as to its condition.

General Superintendent Loree testified that he passed over this fill at 7:30 on the date of the accident. Among other things, he said:

"I did not pay very much or any particular attention to the speed over the fill itself, but I think we were probably going eight or ten miles per hour."

John F. Taylor, engineer on the train on which General Superintendent Loree was riding, testified, among other things, as follows:

"On January 23, 1907, I was on train 719 and passed over this fill east of Longdale at a rate of speed, I judge, between eight and ten miles an hour. Mr. Loree was on that train. There seemed to be nothing wrong with the fill when I went over it. I had this same order No. 25 that day. I passed over this fill between 7 and 7:30. It was dark. I slowed down when I came to it. I am still in the employ of the company."

Here was another train which the defendant company operated under order No. 25, and the engineer in charge testified that when he reached the fill he "slowed down" and only ran at a rate of between eight and ten miles per hour, which is important as throwing light upon what might be termed "running slow" under the order in question.

[8] While some of the defendant company's witnesses testified that the train was running at the rate of 15 miles an hour, yet other witnesses for the plaintiff testified that the ill-fated train was not running over 10 miles per hour at this point. However, in the absence of proof as to what rate of speed could be properly termed "running slow," it

was impossible for the court to give the jury any standard by which it could be guided in determining whether the engineer violated the instructions contained in order No. 25 in attempting to cross the fill. In view of the nature of this order in this respect, it should be borne in mind that there was conflicting evidence as to this point, and the court very properly submitted this matter to the jury for its determination.

There is also evidence tending to show that the fill was not properly constructed in the first instance, and this evidence bearing upon the question as to whether the defendant company properly constructed the same was submitted to the jury by the court below. According to the evidence of witnesses Rollins, Wolf, and Brown, the fill had settled to such an extent that it would have gone down under the weight of cars heavily loaded (as many of them were) regardless of the rate of speed at which the train was running.

In the sixth instruction, to which exception was taken by the defendant, the court instructed the jury that a casualty occurring from a defective track is not one of the ordinary perils which, in presumption of law, the plaintiff's decedent voluntarily assumed when he took service with the defendant railroad company; and that the ordinary care in respect to the safety of its tracks and fills, which the law put upon the defendant railroad company in favor of its servant, varied with the risk or danger; and that the care, in order to be deemed reasonable, must increase as the risk increases, and diminish as the risk diminishes; and that the law exacts an increased degree of care from a railroad company in making provision against the increased risk arising by reason of the railroad being built through lands liable to flood or backwater; and that if they believed from the evidence that the defendant railroad company's track and fill were at the place of the casualty constructed through and upon ground where the track and fill became liable to be affected by floods or backwater, and if they believed further from the evidence that by reason thereof the track and fill became depressed, sunken, and unsafe, and if they believed further from the evidence that the engine on which the plaintiff's decedent was employed as engineer was derailed by reason of the defective condition of the track and fill, and that the plaintiff's decedent was in the exercise of reasonable care on his part, and that by reason of the failure of the railroad company to exercise reasonable care in either constructing its railroad and fill at the place of the casualty in a reasonably safe manner, or in its failure to keep its railroad and track in a reasonably safe condition and repair, then, if they should believe from the evidence that the death of Harry B. Taylor resulted from the unsafe condition of the track and fill, the plaintiff is entitled to recover.

[9] That the defendant railroad company should have exercised great care and caution owing to the condition of its track, roadbed, and fill, as a result of the high waters prevailing at that time, is undoubtedly true. With the knowledge the defendant company had as to the condition of this fill the jury might have found that the company should have kept a watchman at that point day and night in

order that any change in the fill might be observed so as to notify the conductors and engineers of any trains that might be passing over that track while it was in that condition, and the court very properly submitted the question to the jury as to whether the defendant company, under the circumstances, exercised reasonable care and caution in keeping its track, roadbed, and fill at this point in proper repair.

[10] It is also insisted that if there was any negligence it was that of a fellow servant. As we have already stated, the duty of proper construction and maintenance of the roadbed devolved upon the master, and this is a nonassignable duty. In the case of Long Pole Lumber Company v. Gross, *supra*, this court, in referring to this point, said:

"The rule of the federal court, as I understand it, as to fellow servants, is that, with regard to such employés as we are considering in this case, it depends on what the negligent servant was doing; that is to say, that, if the servant from whose negligence the plaintiff suffers was engaged in performing a nonassignable duty of the master, he is not a fellow servant of the plaintiff."

[11] The court in that case, in his instruction to the jury, correctly stated the law as respects the doctrine of fellow servant. In this instance it was the duty of Finicum, the foreman, to superintend the work of maintaining the roadbed and keeping it in proper repair. It also appears that, independent of the knowledge that Finicum had as to the condition of the fill, the company had actual knowledge of the condition of the same owing to the unusual high waters that had prevailed in that region. Under these circumstances, it cannot be said that the failure on the part of the roadmaster, whose duty it was to properly maintain the same, can be pleaded as a defense to this action upon the ground that it was the negligent act of a fellow servant.

[12] It is also insisted that the court erred in giving instruction No. 7, which is in the following language:

"The court instructs the jury that the burden of proof as to the assumption of the risk and the knowledge of the extraordinary danger to the plaintiff's decedent, Harry B. Taylor, is upon the defendant railroad company."

It has been repeatedly held that in a case like the one at bar the burden is upon the master to show that the servant knew of the defects or dangerous condition of the track, roadbed, and fill, or that the dangers were so open and obvious that he would be presumed to have had knowledge of them. In the case of Pennsylvania Railroad Company v. Jones, 123 Fed. 758, 59 C. C. A. 892, Judge Gray, in speaking for the court, said:

"The view we take of the case presented by the record, in short, is this: The jury was warranted in finding that the situation maintained by the defendant below at the locus in quo of the accident was not a reasonably safe one, according to the requirements of the law in that behalf, and, as negligence of the master is never one of the risks assumed by the servant, the conclusion that defendant was guilty of negligence, or, in other words, had failed in its duty to decedent, would inevitably follow, unless the affirmative defense is established that decedent was fully informed as to the danger arising from such negligence, or that the same was so obvious that he ought to have been informed thereof; in which case, whether he be said to have assumed the risk, or have waived the negligence of his employer, or to have

been guilty of contributory negligence in voluntarily exposing himself to such danger, the defendant is not liable. The determination of this fact was properly left to the jury, and we are not disposed to criticise the conclusion to which the jury in this case came, much less to say that it was one that should have been set aside by the court below. We cannot say, as a matter of law, that plaintiff was either guilty of contributory negligence, in not abandoning the train and refusing to occupy the station assigned him, or that by remaining there, under the circumstances disclosed by the record, he assumed the risk of the situation created by the plaintiff's default."

The foregoing case is analogous to the case at bar, and, applying the rule announced therein, we are of opinion that the court below did not err in holding that the burden of proof in this respect was upon the defendant.

The next contention is to the effect that the court below erred in giving instruction No. 9 at the instance of the plaintiff. This instruction clearly states the law as to the duty of the plaintiff to maintain its roadbed and keep it in reasonable and safe repair, and the court also instructed the jury that the plaintiff could not recover if they believed from the evidence that Harry B. Taylor was guilty of contributory negligence in remaining on the engine after he knew of the defective and dangerous condition of the track, and in continuing to run the engine over such defective and dangerous portion of the railroad track and fill, or if they believed from the evidence that the defects and dangers were so open and obvious that he would be presumed to have had knowledge of them. Then the court further instructed the jury that contributory negligence on the part of the engineer would not exonerate the defendant railroad company and disentitle the plaintiff from recovery if they further believed from the evidence that the defendant railroad company might, by the exercise of reasonable care and prudence, have avoided the consequences of the plaintiff's negligence.

[13] In instruction No. 10 the court instructed the jury that contributory negligence is a defense, and that the burden of proof upon the issue as to contributory negligence in this case rested upon the defendant railroad company. This instruction is sustained by numerous decisions, especially those of the courts of Virginia and West Virginia, as well as the courts of the United States. In the case of *Inland & Seaboard Coasting Company v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270, paragraph 4 of the syllabus is in the following language:

"That the burden of proof was on the defendant to show that the plaintiff was negligent, and that his negligence contributed to the injury."

In the case of *Hough v. Railway Company*, 100 U. S. 213, 25 L. Ed. 612, Justice Harlan, in speaking for the court, said:

"* * * That the engineer knew of the alleged defect was not, under the circumstances, and as a matter of law, absolutely conclusive of want of due care on his part. *Ford v. Fitchburg Railroad Company*, 110 Mass. 261 [14 Am. Rep. 598], *Laning v. N. Y. C. Railroad Company*, 49 N. Y. 521 [10 Am. Rep. 417]. In such a case as that presented, the burden of proof to show contributory negligence was upon the defendant. *Railroad Company v. Gladmon*, 15 Wall. 401 [21 L. Ed. 114]; *Wharton, Negligence*, § 423, and authorities there cited in note 1; *Indianapolis & St. Louis Railroad Company v. Horst*, 93 U. S. 291 [23 L. Ed. 898]."

It is insisted that the court erred in giving instruction No. 11. This instruction relates to the duty the railroad company owed the deceased in giving notice of the increased danger. An examination of the same leads us to the conclusion that it was not prejudicial to the rights of the defendant railroad company.

[14] In instruction No. 14 the court instructed the jury that if they should find from the evidence that the death of the plaintiff's decedent was caused either by the act of God, to wit, the extreme flood and winds causing said fill near Longdale to settle and become undermined, which condition reasonable care and attention by the defendant could not discover or repair, or that said death was caused by the contributory negligence of the plaintiff's decedent or by the two causes combined, to wit, by contributory negligence of plaintiff's decedent, and by extreme flood and winds, and was not caused by the negligence of the defendant company, then the jury must find for the defendant.

We think the court fairly presented the two propositions to the jury and very properly left the same to its determination.

[15] In instruction No. 15 the court instructed the jury that if they should find from the evidence that Floyd Finicum and his brother, Harry, were notified at the watch box in what is known as the Narrows about a mile west of Letart, by Rollins about 8 p. m. that the fill east of Longdale was settling, and at that time said Finicum was watchman at the Narrows, and that neither of them knew of the approaching train, but that one of them went within a few minutes to notify John Finicum, section foreman, and the other to notify the operator at Letart, and that both parties acted as promptly as possible to prevent any accident or damage to passing trains, all of these facts should be considered by the jury in connection with all the other evidence in the case, upon the question of negligence or want of care upon the part of the defendant company.

We think that the court very properly submitted this phase of the question to the jury to be considered by it along with the other questions involved in this controversy.

We have carefully examined and considered the cases relied upon by the plaintiff in error; but we are of opinion that the facts of this case are such that those decisions do not apply to the questions involved herein.

An examination of the assignments of error as to the refusal of the court below to give certain instructions and modify those given leads us to the conclusion that there is no prejudicial error.

When we consider the peculiar circumstances surrounding this case and the many interesting points involved, we are impelled to the conclusion that by the trial of this case substantial justice has been obtained.

For the reasons herein stated, the judgment of the lower court is affirmed.

OLIVIER v. HYLAND.

(Circuit Court of Appeals, Fifth Circuit. April 11, 1911.)

No. 2,093.

NEUTRALITY LAWS (§ 4*)—PROCEEDING AGAINST VESSEL FOR VIOLATION—RIGHT OF UNITED STATES TO CONTROL.

Proceedings for the enforcement of the neutrality laws are necessarily under control of the United States, and a proceeding against a vessel, seized on complaint of an informer for violation of section 11 of the Penal Laws (Act March 4, 1909, c. 321, 35 Stat. 1090 [U. S. Comp. St. Supp. 1909, p. 1393]), cannot be continued, if the United States disavows and declines to ratify the seizure.

[Ed. Note.—For other cases, see Neutrality Laws, Dec. Dig. § 4.*]

Appeal from the District Court of the United States for the Eastern District of Louisiana.

Libel of information by Albert J. Olivier against the Steamship Venus, Thomas F. Hyland, master, claimant; United States, intervenor. Decree for respondent, and libellant appeals. Affirmed.

Armand Romain, for appellant.

W. J. Waguestack, Solomon Wolff, and Jno. D. Grace, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The enforcement of the neutrality laws of the United States is of necessity under the control of the government of the United States. Where a seizure is made on complaint of an informer for violation of section 11, Penal Laws of the United States, and the United States, through its proper representatives, intervenes, disavows, and declines to ratify the seizure, as in the instant case, the informer can have no such inchoate or other interest as will permit the further prosecution of the case in his behalf.

The decree appealed from is affirmed.

CHAMBERLIN METAL WEATHER-STRIP CO. v. PEACE METAL WEATHER-STRIP CO.

(Circuit Court, W. D. New York. April 18, 1911.)

No. 356.

PATENTS (§ 328*)—VALIDITY AND INFRINGEMENT—WEATHER STRIP.

The Kenny patent, No. 765,845, for an improvement in metal weather strips, while for a simple improvement in a narrow field, was not anticipated, and discloses patentable invention and utility; also held infringed.

In Equity. Suit by the Chamberlin Metal Weather-Strip Company against the Peace Metal Weather-Strip Company. On final hearing. Decree for complainant.

L. S. Bacon and C. E. Dunn, for complainant.

J. C. Sturgeon, John H. Leggett, and H. M. Sturgeon, for defendant.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep't Indexes

HAZEL, District Judge. This suit is to restrain the infringement by the defendant of patent No. 765,845, dated July 26, 1904, issued to complainant on the application of Hugh E. Kenny, the patentee. The invention relates to improvements in weather strips of the kind described in the expired Sims patent, No. 424,905, which were used in connection with windows having sliding sashes and which displaced rubber and felt strips theretofore extensively used.

The prior Sims weather strips consisted of a metal strip with a base or flange and a raised sealing rib, which was inserted in a groove or channel in the edge of the sliding window sash, and nailed or tacked in the runway of the window frame. The patentee supposed that the arrangement would at all times enable the sash to slide or move freely, but in this supposition he was mistaken.

The specification in suit after referring to the prior art says:

"It has been found, however, that owing to the extent of contact-surface of the strip when a sash fits closely or swells in wet weather the sash will bind, the friction between the base of the strip and sash being too great to permit an easy movement of the sash. Again, when the flat base is employed and nails or tacks are driven through the same their heads often protrude and interfere with the proper working of the sash and often damage it."

Hence, to obviate such difficulties, the patentee describes and claims an improvement consisting of a longitudinal rib or ribs on the base flange or flanges, such ribs projecting outwardly to form contact or so-called rubbing surfaces with the window sash. It is shown that by this change in the Sims structure the frictional contact of the sash is diminished, a close fit between the frame and sash is secured, and the objections to the free movement of the sash are entirely overcome. The defendant contends that the improvement is so slight that it does not disclose patentable invention, and that the claims, if valid, must be limited to the precise construction described. The patent has five claims. The first, second, and third relate to the article manufactured, and the fourth and fifth to the combination. Claim 1 reads as follows:

"1. A metallic weather strip having an attaching-base and a sealing flange or rib, the base being provided with a series of outwardly-projecting rubbing surfaces."

Claim 5 reads as follows:

"5. The combination with a frame and a sash having a groove therein, of a metal weather strip secured to the frame having a series of rubbing projections on its base, and a sealing flange entering the groove of the sash."

On the question of novelty and patentability the defendant has offered in evidence many prior patents, and it is argued that the principal benefit secured by the Kenny patent in suit is merely a slight reduction in the friction surface of prior structures. The weather strips of the prior art in most instances are of different forms and some of the patentees appear to have had in mind the identical object of the Kenny patent; i. e., to reduce the frictional surface so as to prevent the sash from sticking in the frame and prevent interference from the nails and tacks driven into the base, yet they failed of complete success. Without deeming it necessary to differentiate all the

prior structures from that of Kenny, I am of opinion that the prior art does not point out the improvement in suit. The defendant's expert witness, Mr. Popp, has singled out the patent to McMahon, No. 731,600, dated June 23, 1902, as clearly disclosing the invention in suit, and it will suffice to examine such reference. The patent is for a window frame and sash, and it describes a base, sealing flange or rib of metallic construction; the strip or base being depressed at the edge, thus raising a portion of it between the sealing ribs. For illustration, in figure 2 of the patent is shown a slight bulging out of a part of the rib, and it is clear from the specifications that by this adaptation the patentee intended that such bulging or rounded part of the base between the guide and the sealing beads should yield, and thus relieve the binding of the frame upon pressure. The surface engagement between the edge of the sash and the flange is not reduced. The patentee's idea evidently was that the two ribs in his metal strip should simply operate as a guide for the sash, and, as already stated, the slightly rounded part in the sash should form a yielding bearing. There is no disclosure of the longitudinal ribs or corrugations adapted to project outwardly so as to reduce the friction in the movements of the sash as in the patent in suit. The simplicity of the Kenny invention is undeniable, but it is an improvement of the prior Sims weather strips, and, as it came quickly into extensive public use, any doubt I may have as to its novelty should properly I think be resolved in favor of its patentability. The patent is in an exceedingly narrow field and the scope of the claims are, of course, limited and will only include such similar structures as are clearly an evasion of them. Certainly the patentee by his slight advance in the art has formed a smooth bearing surface for his sliding sash, and has made his strips more rigid, and he has also made it possible to use tacks or nails without their tops coming in contact with the sash in its up and down movements. In such circumstances the principle of General Electric Co. v. Hill, 174 Fed. 996, 98 C. C. A. 566, is thought to apply:

"The fact that the invention is simple and that at the present time it seems as if it might have been obvious to the workers in this art does not mitigate against its validity. Many of the most useful inventions depend upon equally simple changes."

The use of the Sims patent is open to the defendant, but it nevertheless, after complainant's improvement, adopted weather strips with raised portions on each side of the sliding rib which operate as rubbing surfaces and also to enable the use of tacks or nails without their heads interfering with the movements of the sash. It makes no difference that the defendant's rubbing surfaces are slight in comparison with the complainant's ribs, inasmuch as they substantially achieve the same result by their adaptation as does the complainant. The defendant's metal weather strip has a flat base which is adapted to be used in the runway of the window frame, and which has an outstanding sealing rib. There are raised portions in the base flanges which extend the entire length of the strip, and upon which the edge of the sliding sash freely moves. Such raised parts are located on opposite sides of the sealing ribs and form a ridge or rib. Hence it is apparent

that the precise elements of the claims in controversy are appropriated by the defendant. The dissimilarity in appearance is specious and an evasion of complainant's improvement.

As such claims are not thought anticipated and are not without novelty, the complainant is entitled to the relief demanded in its bill, with costs. So ordered.

McCREERY ENGINEERING CO. v. MASSACHUSETTS FAN CO. et al.

(Circuit Court, D. Massachusetts. February 3, 1911.)

No. 667.

1. PATENTS (§ 76*)—PATENTABILITY—INVENTION “ON SALE” FOR MORE THAN TWO YEARS.

A patentee of a ventilating apparatus, some three years before he applied for the patent, contracted to build and install in a church an apparatus according to plans and specifications shown and in substantial conformity with that of the patent, and to have the structure completed by a date more than two years prior to the filing of the application. *Held*, that the apparatus was “on sale,” within the meaning of Rev. St. § 4886 (U. S. Comp. St. 1901, p. 3382), at least by the date when it was agreed to be completed, although it was not in fact completed by that time, and that it rendered the patent void.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 98; Dec. Dig. § 76.*]

2. PATENTS (§ 328*)—VALIDITY—VENTILATING APPARATUS.

The Taylor patent, No. 917,185, for apparatus for tempering and purifying air, is void, because the invention was on sale more than two years prior to the filing of the application.

In Equity. Suit by the McCreery Engineering Company against the Massachusetts Fan Company and others. Decree for defendants.

See, also, 180 Fed. 115.

Samuel D. Elmore, for complainant.

Stewart, Coolidge & Rand and Roberts, Roberts & Cushman, for defendants.

LOWELL, Circuit Judge. This is a bill in equity to restrain the infringement of letters patent No. 917,185, issued April 6, 1909, to Taylor, for improvements in apparatus for tempering and purifying air. The original bill was brought against several parties, but all the defendants have now been eliminated except the Fan Company. This defendant has pleaded in substance that, during the pendency of his application, Taylor represented to the Commissioner of Patents that the subject-matter of his application, shown in his specification and drawings, had been “in public use and on sale and had been sold in the United States of America more than two years before (Taylor’s) application was filed” in the Patent Office, March 5, 1908; that the patent was therefore void, because of the Commissioner’s error in granting the patent. There was no public use of the invention, and the question before the court comes to this: Was the invention on sale before March 5, 1906? Rev. St. § 4886, reads as follows:

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep’t Indexes

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceedings had, obtain a patent therefor."

It will be observed that the phrase of the statute is "on sale for more than two years prior to his application." Were the question a new one, it might be argued that, in order to defeat the patent, the law requires a substantially continuous sale of the invention throughout the two years; but the cases dealing with the matter have assumed that the patent is void if the invention was ever on sale more than two years before the application was filed.

[1] The defense is here rested by the plea on the evidence contained in the file wrapper, which is annexed thereto. This shows that Taylor's application was originally rejected by the Patent Office because of a prior disclosure of the invention in certain patents which did not lay claim to it. There was disclosure, but no interference. The file wrapper goes on to show that Taylor, in order to meet the effect of the admitted disclosure, and to overcome the action of the Patent Office, filed there, under rule 75, two affidavits for the purpose of carrying back his invention beyond the date of the disclosure.

These affidavits set out in substance that, on March 16, 1905, Taylor was engineer in charge of the manufacture and installation of plants made by the complainant; that on or about February 27, 1905, the complainant entered into a contract with the Second Church of Christ, Scientist, in Kansas City, Mo., to furnish it with a structure made in substantial accordance with Taylor's application; that this contract provided for the completion of the work on February 27, 1906, but that the work was not completed at that time, but later, and just before July 3, 1906, when there was a settlement of a contract, and the apparatus was paid for. The price of the apparatus, as shown by letters included in the file wrapper, was \$1,875, which sum included a commission to the builders or architects of 10 per cent. The apparatus was built in the church, and was not manufactured outside of it and delivered to it as a completed article. As stated by the complainant in its brief, at page 2:

"It appears that an executory contract was entered into for the installation of an apparatus, the terms of the contract calling for its completion more than two years prior to the filing of the application. The affidavits further show, however, that the contract was not complied with in this respect, and that the apparatus was not completed and delivered more than two years prior to the application."

The question before the court is this: Under the circumstances stated, was the invention on sale before March 5, 1906?

In interpreting Rev. St. § 4886, several things are to be noted. First. The defense is not altogether that of the abandonment of the invention by the inventor. The patent fails if the invention is on sale by any person, with or without the patentee's knowledge, consent, or approval. Andrews v. Hovey, 123 U. S. 267, 8 Sup. Ct. 101, 31 L.

Ed. 160. The law was otherwise under the statute of 1836. 5 Stat. 117. Second. The invention may be "on sale," although there is no sale. *Plimpton v. Winslow* (C. C.) 14 Fed. 919. "If the price list was published in May, it would be immaterial that no skates were sold before the 19th of August, because they were 'on sale.'" The law was otherwise under the statute of 1839. 5 Stat. 353. Third. A single unrestricted sale is sufficient. *Delemaire v. Heath*, 58 Fed. 414, 7 C. C. A. 279. Fourth. The mere manufacture of the invention does not defeat the patent, nor does the physical nonexistence of the article on sale save the patent from the operation of the statute. *Burton v. Greenville* (C. C.) 3 Fed. 642; *Dittgen v. Racine Company* (C. C.) 181 Fed. 394.

Under *Plimpton v. Winslow* (which I follow, as it has not been overruled), the apparatus here in question was "on sale." The contract to furnish and install the invention was made some three years before the application. By its terms, the apparatus was to be completed, installed, and paid for more than two years before the application. Within the third year before the application the device was largely put up under the contract in the vendee's building. From the photograph shown, and other testimony, it appears altogether probable that the part of the apparatus which embodied the invention was finished more than two years before the application. Apparently all that was left was some detail of the job, postponed, it may be, by the vendor's delay, or by the incompleteness of the vendee's building. To show that the manufacture and installation had proceeded thus far was the object of the affidavits introduced by the patentee. What difference is there, material to this case, between a sale by sample, as in the *Plimpton Case*, and a sale based on drawings and specifications, as was the sale here made by this complainant? In the former case the title did not pass; in the latter it may have done so, at least at the vendee's option—an option he might wish to exercise. The only difference is that which arises from the different nature of the goods sold. Ventilating apparatus is not sold by the dozen from a sample, which is the natural method of selling wagon jacks. A manufacturer, who at a given date agrees in the course of business to make, sell, and deliver at a later date, according to drawings then in existence, apparatus afterwards patented, appears to me to have that apparatus on sale at the later date, if not at the earlier. *Campbell v. Mayor of New York* (C. C.) 36 Fed. 260, a case much relied on by the complainant, was concerned with the statute of 1839, in which the phrase "on sale" did not occur.

[2] The complainant urges that the manufacture and sale should be looked upon as merely experimental, and so not within the scope of the statute; but there is nothing in the record to show that the apparatus in question was the first constructed by the complainant, or that the complainant's contract with the church contemplated anything experimental. For aught that appears in the record, the apparatus may have been constructed many times for others before the contract with the church was entered into. The burden of proving that the use was experimental rested upon the patentee. *Swain v. Holyoke Machine Company*, 109 Fed. 154, 48 C. C. A. 265.

The complainant also relied much upon the weight to be attached to the decision of the question here involved by the Patent Office, and it referred to the case of Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657; but in that case there had been in the Patent Office a contest over issues of fact between the same parties as those before the court. Here there was no contest in the Patent Office, and the decision of the Patent Office here controverted was not upon a matter of fact, but upon a matter of law.

Bill dismissed, with costs.

THE RAITHMOOR.

(District Court, E. D. Pennsylvania. February 24, 1911.)

No. 37.

1. ADMIRALTY (§ 6*)—SUBJECTS OF JURISDICTION—"VESSEL."

A navigable structure intended for the transportation of a permanent cargo, as a scow carrying a pile driver and engine, which has to be towed in order to navigate, is a "vessel," and within the admiralty jurisdiction.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 86-98; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7297-7301.]

2. ADMIRALTY (§ 6*)—SUBJECTS OF JURISDICTION—UNCOMPLETED BEACON.

Concrete piles built in a navigable stream by a contractor for the government—intended to support a beacon, but which structure had not been completed—had not yet reached the stage when they were devoted to maritime purposes, and a court of admiralty is without jurisdiction of a suit to recover for their injury by a moving vessel.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 86-98; Dec. Dig. § 6.*]

3. COLLISION (§ 71*)—MOVING AND ANCHORED VESSELS—VESSEL OUT OF CHANNEL.

The steamship Raithmoor passing up the Delaware river at night in charge of a pilot came into collision with an anchored scow and pile driver which were being used in the construction of a government beacon. The structure and vessels were 300 feet to the eastward of the regular used channel, and were lighted, but the pilot testified that he did not see the lights until immediately before collision. Held, that the steamship was in fault for being out of her course, and, in the absence of clear proof that the lights on the scows were improperly placed and misled her, she was solely liable for their injury.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. § 71.*]

In Admiralty. Suit by the Latta & Terry Construction Company against the steamship Raithmoor. Decree for libelant.

H. Alan Dawson, for libelant.

Henry R. Edmunds, for respondent.

J. B. McPHERSON, District Judge. On the evening of Sunday, July 18, 1909, the Raithmoor—a British steamship, 323 feet long, 47 feet beam, loaded with iron ore, and drawing 22½ feet—was coming up the Delaware in charge of a pilot. About 8:30 or 9 o'clock she

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

collided with a scow and some other property belonging to the libelant, the Latta & Terry Construction Company, doing a good deal of damage. The night was dark and overcast, but lights could be easily seen over the usual distance. The tide was in the first hour of flood. Of the injury to the scow it is conceded that the admiralty has jurisdiction; but the right of the District Court to entertain the suit for injury to the other property is denied. It is therefore necessary to consider this question in limine. The facts are these:

The company was executing an independent contract with the United States, which bound them to furnish the necessary materials, labor, plant, etc., and to erect in place a foundation pier to receive a gas beacon. The work was under the continual supervision of a government official, but had neither been finished nor accepted. The structure was to consist of three cylindrical piles of reinforced concrete to be sunk about 19½ feet into the bottom of the river, and to project 12 feet above mean high water, these to be covered with a sheet steel cap. The piles were to be encased in steel and to be protected also by depositing rip-rap around them to a specified height. When completed, the pier was to be used solely as a beacon on the edge of a navigable channel that has not yet been made ready, and the government was to install upon the cap a lamp and other appliances. The site is three-fourths of a mile from the eastern or New Jersey shore, and about two miles from the western or Delaware shore, of the river, and is surrounded by navigable water, about twenty-seven feet deep at low tide. The work was begun in June, and at the time of the collision was approaching completion. The piles were in place, and not much remained to be done except to put the metal cap into place and deposit the rip-rap. The necessities of the work required a temporary platform to be built close to the concrete piles. This was of wood, about 15 feet square, and rested upon wooden piling driven into the bottom of the river. A pile driver was also necessary, and this, with a scow to hold materials, tools, etc., was anchored a few feet to the south. The pile driver is a wooden floating scow having the usual apparatus built on the forward end, and an engine installed on the after end in a shed or house. Neither the pile driver nor the scow has any motive power, but both are intended and adapted for use upon the water. The collision injured the scow and the pile driver, and practically demolished the concrete piles and the temporary platform.

[1] Has the admiralty jurisdiction to redress the injury to the pile driver, the concrete piles, and the temporary platform? The decisions leave the question in some doubt as to the pile driver, but I incline to resolve the doubt in favor of the jurisdiction. I shall not take the superfluous trouble of doing again what Judge Cochran has already done so well in *Barnes v. One Dredge Boat* (D. C.) 169 Fed. 895, 900. He has there collected the cases on this much litigated subject, and has discussed them with care and discrimination, and I agree with his conclusion that "a navigable structure intended for the transportation of a permanent cargo, which has to be towed in order to navigate, is a 'vessel.'" If this is correct, the pile driver is a vessel, and is subject to the admiralty jurisdiction.

[2] The more difficult question concerns the unfinished beacon and the temporary platform. As it seems to me, they stand or fall together, and need not be treated separately. If the beacon had been finished, the platform would have been removed—or have ceased to be used—but it was an appliance necessary for the unfinished structure, and I think may properly be considered as a part of it. Is an unfinished beacon, situated as this structure was, a subject of admiralty jurisdiction? If it had been finished and in use, *The Blackheath*, 195 U. S. 361, 25 Sup. Ct. 46, 49 L. Ed. 236, would undoubtedly support the action. The injury then would have been to “a government aid to navigation from ancient times subject to the admiralty; a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea.” It may be added that the court explained in *Cleveland Terminal Co. v. Steamship Co.*, 208 U. S. 316, 28 Sup. Ct. 414, 52 L. Ed. 508, that *The Blackheath* did not disturb the rule announced in *The Plymouth*, 3 Wall. 20, 18 L. Ed. 125, namely, that:

“The true meaning of the rule of locality in cases of maritime torts was that the wrong must have been committed wholly on navigable waters, or at least the substance and consummation of the same must have taken place upon those waters to be within the admiralty jurisdiction. A substantial cause of action arising out of the wrong must be complete within the locality on which the jurisdiction depended.”

And it was therefore held—as also in *The Troy*, 208 U. S. 321, 28 Sup. Ct. 416, 52 L. Ed. 512—that:

“The admiralty does not have jurisdiction of a claim for damages caused by a vessel to a bridge or dock which, although in navigable waters, is so connected with the shore that it immediately concerns commerce upon land.”

And I may refer, also, to *Bowers Co. v. Federal Co. (D. C.)* 148 Fed. 290; *The Poughkeepsie (D. C.)* 162 Fed. 495 (affirmed in 212 U. S. 558, 29 Sup. Ct. 687, 53 L. Ed. 651) and *The Curtin (D. C.)* 152 Fed. 588, in which *The Blackheath* has been applied. But it is evident, I think, that the Supreme Court has not yet decided the pending question, which may be stated more narrowly in these words: Had this structure reached the point where it must be described as “a government aid to navigation,” or was it still so incomplete that the maritime character of a beacon had not yet attached? I am aware that it may seem artificial to decide that the admiralty cannot redress this wrong, although it is clear that, if the beacon had been completed, an injury to the concrete piles could be redressed as fully as an injury to the lamp. But the line of demarcation must be drawn somewhere. The materials intended to compose these piles would not be protected by the admiralty as long as they remained on shore, or on a projecting pier, or on any other structure affixed to the land or immediately serving commerce on land. They could only gain such protection by becoming devoted to maritime purposes, and there must necessarily be some point of time when the maritime character is taken on. Before that point is reached, all that can be said, as it seems to me, is that

the work of transferring them from one jurisdiction to another is still in progress, but has not yet been finished. The analogy of a ship seems to be instructive. Indeed, if it is applicable at all, it is controlling. There can be no doubt for what purpose a ship is intended, but while it is being built, even although it may be afloat, admiralty declines to take jurisdiction. After it has been finished and begins to carry on a maritime business, the jurisdiction attaches without delay. This point has been often decided. *Ferry Co. v. Beers*, 20 How. 393, 15 L. Ed. 961; *Edwards v. Elliott*, 21 Wall. 553, 22 L. Ed. 487, and many cases cited in note 37 upon page 828 of 1 Cyc. I do not see, therefore, upon what sufficient ground it can be held that the incomplete structure had already become a beacon of which the admiralty had acquired jurisdiction. It was still a mere collection or compound of materials partly put into place, but not yet devoted to the maritime purpose for which it was ultimately intended. Indeed, it might never be finished. The channel might never be widened. The government might change its mind before the work was done and might abandon the enterprise; and certainly neither the frame of a ship rotting on the ways nor the skeleton of a beacon disintegrating under the action of the elements offers the criteria needed to satisfy the tests of admiralty jurisdiction. The case under consideration is new, and presents some hardship, but I cannot convince my mind that the jurisdiction exists. I must hold, therefore, that the libelant cannot recover in this court for the damage to the concrete piles and the temporary platform; but, as the suit is well brought for the injury to the scow and the pile driver, it is necessary to determine whether the steamship was at fault.

[3] Upon this question I entertain no doubt. It is only necessary to point out that the place of collision was 300 feet to the eastward of the extreme edge of the present navigable channel, in order to establish that the Raithmoor was where she had no business to be. It is abundantly clear from his own testimony that the pilot had got out of the channel, and did not know accurately where he was. The site of the work was east of the point where the New Castle range intersects the Deep Water Point range. Not far below an east and west line that would connect this point of intersection with the site, a flashlight gas buoy, No. 26 or Goose Bar buoy, is situated. This is upon the extreme eastern edge of the channel as it now exists, and was burning on the night in question. (As already stated, the new beacon was to stand on the extreme eastern edge of the widened channel as it is intended to be.) Vessels coming up the river should leave No. 26 on the starboard hand, and, while the turn to starboard (or north-east) from one range to the other should be begun a few hundred feet below the buoy, the probable explanation of the pilot's mistake is that he began to turn too soon and failed to see the buoy. He swears that he did not see it until after the collision, and undoubtedly he left it to port instead of to starboard, and, as I have already said, had managed to get 300 feet and more out of his proper course. Neither did he see the lights upon the work until the master called his attention to them, and he was then so near that the disaster could not possibly

be avoided. The lights had been seen by the lookout more than a mile away, and were promptly reported to the bridge; but it is probably true that the pilot did not hear the report—the night seems to have been more or less windy—and, at all events, such is his testimony, and this circumstance may help to account for his blunder. It seems useless to speculate about what he ought to have done, or might have done, if he had heard the report or had seen the lights himself. I assume the fact to be, as he has distinctly and repeatedly testified, that he did not see them, and in that event it is perfectly clear that they could not have misled him. Much of the testimony is concerned with the lights—where they were placed, how many of them would be visible to a vessel approaching from the south, etc.—and there has been much argument concerning what is said to have been their misleading character, but for the reason just given I do not think it either necessary or advisable to go into that subject. It would only be confusing, for it cannot be important, if the pilot is telling the truth; and, moreover, it is certainly clear that, even if he had seen or heard of the lights and had supposed them to be upon a moving vessel, he was at fault for taking no bearings if he were in doubt whether the lights were in motion, for giving no signal, for proceeding at full speed, and for not slowing or stopping in time to avoid what (upon the supposition of misleading lights) he must have believed to be a present danger.

But the theory of misleading lights is in conflict with his unequivocal testimony. He could not have supposed the lights to be on a moving vessel if he did not see them at all; and the other circumstances—the absence of signals, the maintenance of speed, etc.—confirm his assertion that he never saw the lights until he was practically on top of the obstruction, and was then more than 300 feet out of his proper course. It is therefore apparent that he could not have been misled by the lights even if they had been improperly disposed, and, as this is the only fault charged against the libelant, it follows that the whole responsibility must rest with the steamship. In a word, the pilot either got out of the course mistakenly (which I believe to be the true explanation) or was trying to save time by cutting the angle of the ranges instead of keeping in the channel. In either event, he was where he had no business to be, and the ship must take the consequences. The moving vessel is presumed to be at fault (*The Oregon*, 158 U. S. 192, 15 Sup. Ct. 804, 39 L. Ed. 943), and, where the fault is obvious and inexcusable, as it was here, the evidence must be clear and convincing to make a case for apportionment (*The Victory*, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519). This is the best the Raithmoor could hope for, but on her own showing the navigation was solely in charge of a man who could not have been misled by what he admits he did not see.

I regret that this whole controversy cannot be settled in one proceeding, but as the admiralty jurisdiction now stands I see no escape from the foregoing conclusion.

A decree may be entered in favor of the libelant, with costs. In default of agreement upon the damages a commissioner will be appointed.

UNITED STATES v. STERN et al.

(District Court, E. D. Pennsylvania. April 22, 1911.)

Nos. 18, 19.

1. CONSPIRACY (§ 43*)—TIME OF OFFENSE—CONTINUING OFFENSES.

A conspiracy by bankrupts to conceal their property from their trustee formed within 30 days of the filing of the petition in bankruptcy, and followed by actual concealment of the property, is an offense which continues to the date of the refusal to turn over the property to the trustee on his election, and an indictment for conspiracy under Rev. St. § 5440 (U. S. Comp. St. 1901, p. 3676), now Cr. Code, § 37 (U. S. Comp. St. Supp. 1909, p. 1402), properly charges the commission of the offense as of such date.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 43.*]

2. BANKRUPTCY (§ 494*)—FRAUDULENT CONCEALMENT OF PROPERTY—ELEMENTS OF OFFENSE—INDICTMENT.

Under Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (U. S. Comp. St. 1901, p. 3433), punishing the fraudulent concealment while a bankrupt or after his discharge from his trustee of any of his property, a concealment by a bankrupt from a trustee after his appointment and a failure to deliver over to him on demand any property or cash which the bankrupt has in his possession is an offense as of any date the concealment continues, and an indictment charging the offense properly charges its commission as of the date of the refusal to turn over the property to the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*]

3. CRIMINAL LAW (§ 968*)—JUDGMENT—ARREST.

Where circumstantial evidence warranted the jury in finding beyond a reasonable doubt that accused was guilty, a judgment on the verdict should not be arrested.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 968.*]

4. BANKRUPTCY (§ 494*)—CONCEALMENT OF PROPERTY—EVIDENCE—SUFFICIENCY.

Under an indictment charging a bankrupt with concealing from his trustee specified property and cash, the government, to warrant a conviction, need not prove the concealment of every article and of every cent of the cash, but proof of the concealment of any part of the property or the cash warrants a conviction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 911; Dec. Dig. § 494.*]

5. CRIMINAL LAW (§ 703*)—OPENING STATEMENT OF DISTRICT ATTORNEY—MISLEADING ACCUSED.

That the district attorney in his opening statement stated that he expected to prove a fact and then failed to do so could not mislead accused who, if having an intention to prove the fact, could do so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1659; Dec. Dig. § 703.*]

Joseph Stern and others were convicted of crime. Motions in arrest of judgment and for new trial. Denied.

John C. Swartley, Asst. U. S. Dist. Atty., and J. Whitaker Thompson, U. S. Dist. Atty., for the United States.

Samuel J. Gottesfeld and Henry J. Scott, for defendants.

HOLLAND, District Judge. The jury returned a verdict of guilty on two indictments, one charging conspiracy against the defendants under section 5440, Revised Statutes (section 37, Criminal Code), and the other charging them with having fraudulently concealed, while bankrupts, certain personal property and a large amount of money from their trustee under section 29b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]). The property and cash which it is charged they conspired to conceal from their trustee is the same property and cash which it is charged in the other indictment they concealed from their trustee. The time of the conspiracy in the indictment is the 9th day of June, 1909, and the time of the alleged concealment in the other indictment is the same date. Upon this date, which was immediately after the election of a trustee, the defendants refused to turn over to the trustee the property and cash, which it is alleged in the indictments they conspired to conceal and did conceal.

The evidence upon which the government relied to prove the charges in both indictments shows that the conspiracy was formed, and the property and cash had been concealed, within 30 days of the time the petition in bankruptcy had been filed, and the government proceeded upon the theory that the conspiracy and concealment continued, and that, after the election of the trustee, a refusal to produce the property upon demand was a continuance of the concealment as of the date charged, and an overt act in the continuance of the conspiracy, which warranted the government in charging the conspiracy as of the same date.

There are 13 reasons assigned in arrest of judgment, and 56 reasons for a new trial. Neither the reasons in arrest of judgment nor for a new trial require that the court should consider them seriatim.

[1] Sufficient to say that the government's contention that the conspiracy was an offense which was continued and properly charged in the indictment as of the date mentioned is in the judgment of the court correct and supported by numerous authorities, the most recent of which is United States v. Kissel et al., 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168.

[2] The fraudulent concealment "while a bankrupt, or after his discharge, from his trustee of any of the property belonging to his estate in bankruptcy," is the offense prohibited by section 29b of the act. The bankrupt may have placed it in hiding for the purpose of securing it after the bankrupt proceedings, or disposing of it for his own benefit, prior to the proceedings in bankruptcy, and continued to have it or the proceeds in his control and possession up to the time of the appointment of a trustee. Whether or not he could be charged with any offense for so doing, it is plain to be seen from the words of section 29b of the act that a concealment from a trustee after his appointment and a failure to deliver over to him upon demand any property or cash which the bankrupt may have in his possession is an offense as of any date the concealment continues.

[3] The objection that there was no direct evidence of conspiracy or concealment, even if admitted, cannot avail the defendants in

support of their motion in arrest of judgment, because there was ample circumstantial evidence to warrant the jury in finding beyond a reasonable doubt that the defendants were guilty in manner and form as indicated. In fact, there was no explanation which would account for the existence of the facts and circumstances proven by the government other than that these three defendants had just prior to the proceedings in bankruptcy concealed property and cash, and continued to conceal both after the trustee had been appointed. The charges of conspiracy and concealment having been submitted to the jury on sufficient evidence, and a verdict of guilty returned, there is no reason why the judgment should be arrested.

[4] It is, however, further urged that the evidence shows that the property which it is charged was concealed by the defendants was sold by one Frank to various parties, and that the defendants could not possibly have this property in their control. Even if this be true, there is ample evidence to sustain the government's contention that the defendants have in their possession or control cash which they concealed and which they conspired to conceal from the trustee, and the jury would have been warranted in finding them guilty of concealing and conspiring to conceal cash from the trustee. One indictment charged conspiracy to conceal personal property, specifying it, and cash amounting to \$27,000. The other charged the concealment of this property, specifying it, and \$27,000 in cash. It is not necessary, in order that the jury might convict, that the government should have proven the concealment of every shirtwaist and every cent of the cash. Proof to the satisfaction of the jury beyond a reasonable doubt of the concealment of all, or any part, of the personal property or the cash, warranted the jury in finding a verdict of guilty. The motion in arrest of judgment is overruled.

[5] In two of the reasons for a new trial, the complaint is made that the defendants were misled by the opening statement of the district attorney, in that he stated he expected to prove the property which it was charged in the indictment defendants had concealed had been sold by the party to whom defendants sent the goods, and in consequence of that statement they failed to produce evidence to that effect. We do not see how they could have been misled, because if that statement was made, as claimed by defendant's counsel, it was at the beginning of the case, and, when the government closed its case and the defendants found it had not produced such evidence, they could easily have done so themselves, if they at any time had such an intention.

The other reasons for a new trial are assignments to alleged errors of the court in the admission or rejection of evidence, or to the charge of the court, or answers to points submitted by defendants. Upon an examination of these assignments, we do not find there was any error committed. A new trial is therefore refused.

RILEY v. POPE et al.

(District Court, S. D. Georgia, W. D. April 24, 1911.)

1. BANKRUPTCY (§ 345*)—SPECIAL DEPOSITS—RIGHTS OF CREDITOR.

An alleged special deposit made with the bankrupt, a mercantile concern, constituted either a loan or an investment in the business, and, unless secured by a mortgage or other instrument giving a lien to the depositor or creditor, constituted a personal debt, to be settled in accordance with the claims of general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 345.*]

2. BANKRUPTCY (§ 384*)—COMPOSITION—CONFIRMATION.

Civ. Code Ga. 1895, § 1856, provides that persons who organize a corporation and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock, with interest; and section 1890 provides that such individual liability shall be an asset of the corporation, to be enforced by the assignee, receiver, or other officer having the legal right to collect, marshal, and distribute the assets of the failed corporation. The bankrupt, a corporation doing a large business, suffered a fire loss, in which \$62,000 worth of goods were destroyed. There was \$52,000 of insurance, but by adjustment, "due to bad management," the insurance claim was settled for \$25,000, and \$12,000 of this was at once appropriated to settle a debt alleged to be due one of the relatives of a member of the concern as a "special deposit," but who was at most only a general creditor. The corporation's trustee in bankruptcy was only able to secure about \$800 with which to pay an indebtedness of \$25,000, whereupon suit was instituted to enforce the liability of stockholders, some of whom were able to respond. Held, that a composition proposing to pay \$12,500 for the benefit of creditors in settlement of the bankruptcy proceeding would not be confirmed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 384.*]

In Equity. Suit by D. H. Riley, as trustee of the Jackson Stores, bankrupt, against one Pope and others, to enforce stockholders' liability. On application to confirm a compromise agreement. Confirmation of composition in bankruptcy denied.

Talley & Heyward, for trustee.

John R. L. Smith, for objecting creditors.

Mr. Williams, for defendants.

SPEER, District Judge (orally). [1] There is a great deal more involved in this case than the amount of money the trustee can get in hand by the proposed compromise. So far as the facts have been disclosed by the statements of counsel, and we have had nothing else here, this is an exceedingly ugly failure. Sixty-two thousand dollars worth of goods were in the Jackson Stores. They were destroyed by fire. There was \$52,000 worth of insurance, which, so far as anything appears to the contrary, must have been held valid in any court of competent jurisdiction. Allowing, therefore, for the usual deterioration of such stocks, the insurance must have practically covered the loss. By some adjustment, which counsel for the Jackson Stores states may have resulted from "bad management," this \$52,000 of insurance was settled for \$25,000.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

A large amount of that sum—\$12,000 I gather, but I am not sure about the figures—was at once appropriated to settle a debt alleged to be due to one of the relatives of some member of the concern. This, it is stated, had been “deposited” with the concern as a special deposit. It does not appear that the Jackson Stores was a bank, and this sum must have been either loaned or invested in the business, and unless it had been secured by a mortgage or other instrument which gave a lien to the depositor or creditor, whoever he or she may be, it was a personal debt, and ought to have been settled, like the claims of other general creditors, on the pro rata distribution of the bankruptcy assets.

[2] Of the \$25,000 insurance, and of all the other values of this large and apparently prosperous trading corporation, the trustee was enabled to lay his hands only on \$800. This find was supplemented by a wagon and a mule. The indebtedness of the concern is about \$25,000. It appears that the principal, Jackson, has gone through bankruptcy three times, or some other large number of times. Now it is proposed to settle all of the indebtedness by the payment of \$12,500. This would seem a profitable transaction for the bankrupt corporation, or those behind it. There are proceedings, apparently formidable, which may collect a much larger sum. There is one suit pending by the trustee in the superior court of Laurens county to recover the personal indebtedness to the bankrupt corporation due by all of the stockholders of this concern. This is brought under the Georgia statute, which makes the stockholders liable when they have not paid in their stock subscriptions before they enter upon the business.

Section 1856, Code of Georgia of 1895, provides:

“Persons who organize a company and transact business in its name before the minimum capital stock has been subscribed for are liable to creditors to make good the minimum capital stock with interest.”

Section 1890 provides:

“Such individual liability shall be an asset of such corporation, to be enforced by the assignee, receiver, or other officer having the legal right to collect, marshal, and distribute the assets of such failed corporation.”

Besides, the various claims and the conduct of the parties have not been passed upon by the referee in bankruptcy. It is proposed to stop the recovery of the bankruptcy assets, and close the inquiry so far as the bankrupts are concerned, by the payment of \$12,500, which is to be regarded as all of the estate to be distributed among creditors. The court cannot for a moment tolerate the thought of giving its approval to a proceeding of this character. To disapprove it may be worth much more to the business integrity of the community than the whole value of the \$12,500 could be to the creditors who would share it. The court will have nothing to do with a “compromise” like this. The creditors may lose. It is better for them to do so than for the court to sanction a settlement with such features, and to make a precedent of such a damaging character. But they may not lose. One of the defendants alleged to be re-

sponsible is conceded by counsel for the defendants to own property in excess of \$100,000. There are others whose accumulations will be diligently regarded by the appropriate officers of the bankruptcy court.

Taking the case altogether, whether we consider the interests of the creditors here, or the interest of the business community, or the public policy which should direct the action of courts in such cases, I must disapprove the compromise, and direct that the litigation proceed unless something is offered, and supported by evidence, which is more in consonance with the principles of mercantile integrity which this court, we hope, ever bears in mind.

In re J. B. & J. M. CORNELL CO.

(District Court, S. D. New York. April 5, 1911.)

1. BANKRUPTCY (§ 262*)—"BID"—WHAT CONSTITUTES.

A "bid" for property of a bankrupt means an offer by a purchaser to pay something to the bankrupt's receiver for the property purchased, which the receiver may distribute among creditors.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 262.*

For other definitions, see Words and Phrases, vol. 1, p. 772.]

2. BANKRUPTCY (§ 264*)—SALE OF ASSETS—BID—CONFIRMATION.

On sale of a bankrupt's assets, a proposition was received to have a new corporation take over all the bankrupt's assets, and then have all the creditors except those holding claims for about \$30,000 accept the obligations of the new corporation therefor, payable in from 9 to 27 months; to give to the nonincluded creditors either 25 per cent. of their claims in cash, or certificates of the new corporation for the full amount of their claims, payable in two years after the holders of receivers' certificates have been paid, with the right of the new corporation to create obligations which should be a prior lien on its assets over its liability on its obligations to the bankrupt. *Held*, that the proposition could not be accepted; the court having no power arbitrarily to order that any objecting creditor shall receive 25 per cent. of his claim, when it is not apparent that on a formal liquidation he will not receive a larger amount, nor to compel the creditor to consent to have the bankrupt's estate transferred to the corporation, and accept in settlement the obligations of the latter payable at a future date.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 264.*]

In Bankruptcy. In the matter of bankruptcy proceedings of the J. B. & J. M. Cornell Company. On application for the confirmation of a bid for the bankrupt's assets. Confirmation denied.

A. Gordon Murray, for receivers.

Wherry & Morgan, for Taunton-New Bedford Copper Co.

Van Wyck & Mygatt, for Garfield & Proctor Coal Co.

HOLT, District Judge. Upon consideration, I think that the objections stated in the memoranda submitted in behalf of some of the unsecured creditors are insuperable. In the first place, the so-called bid is not strictly a bid at all. It does not offer to pay anything to the receivers. It is in form a proposition to have a

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

new corporation take over all the assets of the bankrupt, except a few contracts, and then have the creditors of the bankrupt directly accept, in place of their claims against the bankrupt, unsecured obligations of the new corporation, payable at different dates in the future, running from 9 to 27 months. The parties who make the bid are the principal creditors, and, of course, so far as they are concerned, any arrangement which they agree to would be satisfactory. But in addition to the claims which they represent, aggregating about \$225,000, there remain further claims, aggregating about \$30,000, held by creditors of the receiver, who have furnished materials or labor in connection with the business which the receivers were authorized to carry on by the order of the court, and with the consent and approval of the creditors making the bid. The bid proposes, in substance, to give these creditors either 25 per cent. cash for their claims, or certificates of the new corporation for the full amount of their claims, payable about two years hence, after the holders of the receivers' certificates have been paid.

[2] I do not think that a bankruptcy court has any power to make such an order as against nonassenting creditors. The court cannot arbitrarily order that any creditor who objects shall receive 25 per cent. of his claim, when it is not apparent that upon a formal liquidation he will not receive a larger amount. Nor can any bankruptcy court compel a creditor to consent to have all the bankrupt estate transferred to a corporation, and accept in settlement of his claim obligations of the new corporation, payable at a future date. There is no explanation in this bid of what the amount of the capital of the new corporation will be, or how it will be furnished, or how the money necessary to carry on the business will be obtained; but the bid states that any new indebtedness which may be necessarily created by the corporation for money borrowed for any purpose shall have priority over all the certificates of indebtedness proposed to be given in settlement of the debts of the bankrupt. The proposition, therefore, is that a court of bankruptcy is to authorize a transfer of all the assets of the bankrupt to a corporation, and compel the creditors of the bankrupt to take the unsecured obligations of the new corporation, payable a long time in the future, and to have it in the power of the new corporation to create obligations which shall be a prior lien on its assets over its liability upon its obligations to the creditors of the bankrupt. I am clear that a court of bankruptcy has no power to authorize such a sale, and, if it had, I should deem it inexpedient to do so. It at first struck me that some such arrangement as is provided for in the supplemental bid would meet the objections; but upon further consideration I do not think that it does.

[1] A bid for property of a bankrupt means what is commonly understood as a bid; that is to say, the purchaser is to pay something to the receiver for the property purchased, and the receiver distributes the proceeds among the creditors. In this case the proposed purchasers represent about \$225,000 of claims. The other indebtedness aggregates about \$30,000, in addition to the expenses

of the receivership. It does not seem unreasonable, if the bidders propose to form a new corporation and carry on this business, that they should take care of the small indebtedness. Upon any bid they may make, up to the total amount of the indebtedness, they can apply their own claims ratably in payment; but there would, of course, have to be some cash paid, and the bid offers 25 per cent. in cash to the nonassenting creditors. The parties are practically quite near together, and it would seem feasible to make a proposition which could be carried out; but the present one, in its present form, I think must be rejected, and if no other bid is made an order will be entered directing the receivers to turn over the property to the trustee, in order that the trustee may proceed in an orderly course in the liquidation of the estate.

Another objection to the transfer of these assets, without anything being received for them except the obligation of the new corporation, payable in the future, is that it leaves the receiver without any means of carrying out certain contracts which are not bidden for. Those contracts, or the claims against the receiver arising under them, must be provided for in some way.

The bid, therefore, is rejected.

UNITED STATES v. OREGON & C. R. CO. et al. (TERRACE et al.,
Intervenors).

(Circuit Court, D. Oregon. April 24, 1911.)

No. 3,340.

1. PUBLIC LANDS (§ 71*)—RAILROAD GRANT—CONSTRUCTION.

By Act July 25, 1866, c. 242, 14 Stat. 239, Congress made a grant of lands in Oregon and California in aid of the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon, the company entitled to such lands in Oregon to be such one, organized under the laws of the state, as should be designated by the Legislature and should file its assent to the conditions of the act within one year after its passage, and thereafter complete a specified section of its road each year and the whole, from Portland to the state line, by a time fixed. The act provided that, if a company should fail to comply with its conditions by filing its assent, etc., the act should be null and void, and also reserved the right of Congress, having due regard to the rights of the companies, at any time to alter, amend, or repeal it. In 1868 it was amended (Act June 25, 1868, c. 80, 15 Stat. 80) by extending the time for commencement and completion of the several sections of the road, and by Act April 10, 1869, c. 27, 16 Stat. 47, a further amendment was enacted which allowed any company theretofore designated by the Legislature of Oregon to file its assent within a year thereafter, with a proviso "that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre." The Oregon Central Railroad Company was organized in 1867, was designated by the Legislature of the state to receive the grant in 1868, and in June, 1869, adopted a resolution assenting to the terms of the act with its amendments, which it filed in the Interior Department. It proceeded with the construction of its road, receiving patents for the lands granted co-terminous with its completed sections in accordance with the act. *Held,*

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

that the grant was not in præsenti, there being no grantee in existence or qualified to take at the time the act was passed: that the company acquired no rights or equities under the act until the filing of its assent by which its rights and its relation to the grant were initiated; and that it took the lands subsequently earned subject to the proviso contained in the amendment of April 10, 1869, by virtue of which amendment alone it was permitted to come into such relation after the time fixed by the original act had expired.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 232; Dec. Dig. § 71.*]

2. PUBLIC LANDS (§§ 85, 117*)—RAILROAD GRANTS—CONDITIONS—EFFECT OF ACTION OF LAND DEPARTMENT.

It is within the jurisdiction of the Land Department, before issuing patents to public lands to a railroad company under a grant, to determine whether all the conditions to entitle the company to such patents have been complied with, and its determination of all matters of fact is conclusive and not subject to collateral attack; but it is not within its province to determine whether conditions subsequent imposed in the grant have been fulfilled, and its issuance of patents from time to time as sections of the road were completed, even after such conditions subsequent had been violated as to lands previously patented, was not a waiver by the government of the right to insist on such conditions nor an adjudication that they had been complied with.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 259, 324; Dec. Dig. §§ 85, 117.*]

Decisions of Land Department—their conclusiveness and effect, see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & Silver Mining Co. v. North Star Mining Co., 28 C. C. A. 344; Unita Tunnel Mining & Transportation Co. v. Creede & Cripple Creek Min. & Mill. Co., 57 C. C. A. 207.]

3. PUBLIC LANDS (§ 85*)—RAILROAD GRANTS—WAIVER OF CONDITIONS—“SALE.”

A condition in a grant of lands to a railroad company, that they should be sold only to actual settlers with a limitation as to quantity and price, was not waived by the government by its acquiescence in a transfer of the entire grant to a corporation organized to succeed to all the property, rights, and franchises of the original grantee, which was not a sale within the meaning of the condition, but merely a substitution of grantees; the land still remaining subject to the condition in the hands of the transferee.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 259; Dec. Dig. § 85.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6291–6306; vol. 8, p. 7793.]

4. PUBLIC LANDS (§ 88*)—RAILROAD GRANTS—WAIVER OF CONDITIONS.

A breach of a condition in a grant of lands to a railroad company that the land should be sold only to actual settlers, in limited quantities, and at a fixed price, was not waived by the government because it remained silent when sales were made, in violation of such condition, where there was no action to mislead the grantee or create an estoppel.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266–268; Dec. Dig. § 88.*]

5. PUBLIC LANDS (§ 88*)—RAILROAD GRANTS—WAIVER OF CONDITIONS—ACTION OF EXECUTIVE OFFICERS.

Executive officers of the United States cannot, without express authority from Congress, waive conditions imposed by Congress in a grant of lands to a railroad company.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266–268; Dec. Dig. § 88.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

6. PUBLIC LANDS (§ 88*)—RAILROAD GRANT—WAIVER OF CONDITIONS.

Where an act granting lands to a railroad company gave the government the right to use the road for certain purposes, and also imposed conditions on the sale of the lands by the grantee, the acceptance and use of the road by the government, even after the violation of such condition, was not a waiver thereof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266–268; Dec. Dig. § 88.*]

7. UNITED STATES (§ 133*)—RIGHT OF ACTION—LACHES.

Laches is not imputable to the United States.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 127, 128; Dec. Dig. § 133.*]

8. PUBLIC LANDS (§ 88*)—RAILROAD GRANTS—CONDITIONS.

Act Sept. 29, 1890, c. 1040, 26 Stat. 496 (U. S. Comp. St. 1901, p. 1598), declaring forfeited all lands theretofore granted in aid of the construction of any railroad opposite to and coterminous with the portion of such road not then completed and in operation, did not operate to confirm the title of the companies to lands opposite completed portions of their roads against all contingencies and reserved conditions whether precedent or subsequent, nor as a waiver of forfeiture for condition broken.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266–268; Dec. Dig. § 88.*]

9. PUBLIC LANDS (§ 88*)—RAILROAD GRANTS—SUIT FOR FORFEITURE—LIMITATION.

Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), and Act March 2, 1896, c. 39, § 1, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603), which together limit the time for the bringing of suits by the United States for the cancellation of patents to lands, whether issued under a railroad grant or otherwise, to a stated time after the issuance of such patents, do not apply to a suit to enforce a forfeiture of an entire railroad grant, so far as the land is still held by the grantee, for breach of a condition requiring the grantee to sell only to actual settlers, which may have occurred after the patents were issued.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266–268; Dec. Dig. § 88.*]

10. PUBLIC LANDS (§ 42*)—CONSTRUCTION—LEGISLATIVE GRANTS OF LAND.

In the case of legislative grants of public lands, imposing conditions along therewith upon the grantee in relation to the thing granted, the acts conferring them are to be construed as laws, and the technical rules governing the interpreting of contracts are inapplicable; the single inquiry being as to the intent of the one party—the legislative intendment in promulgating the law.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 42.*]

11. PUBLIC LANDS (§ 42*)—CONSTRUCTION—LEGISLATIVE GRANTS OF LAND.

If there is ambiguity or uncertainty in an act granting public lands to private individuals or corporations, it should be construed most favorably to the government.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 42.*]

12. TRUSTS (§ 21*)—LAW CREATING TRUST—CERTAINTY AS TO BENEFICIARIES AND INTERESTS.

An act granting lands to a railroad company, with a proviso that they shall be sold to actual settlers only in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre, does not create a trust in the company in favor of persons who may settle on the land, which they can enforce, as such a trust would be void for uncertainty both as to the beneficiaries and their interest, since both the quantity and price specified in the act are maximum, leaving it dis-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

cretionary with the company to sell a less quantity to one purchaser or to make a lower price.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 29, 30; Dec. Dig. § 21.*]

13. PUBLIC LANDS (§ 85*)—RAILROAD GRANT—CONSTRUCTION AND OPERATION.

An act granting lands to a railroad company, with a proviso that they shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser and for a price not exceeding \$2.50 per acre, does not create a contract with a third person to sell him a particular tract of land on his declaring his purpose to become a settler thereon or making actual settlement and tendering the purchase price to the company, in the absence of any such offer by the company, since the act makes no such offer on behalf of the government, but transfers title to the land to the company, which may or may not sell in a particular instance, in its discretion.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 259; Dec. Dig. § 85.*]

14. PUBLIC LANDS (§ 85*)—RAILROAD GRANT—CONSTRUCTION—CONDITION SUBSEQUENT.

In reviving a grant of lands to aid in the construction of a railroad in Oregon, in 1869, after it had lapsed by reason of the failure of any company to file its assent and acceptance within the time prescribed by the original act, Congress added a clause, "And provided further that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." *Held*, that such proviso was not a covenant, but, construing it in the light of the then settled policy of Congress to preserve all public lands for the use of actual settlers, while at the same time it was the design to assist the construction of the road, it imposed on the grant a condition subsequent for a breach of which on the part of the grantee company the lands were subject to forfeiture to the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 259; Dec. Dig. § 85.*]

15. PUBLIC LANDS (§ 90*)—RAILROAD GRANT—CONDITION SUBSEQUENT—RIGHTS OF MORTGAGEE.

Under such construction of the grant, a mortgage of the lands, in their entirety, would be subject to the condition subsequent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 273; Dec. Dig. § 90.*]

16. PUBLIC LANDS (§ 85*)—RAILROAD GRANT—CONSTRUCTION—CONDITIONS SUBSEQUENT.

By Act May 4, 1870, c. 69, 16 Stat. 94, Congress made a grant of lands to the Oregon Central Railroad Company to aid in the construction of its road, the act providing that the lands should be sold to actual settlers only in quantities not greater than one quarter section to any one settler and at prices not exceeding \$2.50 per acre. It further provided that the company should by mortgage or deed of trust to trustees set apart all of the net proceeds of the sales as a sinking fund to be used in the purchase and redemption of its bonds therein described, and that no part of such fund should be used for any other purpose until all of the bonds had been purchased or redeemed. *Held*, that such provisions were not merely regulative covenants, not enforceable, but to be observed or not in the discretion of the company, but conditions subsequent, for a violation of which the grant was forfeitable to the United States.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 259; Dec. Dig. § 85.*]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

17. EQUITY (§ 24*)—JURISDICTION—ENFORCEMENT OF FORFEITURE.

The general rule that a court of equity will not enforce a forfeiture is not inflexible, and it may do so where the forfeiture is consonant with right and justice, and especially where it is for breach of condition of a public grant to a private person or corporation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 69-76; Dec. Dig. § 24.*]

18. PUBLIC LANDS (§ 88*)—SUIT TO ENFORCE FORFEITURE OF GRANT—JURISDICTION OF EQUITY.

By Act July 25, 1866, c. 242, 14 Stat. 239 (as amended by Act June 25, 1868, c. 80, 15 Stat. 80, and Act April 10, 1869, c. 27, 16 Stat. 47), and Act May 4, 1870, c. 69, 16 Stat. 94, Congress made grants of lands to two railroad companies in Oregon annexing certain conditions to each grant. April 30, 1908, Congress by a joint resolution (No. 18, 35 Stat. 571) authorized and directed the Attorney General to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he might deem adequate and appropriate to enforce the rights and remedies of the United States arising or growing out of such grants, in which suits he should, in such manner as he should deem appropriate, assert all rights and remedies existing in favor of the United States, "including the claim on behalf of the United States that the lands granted by each of said acts respectively or any part thereof have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts, which may be alleged and established in any such suits, actions or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture, * * * but it being intended to fully authorize * * * the court or courts before which such suits * * * may be instituted or pending to entertain, consider and adjudicate the claim and right of the United States to such forfeiture, and if found to enforce the same." Held, that a federal court of equity had jurisdiction to entertain and determine such a suit, brought to cancel patents issued under such grants, and to quiet the title of the United States to the lands embraced therein, although it involved a forfeiture of the grants; the lands being wild and unimproved and not in the actual possession of defendants.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 266-268; Dec. Dig. § 88.*]

Jurisdiction of federal courts in suits under public land laws, see note to *Bailey v. Mosher*, 11 C. C. A. 314.]

In Equity. Suit by the United States of America, complainant, against the Oregon & California Railroad Company, Southern Pacific Company, Stephen T. Gage (individually and as trustee), Union Trust Company (individually and as trustee), John L. Snyder, Julius F. Prahl, Albert E. Thompson, James Barr, Fred Witte, W. A. Anderson, W. H. Anderson, O. M. Anderson, F. E. Williams, Paul Birkenfeld, J. H. Lewis, Francis S. Wiser, W. E. Anderson, Albert Arms, Joseph A. Maxwell, Isaac McKay, J. R. Peterson, D. MacLafferty, Edgar MacLafferty, V. V. McAbey, George C. MacLafferty, George Edgar MacLafferty, E. L. MacLafferty, B. N. MacLafferty, Enos M. Fluhrer, F. W. Floeter, S. Shryock, Sidney Ben Smith, Orrin J. Lawrence, Robert G. Balderree, Oscar E. Smith, Egbert C. Lake, C. W. Sloat, Jesse F. Holbrook, A. E. Haudenschild, S. H. Montgomery, W. A. Noland, John H. Haggett, Charles W. Mead, William Ottstrom, Angus MacDonald, John T. Moan, Joseph D. Hadley, Henry C. Ott, Fred L. Freebing, William Cain, R. T. Aldrich, James C.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

O'Neill, Alexander Fauske, Francis Wiest, Cordelia Michael, John B. Wiest, Cyrus Wiest, John Wiest, Thomas Manley Hill, Otto Nelson, Jasper L. Hewitt, B. L. Porter, Frank Wells, C. P. Wells, I. H. Ingram, L. G. Reeves, W. W. Wells, F. M. Rhoades, Marvin Martin, and Roy W. Minkler, defendants; John L. Snyder and others, cross-complainants; and Frank Torrace and others, interveners. On demurrers to bill, cross-bill, and bills of intervention. Demurrer to bill overruled. Demurrer to cross-bill and bills of intervention sustained.

After setting out the citizenship and residence of the respective parties, the bill of complaint states, in effect:

On July 25, 1866, Congress passed an act (Act July 25, 1866, c. 242, 14 Stat. 239) granting lands in aid of the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon. By its first section the act authorizes and empowers the California & Oregon Railroad Company, and such company organized under the laws of the state of Oregon as the Legislature thereof shall thereafter designate, to construct and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California.

Thereafter it is provided as follows:

Sec. 2. "That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; and when any of said alternate sections or parts of sections shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior in alternate sections designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named, alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad, so far as located and within the limits before specified. The lands herein granted shall be applied to the building of said road within the states, respectively, wherein they are situated. And the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold: Provided, that bona fide and actual settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: And provided, also, that settlers under the provisions of the homestead act, who comply with the terms and requirements of said act, shall be entitled, within the limits of said grant, to patents for an amount not exceeding eighty acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

Sec. 3. "That the right of way through the public lands be, and the same is hereby, granted to said companies for the construction of said railroad and telegraph line; and the right, power, and authority are hereby given to said companies to take from the public lands adjacent to the line of said road, earth, stone, timber, water, and other materials for the construction thereof. Said right of way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side tracks, turntables, water stations, or any other structures required in the construction and operating of said road."

Sec. 4. That, whenever 20 or more consecutive miles of the road shall have been completed and ready for use, the same shall be examined by three commissioners appointed by the President, who are required to report to the President; and, if it shall appear that the line of road and telegraph has been constructed and equipped in accordance with the terms of the act, then that patents shall issue to the company entitled to the same for the lands granted to the extent and coterminous with the completed section, and thus from time to time, whenever other sections of the road shall be completed, until the entire line shall have been constructed.

Sec. 5. "That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit dispatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States."

Sec. 6. "That the said companies shall file their assent to this act in the Department of the Interior within one year after the passage hereof, and shall complete the first section of twenty miles of said railroad and telegraph within two years, and at least twenty miles in each year thereafter, and the whole on or before the first day of July, one thousand eight hundred and seventy-five; and the said railroad shall be of the same gauge as the 'Central Pacific Railroad' of California, and be connected therewith."

Sec. 7. "That the said companies named in this act are hereby required to operate and use the portions or parts of said railroad and telegraph mentioned in section one of this act for all purposes of transportation, travel, and communication, so far as the government and public are concerned, as one connected and continuous line; and in such operation and use to afford and secure to each other equal advantages and facilities as to rates, time, and transportation, without any discrimination whatever, on pain of forfeiting the full amount of damage sustained on account of such discrimination, to be sued for and recovered in any court of the United States, or of any state, of competent jurisdiction."

Sec. 8. "That in case the said companies shall fail to comply with the terms and conditions required, namely, by not filing their assent thereto as provided in section six of this act, or by not completing the same as provided in said section, this act shall be null and void, and all the lands not conveyed by patent to said company or companies, as the case may be, at the date of any such failure, shall revert to the United States. And in case the said road and telegraph line shall not be kept in repair and fit for use, after the same shall have been completed, Congress may pass an act to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the United States, to repay all expenditures caused by the default and neglect of said companies or either of them, as the case may be, or may fix pecuniary responsibility, not exceeding the value of the lands granted by this act."

Sec. 9. That the companies concerned shall be governed by the general laws of the respective states as to the construction and management of said railroad and telegraph line in all matters not provided for in the act.

Sec. 10. That all mineral lands, except such as shall contain coal and iron, shall be excepted from the operation of the grant; but that, where such lands contain timber, so much of the timber as shall be required to construct the road over the lands is hereby granted.

Sec. 11. That said companies shall be governed by the statutory regulations of the states concerned in all matters pertaining to the right of way wherever said road shall not pass through public lands of the general government.

Sec. 12. "That Congress may at any time, having due regard for the rights of said California and Oregon railroad companies, add to, alter, amend, or repeal this act."

This act was amended June 25, 1868 (Act June 25, 1868, c. 80, 15 Stat. 80), whereby section 6 thereof was made to provide that: "Instead of the times now fixed in said section, the first section of twenty miles of said railroad and telegraph shall be completed within eighteen months from the passage of this act, and at least twenty miles in each two years thereafter, and the whole on or before the first day of July, anno domini eighteen hundred and eighty."

About October 6, 1866, certain persons attempted to organize a corporation bearing the name "Oregon Central Railroad Company," having its principal office at Portland, Or. This company projected its line of road from Portland to Forest Grove, thence to McMinnville, on the westerly side of the Willamette river. For convenience it will be hereafter referred to as the "West Side Company," and its line as the "West Side Line."

On October 10, 1866, the Legislative Assembly of the State of Oregon, by joint resolution, designated the Oregon Central Railroad Company as the organization entitled to receive the grant and benefits accorded by the act of Congress of July 25, 1866. This company, on May 25, 1867, assented to the provisions of said act of Congress, and thereafter, about July 6, 1867, filed an authenticated copy of its resolution, together with a certified copy of its articles of incorporation and of the joint resolution of the Legislative Assembly of Oregon, with the Secretary of the Interior, and on about the 20th of August, 1868, filed with such officer a general map of survey of its projected line of railroad.

In the meantime, namely, about April 22, 1867, certain persons, contending that said West Side Company was not regularly and lawfully incorporated, and designing to secure the grant and privileges accorded by said act of Congress of July 25, 1866, organized another corporation bearing the name "Oregon Central Railroad Company," having its principal place of business at the city of Salem, Or. This company projected its line of road on the easterly side of the Willamette river, and for convenience will be designated the "East Side Company," and its line the "East Side Line."

On October 20, 1868, the East Side Company procured a joint resolution to be adopted by the Legislative Assembly of the State of Oregon, whereby, after setting out, among other things, the adoption of the act of Congress of July 25, 1866, the adoption by the Legislature of the state of House Joint Resolution No. 13, designating the Oregon Central Railroad Company as the organization entitled to the benefits of the grant and privileges accorded by said act of Congress, that at the time of the adoption of such resolution no such company as the Oregon Central Railroad Company was organized or in existence, that the resolution was adopted under a misapprehension of the facts, and that the proper designation yet remained to be made, it was resolved that the Oregon Central Railroad Company, a corporation organized at Salem on April 22, 1867, "be and the same is hereby designated as the company entitled to receive the lands in Oregon, and the benefits and privileges conferred by the said act of Congress." Thereupon a controversy arose between the West Side Company and the East Side Company as to which was entitled to the benefits of the said act of Congress, and, the time within which to file an assent having expired long prior to the designation of the East Side Company by the Legislative Assembly of Oregon, the said East Side Company applied to Congress for an extension of time for filing its assent, following which the respective contentions of the East and the West Side Companies relative to the right to receive the benefits of the act of July 25, 1866, were placed before Congress, and that body, on April 10, 1869, passed an act amendatory of section 6 of the act of July 25, 1866, in language following:

"That section six * * * be, and the same is hereby, amended so as to allow any railroad company heretofore designated by the Legislature of the State of Oregon, in accordance with the first section of said act, to file its assent to such act in the Department of the Interior within one year from the date of the passage of this act; and such filing of its assent, if done

within one year from the passage hereof, shall have the same force and effect to all intents and purposes as if such assent had been filed within one year after the passage of said act: Provided, that nothing herein shall impair any rights heretofore acquired by any railroad company under said act, nor shall said act or this amendment be construed to entitle more than one company to a grant of land: And provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre." Act April 10, 1869, c. 27, 16 Stat. 47.

On June 8, 1869, the East Side Company adopted a resolution assenting to the terms of the act of July 25, 1866, an authenticated copy of which was filed in the office of the Secretary of the Interior on June 13, 1869. This resolution by its preamble set forth, among other things, that no company was designated within the year within which an assent was required to be filed to the act of July 25, 1866, and that Congress did, on April 10, 1869, pass an act extending the time in which assent might be filed. About October 29, 1869, the East Side Company filed in the office of the Secretary of the Interior a map of survey and location of the first 60 miles of its projected line of railroad; and on December 24th of the same year completed the construction of the first 20 miles of road, from Portland south, which was approved December 31st by commissioners duly appointed.

The West Side Company wholly failed to construct any part of its projected line of road, and abandoned and waived all claim to the benefits to accrue under said acts of Congress, and in lieu thereof applied for and obtained and accepted a similar grant of lands, franchises, and other benefits pertaining to its projected line of road by act of Congress approved May 4, 1870 (Act May 4, 1870, c. 69, 16 Stat. 94).

The East Side Company having become involved in litigation questioning the validity of its organization, also its right to use the corporate name adopted, on March 17, 1870, its officers, stockholders, and promoters organized the Oregon & California Railroad Company; the principal purpose of this organization being to become the successor to said East Side Company, and to receive, hold, and exercise the grants, franchises, and privileges accorded by said act of Congress of July 25, 1866, and acts amendatory thereto. Pursuant to such purpose, the East Side Company, on March 29, 1870, executed and delivered to the Oregon & California Railroad Company a certain instrument of writing purporting to assign, transfer, and convey to the latter company all the property of the former, including all its right, title, and interest in and to the grants, franchises, and benefits under the act of July 25, 1866.

On April 4, 1870, the Oregon & California Railroad Company adopted a resolution, whereby the company accepted the grant conferred by the act of Congress of July 25, 1866, and acts amendatory thereof, and authorized its president and secretary to file such assent in the office of the Secretary of the Interior, together with an authenticated copy of the deed of assignment from the Oregon Central Railroad Company. A copy of the resolution and deed of assignment was filed with the Secretary of the Interior April 28, 1870; and from that time on the Oregon & California Railroad Company assumed and continued to act as the successor to the Oregon Central Railroad Company, being the said East Side Company.

On May 4, 1870, Congress passed an act granting certain lands to the Oregon Central Railroad Company—the West Side Company—to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in Oregon, which provides as follows:

"That for the purpose of aiding in the construction of a railroad and telegraph line from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinnville, in the state of Oregon, there is hereby granted to the Oregon Central Railroad Company, now engaged in constructing the said road, and to their successors and assigns, the right of way through the public lands of the width of one hundred feet on each side of said road, and the right to take from the adjacent public lands materials for constructing said road, and also the necessary lands

for depots, stations, side tracks, and other needful uses in operating the road, not exceeding forty acres at any one place; and, also, each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act. And in case the quantity of ten full sections per mile cannot be found on each side of said road, within the said limits of twenty miles, other lands designated as aforesaid shall be selected under the direction of the Secretary of the Interior on either side of any part of said road nearest to and not more than twenty-five miles from the track of said road to make up such deficiency."

Sec. 2. "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed. And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said granted lands adjacent to and coterminous with such located sections of road to be segregated from the public lands; and thereafter the remaining public lands, subject to sale within the limits of the said grant, shall be disposed of only to actual settlers at double the minimum price for such lands: And provided also, that settlers under the provisions of the homestead act who comply with the terms and requirements of said act, shall be entitled, within the said limits of twenty miles, to patents for an amount not exceeding eighty acres each of the said ungranted lands, anything in this act to the contrary notwithstanding."

Sec. 3. "That whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the said railroad and telegraph, the Secretary of the Interior shall cause the same to be examined, at the expense of the company, by three commissioners appointed by him; and if they shall report that such completed section is a first-class railroad and telegraph, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the said granted lands as shall be adjacent to and coterminous with the said completed sections."

Sec. 4. "That the said alternate sections of land granted by this act, excepting only such as are necessary for the company to reserve for depots, stations, side tracks, wood yards, standing ground, and other needful uses in operating the road, shall be sold by the company only to actual settlers, in quantities not exceeding one hundred and sixty acres or a quarter section to any one settler, and at prices not exceeding two dollars and fifty cents per acre."

Sec. 5. "That the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of the said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road depots, stations, side tracks, and wood yards, not exceeding thirty thousand dollars per mile of road, payable in gold coin not longer than thirty years from date, with interest payable semi-annually in coin not exceeding the rate of seven per centum per annum; and no part of the principal or interest of the said funds shall be applied to any other use until all the said bonds shall have been purchased or redeemed and cancelled; and each of the said first mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for. And the District Court of the United States, concurrently with the state courts, shall have original jurisdiction, subject to appeal and writ of error, to enforce the provisions of this section."

Sec. 6. "That the said company shall file with the Secretary of the Interior its assent to this act within one year from the time of its passage; and the foregoing grant is upon condition that said company shall complete a section of twenty or more miles of said railroad and telegraph within two years, and the entire railroad and telegraph within six years, from the same date."

About July 2, 1870, the West Side Company, through its board of directors, adopted a resolution assenting to and accepting all the provisions of said act, and thereafter, on July 20th, filed an authenticated copy of such resolution in the office of the Secretary of the Interior. About August 15, 1870, all the capital stock of the West Side Company was acquired by the owners of the capital stock of the Oregon & California Railroad Company, and thereafter the capital stock of both companies was held as a single interest, and the affairs of the two companies were conducted as a single enterprise until the dissolution of the West Side Company.

With funds derived from mortgage bonds and otherwise, the East Side Line, up to the month of January, 1873, was constructed as far south as Roseburg, a distance of 197 miles from Portland, and said West Side Line to McMinnville, a distance of 47 miles. At that time the companies became insolvent, and the construction of the East Side Line was not resumed until in June, 1881, while the West Side Line was never resumed. Thereafter, from about July 24, 1874, the direction and control of the financial affairs of the two companies were assumed and exercised by the creditors thereof, organized under the name and designation "Bondholders' Committee," which committee subsequently acquired all the capital stock of said companies. About October 6, 1880, the Bondholders' Committee caused the West Side Company to execute and deliver to the Oregon & California Railroad Company a certain instrument in writing purporting to assign, transfer, and convey to the latter company all the property of the former, including all its right, title, and interest in and to the grant, franchises, and other benefits accruing in pursuance of the act of Congress of May 4, 1870. Ever since said date the Oregon & California Railroad Company has assumed to be the rightful successor to the said West Side Company.

For convenience, the respective grants by Congress will be alluded to as the "East Side grant" and the "West Side grant."

About May 7, 1881, through a readjustment of the capital stock of the Oregon & California Railroad Company by its board of directors and stockholders, all the former capital stock of said company was canceled, and a reissue was had, consisting of \$12,000,000 preferred stock, and \$7,000,000 common stock, aggregating \$19,000,000. Through the issuance of this stock, and the use in part of the proceeds of a new bond issue, all of the company's existing indebtedness was then fully paid and discharged.

About June 2, 1881, the Oregon & California Railroad Company executed and delivered to Henry Villard, Robert Davie Peebles, and Charles Edward Brotherton, as trustees for the owners and holders of the said preferred stock, an instrument of writing purporting to convey to said trustees all lands comprised by both of said land grants, in trust, to secure to the owners of said preferred stock some asserted right or interest in or to said lands, and for certain other purposes more particularly specified in said instrument. Thereafter Stephen T. Gage succeeded to the trusteeship under said instrument, and is now the sole surviving trustee. He, by virtue thereof, and the Southern Pacific Company, by virtue of its ownership of the preferred stock, claim and assert some right, title, and interest in, or lien upon, the granted lands.

In June, 1881, and May, 1883, the Oregon & California Railroad Company issued first and second mortgage bonds aggregating, approximately, \$5,000,000; the work of construction was resumed; and the East Side Line was extended to a point 1 1/4 miles south of Ashland, a distance of approximately 145 miles. This extension was completed about the month of January, 1884, and the work of extension was not again resumed until in April, 1887. In January, 1885, by reason of default in payment of said first and second mortgage bonds, the Oregon & California Railroad Company was placed in the hands of a receiver.

In connection with these facts, which are more fully set out in the bill of complaint, it is alleged that the West Side Company acquired no right or interest in or to the East Side grant, and that the said East Side Company acquired no right or interest therein except subject to all the terms and conditions of the act of Congress of April 10, 1869; that the principal purpose of the conveyance of date March 29, 1870, was not to operate as a sale or conveyance of any of the lands granted by said act of Congress of July 25,

1866, but was to constitute the Oregon & California Railroad Company the successor to the said East Side Company, to construct and equip said line of railroad, and to receive the grant and exercise the franchises and other benefits accorded by said act of Congress, the same allegation being made with reference to the conveyance by the West Side Company to the Oregon & California Railroad Company, of date October 6, 1880; that the original capital stock of the Oregon & California Railroad Company, and substantially all the stock of the West Side Company, were issued without consideration; that neither of said companies had any funds for construction or other purposes, except such as were borrowed therefor; and that the deed of trust to Villard and other trustees purports to convey and to authorize said trustees to sell and convey said lands comprised by the said East and West Side grants to other than actual settlers, in quantities greater than one quarter section to one person, and at a price greater than \$250 per acre, and was therefore in violation and breach of the express terms of the grants.

It is further alleged, in effect, as follows: About January, 1885, a certain railroad syndicate, known as the "Southern Pacific System," controlling substantially all the railroad lines in the southwestern part of the United States, including the Central Pacific Railroad, organized the Southern Pacific Company as a general holding company for said syndicate, and on or about March, 1885, the Southern Pacific Company acquired, and has since exercised, a controlling interest in each of the corporations constituting said Southern Pacific System, and is the lessee of all of the railroad lines controlled by said system, exercising control thereof, as well as control over, and the handling and disposal of, all the lands of its constituent companies. Shortly after the organization of the Southern Pacific Company, it established a land department in San Francisco, Cal., for the control, handling, and disposal of lands of its constituent companies held under grants from the government; and, after the Oregon & California Railroad Company passed into the hands of a receiver, the Southern Pacific Company, designing to acquire the ownership and control of its holdings, entered into negotiations with said company, and the bondholders and stockholders thereof, which resulted in a contract, of date March 28, 1887, the general effect being that the Oregon & California Railroad Company, together with its lines of railroad, was absorbed by, and merged into, the said Southern Pacific System; and the complainant charges that it was further the purpose and design of the Southern Pacific Company to secure control of the Oregon & California Railroad Company's land grants, and to divert the same from the purposes for which such grants were made to the exclusive use and benefit of the Southern Pacific Company. Thereafter the Oregon & California Railroad Company was continued a corporation in name only, and as an instrumentality and device for the administration of these grants.

About May 12, 1887, in pursuance of the contract of March 28, 1887, all of the capital stock, and all of said second mortgage bonds of the Oregon & California Railroad Company were assigned and transferred to the Pacific Improvement Company, and all of said first mortgage bonds were assigned and transferred to the Southern Pacific Company. The Pacific Improvement Company was a corporation controlled and directed by the owners of a majority of the capital stock of the Southern Pacific Company, and held the capital stock of the Oregon & California Railroad Company in trust for the use and benefit of the Southern Pacific Company until about April 9, 1901, when all of such capital stock was transferred to the Southern Pacific Company, which company is now the owner and holder thereof.

Pursuant, further, to the contract of March 28, 1887, the Southern Pacific Company and the Oregon & California Railroad Company entered into a contract of lease, in writing, whereby the railroad and telegraph lines of the latter company were leased to the former for the term of 40 years, which remained in full force and effect until about August 1, 1893, when the said companies entered into a further contract, whereby such properties were leased to the Southern Pacific Company for the term of 34 years, which latter contract is still in full force and effect, and by virtue whereof the Southern Pacific Company entered into, and is now in, the full possession, management, and control of said properties.

In pursuance, also, of the contract of March 28, 1887, the Oregon & California Railroad Company, on about January 3, 1888, executed and delivered to the Union Trust Company its mortgage upon certain of its properties, to secure certain bonds, then issued and thereafter to be issued, of which approximately \$17,500,000 in amount are still outstanding. Although executed by the Oregon & California Railroad Company, the bonds were guaranteed by the Southern Pacific Company, and were used by that company to purchase the outstanding securities of the Oregon & California Railroad Company, and to complete the construction of and improve the lines of the said latter company. In this relation, it is averred that said mortgage deed, in so far as it relates to any of the granted lands, if at all, purports to convey, and to authorize the Union Trust Company to sell and convey said lands to persons other than actual settlers, in quantities greater than one quarter section to one purchaser, and for a price exceeding \$2.50 per acre, and for purposes other than those authorized by said grants.

During the year 1887, the last section of the East Side Line, extending from Ashland to the southern boundary of the state of Oregon, was completed, and on or about the 6th day of June, 1888, the receivership proceedings were wound up and the receiver discharged. All of the first and second mortgage bonds (not including the issue of July, 1887), together with all mortgages and trust deeds securing the payment thereof, were canceled and discharged; whereupon the Southern Pacific Company entered into the possession and management of all of the properties of the Oregon & California Railroad Company, as aforesaid.

Under the East Side grant, and during the years 1871 to 1877, inclusive, patents for approximately 323,000 acres of land were applied for by, and issued to, the Oregon & California Railroad Company, being lands contiguous to the first 125 miles of said East Side Line. No patents were applied for or issued within that time under the West Side grant. Commencing about the year 1891, other patents were applied for, and, from 1893 up to 1906, lands aggregating 2,450,000 acres were patented to the Oregon & California Railroad Company under the East Side grant; and, commencing about the year 1895, approximately 128,000 acres under the West Side grant. Of the lands so granted, the Oregon & California Railroad Company has made approximately 5,306 sales, aggregating about 820,000 acres, as follows: Sales in quantities not exceeding one quarter section, 4,930, covering 296,000 acres, and sales in quantities exceeding one quarter section, 376, covering 524,000 acres. In this connection, it is alleged: That the Oregon & California Railroad Company, under the direction and domination of the Southern Pacific Company, from the year 1894 until about January 1, 1903, sold and disposed of said granted lands in manner and upon terms in violation and breach of the terms and conditions of the grants. That is to say, said lands were sold to speculators and persons other than actual settlers, and in quantities greatly in excess of one quarter section to one purchaser, namely, in quantities ranging from 1,000 to 45,000 acres to a single purchaser, and for prices greatly in excess of \$2.50 per acre; the same ranging from \$5 to \$40 per acre. That about 90 per cent. of the said 524,000 acres was sold or conveyed since the year 1897, and of this approximately 370,000 acres were sold to 38 purchasers, in quantities exceeding 2,000 acres to each purchaser. On January 1, 1903, there remained unsold of said granted lands approximately 2,373,000 acres, consisting of about 2,080,000 acres which have been patented, and 293,000 acres unpatented, now claimed by the defendant Oregon & California Railroad Company by virtue of said grants.

It is alleged that since January 1, 1903, many persons have applied to the Oregon & California Railroad Company to purchase the lands remaining unsold, in quantities of 160 acres to each purchaser, the said applicants desiring and intending in good faith to settle thereupon, and to make permanent homes thereof; but that said applications have been refused and rejected, and the said Oregon & California Railroad Company and the Southern Pacific Company have, since January 1, 1903, withdrawn all of said unsold lands from sale, and have at all times thereafter refused, and do now refuse, to sell any part of said grants, to actual settlers or for purposes of actual set-

tlement, in quantities or for prices as prescribed by the terms and conditions of such grants. In setting forth these facts, it is further alleged that since said January 1, 1903, the Oregon & California Railroad Company has assumed, and now asserts, an absolute and unconditional estate in and to all of said unsold lands, and that by reason of the premises and the relationship which the Southern Pacific Company sustains to the Oregon & California Railroad Company, all of such unsold lands have been converted to the use and benefit of the said Southern Pacific Company; that the Oregon & California Railroad Company has derived benefits from said grants other than from sales of the lands, namely, from forfeiture of contracts of sale, from leases, and from timber cut from the grants; and in further detail matters are alleged upon which to base injunctive process, and other matters designed to excuse delay in instituting this suit.

On February 14, 1907, a memorial was presented to Congress, praying that steps be taken to compel the Oregon & California Railroad Company to comply with the terms of the said grants, or to require a forfeiture of the lands granted. Later, on April 30, 1908, Congress adopted a joint resolution providing as follows:

"That the Attorney General of the United States be, and he hereby is, authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to either or any of the following described Acts of Congress, to wit: 'An act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon,' approved July twenty-fifth, eighteen hundred and sixty-six, as amended by the acts approved June twenty-fifth, eighteen hundred and sixty-eight, and April tenth, eighteen hundred and sixty-nine. * * * Also 'An act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon,' approved May fourth, eighteen hundred and seventy, including all rights and remedies in any manner relating to the lands, or any part thereof, granted by either or any of said acts; and in and by any and all such suits, actions or proceedings, the Attorney General shall, in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States, relating to the subject of such suits, actions and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same." 35 Stat. 571.

This suit is instituted in pursuance of said joint resolution, and it is further alleged that by reason of the premises all of said granted lands now unsold, and such as were sold in violation of the grants, are forfeited to the United States, and specifically that: "Pursuant to the authority and direction contained in said joint resolution of Congress approved April 30th, A. D. 1908, your orator does hereby assert title to, and does hereby resume the title of, all of said lands and estates in lands forfeited to your orator as aforesaid." The relief demanded is:

(1) That the court adjudge and decree all unsold lands comprised by said grants, whether patented or unpatented, to be forfeited to the United States, and the title thereof quieted; or, if such relief be denied,

(2) That the court adjudge and decree that all such unsold lands are subject to purchase by actual settlers, in quantities of 160 acres to one purchaser,

and for a price not exceeding \$2.50 per acre, and that a receiver be appointed to carry into effect the conditions of the grants in that respect; or, if this relief be denied,

(3) That a mandatory injunction issue requiring the Oregon & California Railroad Company to sell such unsold lands in compliance with the terms of the grants.

An injunction is further sought; also, an accounting for moneys received for lands unlawfully sold, discovery, and general relief.

Prior to the filing of the bill of complaint, John L. Snyder and 66 others had instituted suits against the defendants the Oregon & California Railroad Company, the Union Trust Company, and S. T. Gage, to require such defendants to convey to said complainants each a tract of 160 acres of land included in the West Side grant. These parties claim their right to such conveyances by reason of having settled upon lands designated, with a bona fide purpose of making said lands their homes, and of having tendered to the Oregon & California Railroad Company the sum of \$2.50 per acre, or \$400 for each quarter section so settled upon, in alleged pursuance of the act of May 4, 1870, making such grant. When, however, the United States instituted its suit making the complainants in the Snyder suit parties thereto, the causes were consolidated, and Snyder and others have filed their cross-bill in the government's case, setting up their alleged rights. The particular feature of this cross-bill, after setting out the history of the grant in purport much as it is narrated in the complaint, is voiced in its ninth paragraph, whereby it is alleged, in substance: That Congress, by the act of May 4, 1870, intended to and did grant to the Oregon Central Railroad Company, and to its successor, the Oregon & California Railroad Company, a limited beneficial interest in the lands specified in the act, and to that end made and constituted the Oregon & California Railroad Company a mere intermediary trustee, through which to convey the legal title to the odd-numbered sections comprised by the grant to such citizens of the United States as might thereafter settle upon such lands. That Congress did not intend to grant to said railroad company any possessory title to any of said lands, except for depot grounds, stations, etc., but reserved the right to citizens of the United States to enter upon and take possession of all of said lands, and to purchase the same from the railroad company upon becoming actual settlers upon the respective tracts selected; in other words, in order to afford financial aid to the grantee, Congress constituted the railroad company a trustee, for the express purpose, and with power and authority to sell and convey the lands designated to actual settlers, and that thereby the railroad company became a trustee as to such lands for the United States, and for all citizens of the United States who may now be actual settlers upon such lands. It is further asserted that the railroad company refused to accept the tender made by cross-complainants of the purchase price, and refused and still refuses to make conveyances of the lands selected and settled upon, and now claims and asserts ownership of the absolute fee-simple title thereto.

Many persons, amounting to several thousand, through intervention permitted by order of the court, have filed complaints against the defendant railroad companies, claiming the right to purchase from the Oregon & California Railroad Company certain lands comprised by the grants of Congress of July 25, 1866, and May 4, 1870. These complaints, in their narration of the history of the grants, follow very closely the allegations contained in the government's bill. The particular claim, however, upon which the complainants therein found their alleged right, is set forth, in substance, as follows: That since January 1, 1903, and prior to the commencement of the government's suit, the intervenors applied to the Oregon & California Railroad Company to purchase certain of the lands comprised by the aforesaid grants; that in so applying each of the said intervenors made request to purchase 160 acres or one quarter section of land, and thereupon offered to pay to said company the sum of \$2.50 per acre, or \$400 per quarter section, and tendered the amount each for the parcel of land selected, and demanded a deed of conveyance therefor, under the alleged terms and conditions of the grants of Congress; that each of the intervenors, ever since his application to purchase was made, has been

and now is ready and willing to pay said money consideration, and offers to bring the same into court to be used for such purpose, if the court shall so order; and that each is a qualified purchaser under the terms of the grants, and at the time of the application intended, and now intends, to make actual settlement upon the tract of land so selected, and henceforth to use the same as an actual settler.

It is further alleged that the interveners have a prior right, estate, and vested interest in the property, to the extent of the amount of land which each has so applied to purchase; that, under the terms and conditions of said acts of Congress, it was the legal duty and obligation of the Oregon & California Railroad Company to issue its deed for the lands applied for upon payment of the purchase price as named; and that as to such interveners the court is without jurisdiction to declare the lands forfeited to the government.

Many other persons have also intervened, by permission of the court, who have made applications to the Oregon & California Railroad Company to purchase since the commencement of the government's suit, who base their alleged right and claim upon like application and tender as the prior interveners; the allegations of their complaints conforming very nearly to those of such prior interveners.

Demurrs to the government's bill, to the cross-bill, and to all bills of intervention, which are pertinent to raise the paramount questions involved by the controversy, have been interposed by the defendant railroad companies and Stephen T. Gage, and also by the Union Trust Company.

John McCourt, U. S. Atty., B. D. Townsend, and Tracy C. Becker, Special Counsel for the Government.

P. F. Dunne, Wm. D. Fenton, and Wm. Singer, Jr., for defendants.

A. W. Lafferty and Arthur I. Moulton, for cross-complainants.

C. I. Leavengood, Charles E. Shepard, Wm. H. Flett, Jno. Mills Day, and M. E. Brewer, for interveners.

WOLVERTON, District Judge (after stating the facts as above). Counsel for the defendant railroad companies and S. T. Gage make the following points of contention in support of their demurrs to the bill of complaint, the cross-complaint, and the bills in intervention: I quote from their reply brief:

"(1) Rights acquired by the East Side Company under the act of 1866 deprived Congress of the power, by amendatory act of 1869, to impose new conditions on the estate; besides, the amendatory act expressly saved 'rights acquired' under the act of 1866.

"(2) The controlling purpose of Congress in making the land grants, here and by the Union Pacific act, as expressly stated in each act, is the same; hence here, as there, any policy of Congress to promote settlement of the lands 'was manifestly subordinated to the higher purpose of having the road constructed with the aid of the land grant.' [Platt v. Union Pacific R. Co.] 99 U. S. 48-67 [25 L. Ed. 424].

"(3) The 'actual settler' proviso is not a condition, because it does not (a) injure specially to the grantor, nor (b) indicate that forfeiture shall attend its breach, and (c) is not compulsory; but if a condition it is void for (d) repugnancy to the grant, and (e) restraint of alienation.

"(4) The 'actual settler' proviso is a personal covenant between grantor and grantee, only. Specific performance cannot be enforced because (a) it is not compulsory, (b) lacks mutuality of right and remedy, and (c) is in the nature of a continuing contract. Besides, whether compulsory or prohibitive, it is (d) in restraint of alienation.

"(5) As the 'actual settler' proviso is not compulsory, withdrawal of the lands in suit from sale is not a breach; and the other alleged breaches would not operate forfeiture of these unsold lands, were the proviso a condition.

"(6) Were the 'actual settler' proviso a condition, broken as alleged, grantor has waived the breach by: (a) Apparent acquiescence in the many deeds

of record made by the railroad company in violation of the proviso; (b) acceptance and use of the road; (c) annual issuance of land patents, from 1871 to 1906; and by (d) effect of the general forfeiture acts of January 31, 1885, and September 29, 1890.

"(7) The land patents are conclusive. Were they void, the title which they purport to convey was confirmed by the force and effect of the acts of March 3, 1891, and March 2, 1896; which acts also bar this suit as to all lands patented prior to October, 1902.

"(8) All causes of action sought to be presented by the bill, other than forfeiture and to quiet title, are also barred by laches and limitations; it appearing that as to those other causes of action complainant is not the real party in interest. Cross-complainants and interveners are also barred by laches and limitations.

"(9) Were the 'actual settler' proviso a condition, which has been broken, still this suit could not be maintained as one to enforce forfeiture, nor to quiet any title which complainant could acquire by such a judgment, because: (a) Grantor has not declared forfeiture; (b) the fact of forfeiture has not been adjudged at law; and (c) the defendant railroad company holds the legal title and possession."

These will be considered, though not in the order of their statement; but in the meanwhile it will be necessary to determine the contentions of the cross-complainants and interveners.

It should be premised that the theory of the bill is not that the grants have not been fully earned so as to entitle the Oregon & California Railroad to have the patents issued, but that, being earned, and patents in large measure having issued, the company has failed to comply with certain terms attending the grants, which it is claimed are conditions subsequent qualifying the estate granted, and that thereby the estate, whether now held under patent or as yet in pursuance of the acts making the grants, has been forfeited to the United States.

The several acts, namely, the act of July 25, 1866, the acts of June 25, 1868 and April 10, 1869, amendatory thereof, and the act of May 4, 1870, contain all of the provisions of Congress relative to the granting of the public lands in question. Scarcely four years elapsed from the inception of the legislation until the last act was adopted, and, viewed as a whole, extending from the first to its final development and adaptation, it indicates a common purpose, and should be considered in pari materia.

A corporation bearing the name "Oregon Central Railroad Company" was organized October 6, 1866, with its principal office at Portland, Or. This company, it is alleged, projected its line of road southward from Portland, on the westerly side of the Willamette river, and on October 10, 1866, the Legislative Assembly of the State of Oregon (Laws 1866, p. 81) by joint resolution, designated it as the company entitled to receive the grant under the act of Congress of July 25, 1866. This company also adopted a resolution on May 25, 1867, assenting to the provisions of the grant, and filed a copy thereof with the Secretary of the Interior July 6, 1867. On August 20, 1868, the company filed with the Secretary of the Interior a map of survey of its projected line. On April 22, 1867, another corporation was organized, under the same name, with its principal place of business at Salem, Or. This company, claiming that the one previously organized was not lawfully incorporated, procured, on October 20, 1868, the adoption of a joint resolution by the Legislative Assembly of Oregon,

designating it as the organization entitled to receive the grant. This resolution by preamble sets out that at the time of its adoption no such company as the Oregon Central Railroad Company, with its principal office at Portland, was organized or in existence, and that the previous joint resolution designating that company as the one entitled to receive the grant was adopted under a misapprehension of the facts. On June 8, 1869, the company last organized, with its principal office at Salem, being the East Side Company, adopted a resolution assenting to the provisions of the act of Congress of July 25, 1866, and specifically to the amendments thereto, which resolution was filed in the office of the Secretary of the Interior June 30, 1869. On October 29, 1869, this company filed its map of survey and location of the first 60 miles of its projected line of railroad on the East Side, and on December 24, 1869, completed the construction of its first 20-mile section; the same being approved on the 31st of that month. The allegations of the bill do not show that the company was engaged in the work of construction prior to the time of filing its assent, namely, June 30, 1869; but for the purposes of this controversy it may be assumed that such was the case, as it is not at all probable that the section was built in so short a time as intervened between the date of such filing and that of the completion of the section.

On July 2, 1870, the company first organized—the West Side Company—by resolution assented to the grant of May 4, 1870, and filed a copy of such resolution with the Secretary of the Interior July 20, 1870. The Oregon & California Railroad Company was incorporated March 17, 1870, and on March 29, 1870, it took over, by assignment and transfer, all of the property, rights, and franchises of the East Side Company, including its grant of public lands by virtue of the act of Congress of July 25, 1866, and the acts amendatory thereto. By resolution adopted April 4, 1870, this company accepted the grant upon the terms and conditions specified. A copy of the resolution was filed with the Secretary of the Interior April 28, 1870. Ever since such transfer, the latter company has exercised control in the construction of the East Side Road and over the grant of Congress to the East Side Company; and the West Side Company has never, since filing its assent to the West Side grant, claimed or assumed to exercise any control over the affairs, rights, or privileges of the East Side Company.

Now, bearing in mind the various acts of Congress touching these grants, the resolutions of the Legislature of the state, and the proceedings of these several corporations, we will consider the first contention of defendants' counsel, together with the incidental questions presented in support of the demurrer to the bill.

[1] It is stoutly urged that these grants are in *præsenti*, and with reference to the East Side grant that it became operative, by relation back to the date of the act of Congress conferring the grant, upon the designation by the Legislature of the state of the Oregon Central Railroad Company (East Side) as the one entitled thereto, October 20, 1868. That is to say, that, upon that date, the grant became vested in the East Side Company, subject to the conditions imposed for construction, etc., and hence that the amendment of April 10, 1869, re-

quiring the lands granted to be sold to actual settlers, in quantities not exceeding 160 acres to one purchaser, and at a price not exceeding \$2.50 per acre, was beyond the power of Congress to enact.

It is undoubtedly true, as argued, that the grant could not become operative until there was a grantee in being, or in existence, capable of taking; nor could it become operative until a company was designated by the Legislature of the state as the one entitled to the benefits thereof, as, under the provisions of the act conferring the grant, it was to the company that should be so designated. The words "that there be, and hereby is, granted," standing alone, unquestionably import a transfer of present title. When read in connection with the terms of the grant, and in relation to the thing granted, they may or may not bear such signification. Where a grantee is actually in existence and qualified to take according to the terms of the law, the words alluded to operate as an immediate and present transfer. But it is otherwise if the grantee is not in existence, or has not qualified himself in pursuance of the terms of the grant to entitle him to that which is offered. Instances of a present transfer are illustrated by the following cases:

Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634, which related to a grant to the state to aid in the construction of certain railroads; the companies to be aided being named and designated in the act making the grant. Schulenberg v. Harriman, 21 Wall. 44, 22 L. Ed. 551, which was also on a transfer to the state "to aid in the construction of railroads"; the holding being that the state acquired a present estate by the terms of the grant. Lessieur v. Price, 12 How. 59, 13 L. Ed. 893, a grant to the state of four sections of land, to be selected, for the purpose of fixing the seat of government thereon. Railroad Company v. Smith, 9 Wall. 95, 19 L. Ed. 599, a grant of swamp lands to the state. And Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591, also a grant of like lands to the state.

In all such and like cases, where identification of the lands in contemplation has been necessary, as by the definite location of the line of railroad which determines the particular sections comprised by the grant, or by the ascertainment of the quality of the land in determination of its swampy character, the grant is said to take effect at the time of the identification or ascertainment, but by relation back to the date of the grant, notwithstanding the grant is denominated as one in *præsenti* and vests a present estate. Where, however, the grantee is not in existence, or is required to do something by which to qualify himself to take under the terms and conditions prescribed, then the grant does not vest a present estate; nor does it become operative except at the time the contemplated grantee comes into being or qualifies himself to receive the designated bounty. As is said by Mr. Chief Justice Waite, in Hall v. Russell, 101 U. S. 503, 509, 25 L. Ed. 829:

"There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently."

In that case, the grant, which was in pursuance of the donation act of September 27, 1850 (Act Sept. 27, 1850, c. 76, 9 Stat. 496), was to a white settler or occupant of the public lands "who shall have resided upon and cultivated the same for four consecutive years," and the distinguished jurist further said:

"Whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested. But until he was qualified to take, there was no actual grant of the soil."

It was concluded that there was no grant of land to the settler until he had qualified himself to take by completing his four years of residence and cultivation, and performed such other acts in the meantime as the statute required in order to protect his claim and keep it alive, and that "down to that time he was an authorized settler on the public lands, but not a grantee." In such a case, therefore, the grant is of the date the settler qualifies himself to take; the court making no declaration concerning the doctrine of relation. The doctrine of relation, while a fiction of law, is potent for subserving the purposes of justice, and is applied only for the security and protection of persons who stand in some privity with the party initiating proceedings for land, and who has acquired the equitable claim or right to the title. By it is meant:

"That principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had." Gibson v. Chouteau, 13 Wall, 92, 100; 20 L. Ed. 534.

See, also, Lynch v. Bernal, 9 Wall. 315, 325, 19 L. Ed. 714.

Applying this doctrine in a case involving rights acquired under the timber act of June 3, 1878 (chapter 151, 20 Stat. 89 [U. S. Comp. St. 1901, p. 1545]), Mr. Justice Brewer, in *United States v. Detroit Lumber Co.*, 200 U. S. 321, 334, 26 Sup. Ct. 282, 286 (50 L. Ed. 499), says:

"It is a doctrine of frequent application, designed to promote justice. * * * The ordinary railroad land grants have been grants in *præseunti*, and under them the title has been adjudged to pass, not at the completion of the road, but at the date of the grant. (Citing authorities.) A patent from the United States operates to transfer the title, not merely from the date of the patent, but from the inception of the equitable right upon which it is based. *Shepley v. Cowan*, 91 U. S. 330 [23 L. Ed. 424]. Indeed, this is generally true in case of the merging of an equitable right into a legal title. Although the patents in this case were not issued until after the sales of the timber, yet when issued they became operative as of the date of the original entries."

If the doctrine of relation were applied in the case of *Hall v. Russell*, *supra*, we should say that the grant was of the date the settler qualified himself to take with relation back to the date of the initiation of his claim, but not to the date of the enactment of the donation law.

In the present case the grant was to a company to be organized, and to such a one as the Legislature of the state of Oregon should desig-

nate as entitled thereto. It is plain, under the authorities, that no title passed until the organization was perfected and the designation of the Legislature made. Nor do I think that the grant became operative until the company filed its assent to the terms and conditions of the act, as required by section 6 thereof, as amended April 10, 1869. It was one of the conditions of the act that the assent be filed, and it was by the observance thereof that the grantee qualified itself to take. Indeed, it was the first act required to be done on the part of the grantee for the initiation of a claim under the grant, and without such an assent no one could know that it purposed availing itself of the benefits of the act conferring the grant. Hence, under the doctrine of the cases, the act of July 25, 1866, could not operate to vest an interest in the grantee until the organization qualified itself by assenting to the terms of the act in the manner prescribed; and, whether the grant then took effect by relation back to the date of the act or not, Congress was wholly authorized to add such amendments in the meantime as it saw fit. It disturbed no vested right of the grantee by so doing. But, however this may be, there is another reason rendering it competent for Congress to make the amendment. On October 10, 1866, the Legislature of Oregon designated the West Side Company as the organization entitled to the grant, and that company filed its assent to the provisions of the act of July 25, 1866, with the Secretary of the Interior July 6, 1867, within the year, and in these respects it would seem that the law had been complied with.

But the East Side Company, organized April 22, 1867, set up a claim to the grant, which was evidently brought to the attention of the Legislature of the state, for that body, assuming that it had previously designated a company not in existence as entitled to the grant, designated the East Side Company as the one proper to receive the benefits thereof. This was on October 20, 1868, being more than one year subsequent to the passage of the act of July 25, 1866. From this time, the West Side Company made no further claim to this particular grant, and later accepted a new grant. So that the West Side Company was no longer entitled to the benefits of the act of 1866, and whatever controversy existed between the two companies was thus ended. On June 13, 1869, the East Side Company filed its assent, whereby it accepted all the provisions, rights, privileges, and franchises of the act of July 25, 1866, and of all acts amendatory thereof, and upon the conditions therein specified. Congress had amended the original act by extending the time for completion of the first and subsequent sections of 20 miles each of the road, and for the completion of the whole. This was prior to the date when the Legislature of the state designated the East Side Company as the one entitled to receive the grant, and, had it not been for the amendment, the East Side Company would then have been in default in construction work, and, under section 8, the act would have been rendered null and void. Then followed the amendment of April 10, 1869, extending the time for filing assent, being the one containing the proviso that the lands granted shall be sold to actual settlers. There was some reason for passing this amendment. Congress undoubtedly believed that it was necessary so that the act might be com-

plied with in that respect, and the East Side Company supposed that it was necessary to the acquirement and completion of its rights to the grant, for it soon thereafter signified its assent to the original act by resolution adopted and duly filed with the Secretary of the Interior. The language of the resolution leaves no doubt as to the purpose of the company. Now, here was a legislative interpretation of the act of July 25, 1866, that it was necessary to the acquirement of the grant that the company seeking its benefits should file assent thereto, and for that purpose an extension of time was given. On the other hand, there was a complete assent to the interpretation on the part of the railroad company, thus ratifying, if need be, the act of Congress in making the extension of time and requiring sale of the lands to actual settlers. This all under the reservation in the original act, by section 12, of the authority of Congress to alter, amend, or repeal the same.

The view thus entertained is not without authoritative support. In St. Paul, etc., Railway Co. v. Greenalgh, 139 U. S. 19, 11 Sup. Ct. 395, 35 L. Ed. 71, Congress by an act extended time to the St. Paul & Pacific Railroad Company within which to complete its road, upon condition:

"That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or other such persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad."

In conjunction therewith the railroad company was required to file a formal acceptance of the conditions in the Department of the Interior for record. Notwithstanding it did not affirmatively appear that any acceptance was ever signed, it was considered, in the absence of such proof, that, as the company continued to assert and exercise ownership over the road, it had in fact accepted the conditions imposed. Hence it was adjudged that a settler upon the lands of the grant prior to the act extending the time for completion of the road acquired a right superior to that of the railroad company. Thus in effect the amendment of the statute conferring the grant was acceded to by the grantee, and it thereby became bound by it. In this relation the court says:

"A mere breach of condition does not of itself work a forfeiture of a grant; some other proceeding must be taken by the grantor to indicate his dissatisfaction with the breach and his intention to exercise his rights to revoke the grant and take possession of the property in consequence thereof. While in this case no specific action was taken by Congress to work a forfeiture of the grant, or by the state, yet the continued possession and use of the property by the company were, in fact, subject to the condition that the rights of settlers upon the lands at the time should not be interfered with, where such settlements had been made in good faith, as was the case in the present instance. And it would be in the highest degree inequitable to allow the company to have all the benefits of the extension of time to complete its road, so as to avoid any forfeiture of its privileges and franchises, without at the same time holding it to the conditions affecting the rights of settlers upon the lands of the company, in consideration of which the extension was made."

So it is here, the railroad company acceded to the amendment by complying specifically with its requirements, saying nothing of its alleged participation in securing the passage thereof.

It is insisted that the amendment extending the time for completing the road was a waiver on the part of Congress of the necessity for filing an assent, because it was adopted more than one year after the adoption of the main act, and the amendment makes no mention of the time for filing assent. The answer to this is that Congress did not so treat it, and the railroad company evidently did not regard it, for both proceeded upon the theory that the assent was yet essential to the earning of the grant. But it is said that, at the time of the designation by the Legislature of the East Side Company as entitled to the grant, the company had already assented to the conditions of the act conferring it, by implication, because it was organized especially for subserving the purposes of the act, and had then been in the active construction of the road for some time, and therefore that the act then became operative. It is not alleged in the bill that the company was then engaged in the construction of its road; but, conceding that it was, Congress had made express assent essential by direct terms, and the time of that assent was also made of the essence of the grant, for the grant was made dependent upon the observance of the provision.

Construing the act as a law, however, as it will presently appear it should be construed, which requires that the intent of Congress shall govern rather than that the law of specific performance of a contract shall be applied, the construction of the act of Congress, together with its subsequent amendment and the acquiescence of the railroad company therein, again becomes paramount and controlling, and the express assent dominates the grant, so that it does not become operative until that assent is given. See *Rogers v. Port Huron & Lake Mich. R. R.*, 45 Mich. 460, 468, 8 N. W. 46, 50. As was said in this case, which bears a close analogy to the case at bar as it pertains to the present question:

"This acceptance was the only act whereby any of these companies was brought into contract relations with the state at all. The law did not assume to force the grant upon any company, and the contract could not bind either party until both assented to the same agreements and conditions."

The clause in the amendment of April 10, 1869, protecting any rights theretofore acquired by any railroad under the original act, was intended, looking to the history of the legislation, to protect the West Side Company, as at that time there was a controversy between the East Side and West Side Companies as to which was entitled to claim the grant. The West Side Company had previously been designated by the Legislature as entitled to the benefits of the act, and it had furthermore filed its assent, so that, but for the fact that the East Side Company was now claiming the grant, the West Side Company was apparently entitled to it, and, while Congress did not assume to settle the differences between these companies, it did intend to preserve any rights of the West Side Company that it had then acquired. So it was further enacted that the amendment should not be construed as to entitle more than one company to the grant; thus leaving the companies to adjust the matter between themselves. The adjustment came when the West Side Company also obtained a grant.

Nor is this case controlled by the case of the United States v. Oregon & California Railroad Company, 176 U. S. 28, 51, 20 Sup. Ct. 261, 44 L. Ed. 358, for the stipulation upon which that cause was determined shows a different state of facts from those here presented. That construction is preferred which will give meaning, force, and operation to all the clauses of an act, rather than that one clause should nullify another, unless it be that there is a clear and irreconcilable repugnance between them. It is hardly reasonable to suppose that the clause protecting any company against the impairment of rights accrued was designed in any way to nullify the provision requiring sales to be made to actual settlers, etc., seeing that the latter provision is a part of the same amendment, and follows immediately after the former clause.

The sixth and seventh points of contention will be considered together. It is strongly insisted that the government has in several ways waived, or has precluded itself of the right at this time to insist upon, a forfeiture of the lands in question:

First, by the issuance of its patents to such of the lands comprised by the grant as have been patented.

Second, by not sooner insisting upon the forfeiture; it being assumed that the government was in possession of knowledge of certain breaches of the condition requiring the grantee railroad companies to sell to actual settlers.

Third, by the act of Congress of September 29, 1890 (chapter 1040, 26 Stat. 496 [U. S. Comp. St. 1901, p. 1598]), entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads and for other purposes"; and as to the West Side grant by an act approved January 31, 1885 (chapter 46, 23 Stat. 296), entitled "An act to declare forfeiture of certain lands granted to aid in the construction of a railroad in Oregon."

Fourth, by the act of March 3, 1891 (chapter 561, § 8, 26 Stat. 1099 [U. S. Comp. St. 1901, p. 1521]), fixing a time beyond which suits to annul and vacate patents issued by the United States may not be instituted, together with the act of March 2, 1896 (chapter 39, 29 Stat. 42 [U. S. Comp. St. 1901, p. 1603]), relating to suits by the United States for vacating any patent to lands theretofore erroneously issued under railroad or wagon-road grants, which is a re-enactment, or rather amendatory of the preceding act.

First, as to the effect of the issuance of the patents: By reference to the bill of complaint, it will be noted that patents were issued subsequent to 1871, running to 1906, inclusive, for approximately 2,765.597 acres of the East Side grant, and of the West Side grant 128,518 acres. The discussion must proceed with reference to the theory of the government in seeking to maintain this suit, which is that the "settlers clause" in the amendment of April 10, 1869, and in the act of May 4, 1870, is a condition subsequent to be observed on the part of the railroad companies; that, if not observed, a forfeiture of the lands would be incurred; and that such provision is a condition attending and upon which the grant was made. Whether the theory can be substantiated in law will be a subject for consideration later.

To recur to the act of July 25, 1866, the first section relates to the authorization of the railroad company to construct the road; the second to the grant of the lands, the said lands to be applied to the building of the road; and the third section to the grant of the right of way. The fourth section relates to the issuance of the patents. These were required to be issued whenever any section of 20 miles of the road was completed, upon the report of the commissioners showing that the road had been constructed and equipped in all respects as required by the act. The fifth section prescribes that the grants are made upon condition that the companies shall keep the road in repair and use. The sixth relates to the filing of the companies' assent and the time of the completion of the road, section by section, as specified; and the eighth section, besides providing for forfeiture for noncompliance with specific provisions, authorizes Congress, in case the road is not kept in repair or fit for use after completion, to pass an act to put the same in repair and use, and to appropriate the income for defraying the expenses thereof. These comprise all the provisions of the act which can have any bearing upon the issuance of patents for lands earned under the provisions of the grant.

[2] All public grants are administered by the Land Department, which is a part of the administrative and executive branch of the general government, and was organized to supervise all the various proceedings by which title to public lands is acquired, from their commencement to their close. Before the issuance of any patent, the Land Department is charged with the duty of ascertaining and determining whether all the conditions of the law entitling it to issue have been complied with. It may be that the issuance depends upon the existence of certain facts, or the performance of certain obligations imposed, or the observance of specific regulations; and in all these the Land Department must ascertain and determine whether the law has been fulfilled so as to entitle the grantee to his final patent under the grant. Within its special jurisdiction, and wherein its function is to conduct inquiry into matters of fact, the Land Department acts judicially, and its findings and judgments, while proceeding within the scope of its powers, are as binding and conclusive as the findings, judgments, and decrees of any other special tribunal, and they are unimpeachable and unassailable except by direct proceeding instituted for their correction or annulment. This much for the solemnity and integrity of the acts of the Land Department when in the exercise of its judicial functions. These functions are usually brought into requisition in the considerations and determinations relative to the issuance of patents, both under general laws for disposal of the public domain to private persons, and under specific grants for railroad and other purposes.

In *Barden v. Northern Pacific Railroad*, 154 U. S. 288, 327, 14 Sup. Ct. 1030, 1038 (38 L. Ed. 992), a case concerning a grant for railroad purposes, the court declares that:

"It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and

determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack."

"The patent of the United States, is," it is said, "the conveyance by which the nation passes its title to portions of the public domain." Smelting Co. v. Kemp, 104 U. S. 636, 640 [26 L. Ed. 875.]

This under the general laws for disposition of the public lands. And it is further said that:

"The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with."

Ordinarily, the patent under a grant for railroad purposes does not operate to pass the title, for that is done by virtue of the grant itself, in which case the patent is rather in the nature of a confirmation of the grant, and in further assurance of title, bearing the force and effect of a solemn certificate that all things have been done and observed entitling the patentee to his grant at that particular juncture.

Says Mr. Justice Field, in *Langdeau v. Hanes*, 21 Wall. 521, 529, 22 L. Ed. 606:

"In the legislation of Congress a patent has a double operation. It is a conveyance by the government when the government has any interest to convey; but, where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence, having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation. The instrument is not the less efficacious as evidence of previously existing rights because it also embodies words of release or transfer from the government."

The eminent jurist, in a later case concerning lands comprised by a railroad grant (*Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, at page 510, 10 Sup. Ct. 341, at page 346 [33 L. Ed. 687]), after holding that the grant was in *præsenti*, says:

"The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions."

This language was substantially repeated in *Deseret Salt Company v. Tarpey*, 142 U. S. 241, 251, 12 Sup. Ct. 158, 35 L. Ed. 999, where a question was suggested as to the necessity for patents where the title passed by the act conferring the grant.

Let us ascertain now what the Land Department, in acting in its supervisory character in the administration of these grants, was required to ascertain and determine relative to the lands granted before issuing patents therefor. It must know that the railroad company was

duly incorporated, properly designated by the state Legislature as entitled to the benefits of the act, and duly authorized to take the grant. It must know that the lands for which patents are sought are within the place or indemnity limits of the grant, and that they have not been reserved, sold, or otherwise disposed of. It must know that the section of 20 miles opposite which the lands are sought to be patented has been completed and equipped in all respects as required by the act conferring the grant and the amendments thereto, section by section of 20 miles each in its order as the road progresses; and, if the entire road was completed and equipped according to law, the Land Department must know that. In this respect the Land Department is aided by the commissioners appointed by the President for the express purpose of ascertaining and making report relative to the facts pertinent to the inquiry. When these facts have been ascertained and determined to exist, then it is incumbent upon the Land Department to issue the patents. The department is required to look no further, nor to concern itself with what the railroad company is bound to do in the future to preserve the integrity of the grant, or to prevent its forfeiture, if such a thing is within the purpose and intendment of Congress.

Now, recurring again to the theory of the bill of complaint that the settlers clause imposes a condition subsequent upon the railroad company for the breach of which a forfeiture would be incurred, it is plain that the Land Department could have nothing to do with any alleged breach of the condition, as by the very order of things such breach would come after the time when it would have passed judgment with relation to the issuance of the patents under the grant. The issuance of the patents, therefore, by the Land Department could be taken neither as a waiver on the part of the government of the right to insist upon the condition subsequent, nor as adjudication conclusive against the government's insistence upon the performance of such a condition.

[3] The second ground upon which waiver is predicated is that the government has not sooner insisted upon forfeiture, knowing that breach of the alleged condition subsequent has been committed. The infractions of the condition referred to consist in the assignment and transfer by the East Side Company of all its right, privileges, franchises, and property, including the right, title, and interest of the company in and to the granted lands, East Side, to the Oregon & California Railroad Company March 29, 1870, and a like transfer of the West Side grant October 6, 1880, the execution of certain mortgages noted in the bill of complaint, covering the granted lands, and other conveyances.

As to the transfers to the Oregon & California Railroad Company, these were not intended as a sale and disposition of the lands, but the transactions were designed to work a substitution of the latter company for its predecessors, so that the intention and purpose of Congress, voiced by the enactments conferring the grants, might be carried into effect through its instrumentality, thus conceding to it the rights and benefits to accrue to the original companies, but nothing beyond. Such is the theory upon which the bill of complaint is drawn, and such is clearly the effect of the transfers. The Oregon & Califor-

nia Railroad Company has so treated them, and so has the government. As it pertains to the East Side grant, the Oregon & California Railroad Company specifically assented to the act conferring it, and assented to the grant itself on April 4, 1870, within the extended time for filing assent by the amendment of April 10, 1869. The assent was, however, not filed with the Secretary of the Interior until April 28th. But no importance is attached to that. As to both grants, patents have been issued by the government to the Oregon & California Railroad Company, and accepted by it as the grantee, and in all transactions since the transfers the Oregon & California Railroad Company has been treated, and it has so treated the relationship with the government, as the grantee company.

[4] As it relates to the mortgages, if considered as evidencing sales of the granted lands, and other conveyances in alleged violation of the stipulations of the settlers clause, there is nothing stated in the bill from which it can be inferred that the government assented to them in any way, and hence it cannot be considered to have waived the condition.

"Mere indulgence or silent acquiescence is never construed into a waiver unless some element of estoppel can be invoked." 29 A. & Eng. Enc. of Law, 1196.

So it is said in *Gray v. Blanchard*, 8 Pick. (Mass.) 284, 292:

"A mere indulgence is never to be construed into a waiver of a breach of condition; and so are the authorities."

See, also, *Trustees of Union College v. City of New York*, 173 N. Y. 38, 65 N. E. 853, 93 Am. St. Rep. 569; *Howe v. Lowell*, 171 Mass. 575, 51 N. E. 536; *Carbon Block Coal Company v. Murphy et al.*, 101 Ind. 115.

There is certainly nothing contained in the bill of complaint that shows that the government did more than to remain silent while the Oregon & California Railroad Company was disposing of the lands in violation of the condition prescribed by the settlers clause, if it be a condition, and one of which the government can avail itself. It did nothing affirmatively or actively by which to mislead the railroad company or cause it rightfully to presume upon the government's acquiescence. So that the government has neither waived, nor is it estopped to insist upon, forfeiture for condition broken, if forfeiture may be predicated upon the clause. This will be determined later.

[5] Furthermore, it is not believed that the executive officers of the government can, without express authority from Congress, waive the conditions expressed in a grant emanating from Congress.

[6] The acceptance and use of the road by the government was contemplated from the beginning, and could not operate as a waiver of a condition subsequent attending the grant.

[7] If it be the purpose to ground the defense upon laches, that cannot be done, for laches is not imputable to the government.

The other ground of waiver as assigned cannot be supported. The act of Congress of September 29, 1890, *supra*, declares:

"That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state

or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain." Section 1.

[8] It has been held, in *United States v. Tennessee & Coosa Railroad Co.*, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452, that this act did not operate upon lands opposite completed road, and did not work a forfeiture as to them. It is urged that, under the rule, "Expressio unius est exclusio alterius," the act operates as a declaration of waiver of forfeiture as to all lands opposite the completed portions of all railroads. This is equivalent to saying that the effect of the act was to confirm to the railroad companies all lands opposite completed railroads, or portions thereof. The application sought is a novel one. To say that forfeiture by Congress of lands opposite railroads not constructed is to confirm to the grantees the lands opposite roads constructed, against all contingencies and reserved conditions, whether precedent or subsequent, is carrying the doctrine beyond its purpose and effect. It could not be presumed that Congress, when adopting the general statute applying to all lands under grants lying opposite parts of railroads uncompleted, had in mind all conditions subsequent that might have been annexed to grants where the roads had been completed. The thing is so manifest that it requires no argument; it is sufficient to state the proposition. So Congress could not have intended, by the act under discussion, to confirm the grants here concerned against any condition subsequent that might have been annexed to them, and, if not intending so to do, the act could not operate as a waiver of forfeiture of conditions subsequent, if broken. The same is true of the act of January 31, 1885, c. 46, 23 Stat. 296, forfeiting the unearned land grant to the West Side Company, although its operation was not general, but related to the forfeiture of a portion of one grant only.

[9] The fourth ground upon which waiver is predicated relates to the statutes of limitation for bringing suits for the annulment of patents, and is rather an objection going to the remedy or the right to institute the suit. The statutes invoked are section 8 of the act of March 3, 1891, c. 561, 26 Stat. 1099 (U. S. Comp. St. 1901, p. 1521), and section 1 of the act of March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603). The former statute provides:

"That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents."

The provision is contained in "An act to repeal timber culture laws, and for other purposes," but, being general in its terms, would seem to include patents to railroad companies under grants thereto, as well as other patents issued by the government. The later statute declares:

"That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six

years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-First Congress and amendments thereto is extended accordingly as to the patents herein referred to."

The two statutes read together put all patents, whether issued in pursuance of railroad grants or otherwise, in the same category, and suits by the government to cancel cannot be maintained except as thereby provided. But the plain answer to the objection is that this is not a suit to annul the patents issued under these grants. It reaches back of the patents; the purpose being to forfeit the entire grants, so far as the lands are now held by the railroad company, for failure to observe the condition requiring the company to sell to actual settlers. The patents are only evidentiary of the grant; it is the grant that confers title. If the grant is rendered subject to forfeiture for want of the observance of a condition subsequent, the breach whereof may have occurred later than the issuance of many patents, it does not appeal to reason that the forfeiture should be defeated because suits were not instituted to annul the patents within the time fixed by the statute. Should the grant be annulled, the annulment would carry with it, it is true, the avoidance of the patents. But the conditions of the grant must be read into the patents, so the patents cannot stand in the way of the enforcement of such conditions.

The cause which forms the basis of this suit arises out of none of the facts adjudicated by the Land Department, or with which that department had anything to do in issuing the patents; but it arises from the alleged want of the observance of the terms of the grant, whereby the grant itself, it is alleged, has been forfeited. The patents add nothing to the terms of the grant, nor take aught from them.

So I conclude that the government has not waived its right to maintain this suit for any of the reasons assigned. Nor is it barred of its remedy by virtue of the statutes of limitation relied upon by counsel.

The crucial controversy attending this cause relates to the true intent of Congress as expressed by the clause contained in the amendment of April 10, 1869, referred to as the "actual settlers" proviso, as follows:

"And provided further, that the lands granted by the act aforesaid shall be sold to actual settlers only, in quantities not greater than one-quarter section to one purchaser, and for a price not exceeding two dollars and fifty cents per acre."

The government contends that this is a condition subsequent, subjoined to the original act, the effect of which is to entail a forfeiture of the lands granted for nonobservance of the condition. The defendants the railroad companies and Stephen T. Gage contend that it is neither a condition subsequent, an enforceable covenant, nor a trust obligation; it being urged that it is an "unenforceable regulative, directive covenant," leaving it wholly to the good faith and discretion of the grantee whether to observe its terms or not.

Reference to some of the plain rules of statutory interpretation will aid in the solution of the problem. It is axiomatic that the intent of Congress, as a first principle, should be ascertained and enforced.

"These grants," says the Supreme Court, "are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance." *Winona & St. Peter R. R. Co. v. Barney*, 113 U. S. 618, 625, 5 Sup. Ct. 606, 609 (28 L. Ed. 1109).

"There is a presumption," says the same court, "against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience." *Bird v. United States*, 187 U. S. 118, 124, 23 Sup. Ct. 42, 44 (47 L. Ed. 100).

"The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar; and from this presumption it is not allowable to depart, unless adequate grounds are found, either in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the Legislature." Endlich on the Interpretation of Statutes, p. 4, § 2.

In application of this rule the court says, in *McCluskey v. Cromwell*, 11 N. Y. 601:

"If the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation."

And so in *United States v. Goldenberg*, 168 U. S. 95, 102, 18 Sup. Ct. 3, 4 (42 L. Ed. 394), Mr. Justice Brewer says:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent. No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specially provided for, justify any judicial addition to the language of the statute."

In further elucidation, "The province of construction," says the court in *Hamilton v. Rathbone*, 175 U. S. 414, 421, 20 Sup. Ct. 155, 158 (44 L. Ed. 219), "lies wholly within the domain of ambiguity." And in another case (*Kohlsaat v. Murphy*, 96 U. S. 153, 160, 24 L. Ed. 844) that:

"The controlling rule of decision in applying the statute in any particular case is that, whenever the intention of the Legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which should never be imputed to the Legislature, except when the language employed will admit of no other signification."

Another plain rule of interpretation is that the purposes of the act must be gathered from the context and a survey of all its provisions, so that if possible it may stand as a harmonious and consistent whole, every word and sentence bearing an appropriate meaning and significance, rejecting none, unless leading to a manifest absurdity, which it must be presumed that the Legislature never intended. *Rice v. Railroad Company*, 1 Black, 358, 378, 17 L. Ed. 147; *United States*

v. Winn, 3 Sumn. 209, 211, Fed. Cas. No. 16,740; United States v. Bitty, 208 U. S. 393, 402, 28 Sup. Ct. 396, 52 L. Ed. 543.

Furthermore, interpretation must be had in the light of the conditions prevailing at the time of the enactment, and thus by standing in the place of the legislative body its intendment may be gathered by looking through its vision at the things as they then existed, and the probable exigencies that gave rise to the measure.

In Platt v. Union Pacific R. R. Co., 99 U. S. 48, 60, 25 L. Ed. 424, construing the Union Pacific land grant by act of 1862 (Act July 1, 1862, c. 120, 12 Stat. 489), the court says:

"All will concede * * * we are to look at the state of things then existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the congressional intentions."

As stated by Mr. Justice Jackson, in Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486, 502, 14 Sup. Ct. 968, 974 (38 L. Ed. 793):

"Legislative contracts, especially, should be read in the light of the public policy entertained, and the purposes sought to be accomplished at the time they were made, rather than at a later period when different ideas and theories may prevail."

Other citations to this purpose are unnecessary. I shall later point out some of the attendant and inducing conditions, including the policy and purposes of the government pertaining to railway grants and donation and sale of the public domain to private settlers, leading in all probability to the legislation in controversy.

[10] In the case of legislative grants, imposing conditions along therewith upon the grantee in relation to the thing granted, the acts conferring them are to be construed as laws, and the technical rules governing the interpretation of contracts are inapplicable; the single inquiry being as to the intent of the one party—the legislative intendment in promulgating the law.

Says the court, in Schulenberg v. Harriman, 21 Wall. 44, 62, 22 L. Ed. 551:

"A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the Legislature requires."

So in Missouri, etc., Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S. 491, 497, 24 L. Ed. 1095:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties."

Mr. Justice Brewer, sitting in the Circuit Court, states the rule concisely, yet comprehensively, thus:

"All legislative land grants are to be regarded, not merely as contracts, but also as laws. As such, they are subject to the same rules of interpretation that govern other laws, and a primary rule is that the intent of the legislator is to be sought, and, when ascertained, controls. The technical rules which govern the interpretation of private contracts must always yield

to the single inquiry of the intent of the one party—the Legislature.” St. Paul, M. & M. R. Co. v. Greenalgh (C. C.) 26 Fed. 563, 568.

See, also, *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 25 L. Ed. 424; *Hall v. Russell*, 101 U. S. 503, 509, 25 L. Ed. 829; *Johnson v. Ballou*, 28 Mich. 379.

[11] And still another rule of construction as it pertains to grants of the public domain to private individuals or corporations is that they should, where there is ambiguity or uncertainty, be construed most favorably to the government, thus devolving upon the grantee, in whatsoever claim he seeks to maintain against the government relative to the grant, to show a right clearly defined and about which there can be no controversy or contention. Mr. Justice Harlan, in *Sioux City, etc., Railroad v. United States*, 159 U. S. 349, 360, 16 Sup. Ct. 17, 21 (40 L. Ed. 177), states the principle thus:

“If the terms of an act of Congress, granting public lands, ‘admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor. And, if rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.’ Leavenworth, etc., Railroad v. United States, 92 U. S. 733, 740 [23 L. Ed. 634].”

Mr. Justice Field earlier stated the same principle in *Slidell v. Grandjean*, 111 U. S. 412, 437, 4 Sup. Ct. 475, 487 (28 L. Ed. 321):

“It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms, or as to its general purpose, that construction should be adopted which will support the claim of the government rather than that of the individual. Nothing can be inferred against the state.”

Mr. Justice Harlan makes use of this explicit and significant language in *Water Company v. Knoxville*, 200 U. S. 22, 33, 26 Sup. Ct. 224, 227 (50 L. Ed. 353):

“The universal rule in doubtful cases, this court said in *Oregon Railway Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 26 [9 Sup. Ct. 409, 32 L. Ed. 837, 842], is that ‘the construction shall be against the grantee and in favor of the government.’ As late as *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 562 [12 Sup. Ct. 689, 691],¹ this court said: ‘The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication.’”

And so it was held in that case.

See, further, *Hannibal, etc., Railroad Co. v. Packet Co.*, 125 U. S. 260, 271, 8 Sup. Ct. 874, 31 L. Ed. 731; *Barden v. Northern Pacific Railroad*, 154 U. S. 288, 325, 14 Sup. Ct. 1030, 38 L. Ed. 992; *United States v. Oregon, etc., Railroad*, 164 U. S. 526, 539, 17 Sup. Ct. 165, 41 L. Ed. 541; *Northern Pacific Railway v. Soderberg*, 188 U. S. 526, 534, 23 Sup. Ct. 365, 47 L. Ed. 575; *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

Some inquiry now relative to the conditions existing at the time these grants were made, and the history, policy, and purposes of the general government in its control, administration, and disposition of the public domain.

¹ 36 L. Ed. 537.

In the early annals of the United States the public lands were regarded largely as an asset out of which to derive revenue for the needs of the government. At one time the domain was pledged to the payment of the public debt. The earlier policy was to dispose of these lands to private purchasers, both at public and private sale, but for as much as could be had, and thus to increase the revenues of the government. Such was the central thought. It may have contemplated that purchasers of large tracts would themselves subdivide their holdings, by disposition to persons desiring to establish homes, and that the lands would eventually be devoted to the needs of the settler. But that was subordinate to the main purpose. Lands once offered at public auction, when no purchaser was secured, became what was known as "offered lands," or lands subject to private entry. These offered lands could thereafter be purchased at the minimum price, being the price fixed below which the government would not consent that they should be bid in at auction. Through this regulation, purchasers at private entry were enabled to acquire such tracts of land as they were able to pay for, for home or other purposes. They could acquire no other lands from the government except those that had been previously offered at public auction and failed of a purchaser at a price equal to the minimum or above. Even settlement upon the public domain was discouraged; Congress believing that satisfactory disposition thereof might otherwise be more readily and expeditiously accomplished. Notwithstanding, there was constant and increasing encroachment upon the public domain, and many persons made settlement upon tracts of land of their own selection, cultivating and improving them, and thus fitting and designing them for homes and permanent residence. Based upon such settlement, cultivation, and improvement, and by virtue of being the first appropriators, the settlers began to put forth claims to the first right to purchase the tracts involved from the government, that they might acquire the ultimate title thereto. Later Congress recognized these claims of right; first in a small way, that is, confining its recognition to settlers in certain localities, and limiting its relief in matter of time. The idea grew, however, until Congress was induced to adopt a general pre-emption law authorizing the entry of lands surveyed, but not open to private entry, as well as of lands which could be bought at private sale. In illustration of the development of the policy, it was enacted May 29, 1830 (Act May 29, 1830, c. 208, 4 Stat. 420, 421):

"That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year 1829, shall be, and he is hereby, authorized to enter * * * any number of acres, not more than one hundred and sixty or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land."

On April 5, 1832, another statute was passed (Act April 5, 1832, c. 65, 4 Stat. 503), declaring:

"That all actual settlers, being housekeepers upon the public lands, shall have the right of pre-emption to enter, within six months after the passage of this act, not exceeding the quantity of one-quarter section."

Where, by reason of the public surveys not having been made, the settlers were unable to describe their entries, the privileges thus granted were extended by acts of July 14, 1832 (Act July 14, 1832, c. 246, 4 Stat. 603), and March 2, 1833 (Act March 2, 1833, c. 92, 4 Stat. 663), for a period of one year after the surveys should be made. These pre-emption acts were revived by act of June 19, 1834 (chapter 54, 4 Stat. 678), and again by act of June 22, 1838 (chapter 119, 5 Stat. 251), and later still by act of June 1, 1840 (chapter 32, 5 Stat. 382). But on September 4, 1841 (Act Sept. 4, 1841, c. 16, § 10, 5 Stat. 455), a general pre-emption statute was enacted extending the benefits of settlement without restriction as to time, and providing that, from and after the passage of the act, every person as therein designated, being the head of a family, etc., who since the 1st day of June, 1840, had made or should thereafter make settlement in person on the public lands, which had been surveyed prior thereto, and who should inhabit and improve the same and erect a dwelling thereon, was authorized to enter, in the proper land office, any number of acres of such land, to include the residence of the claimant, not exceeding 160 acres, by payment to the United States of the minimum price of such land. This statute expressly authorized any person possessing the qualifications designated to make settlement upon any lands of the government domain that had theretofore been surveyed. Prior thereto the government had been adopting legislation designed to legalize what was treated rather as a trespass upon the government's domain than as an entry and occupation by right, license, or privilege. Now the entry is directly permitted, and not only this, but settlement is invited, by throwing open the surveyed portions of the public domain for that express purpose. Says the court in Clements v. Warner, 24 How. 394, 397, 16 L. Ed. 695:

"Later statutes enlarged the privilege (of pre-emption), so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers."

This case was decided in 1860. In the meanwhile the trend of public thought was toward even greater liberality as it concerned the settler. The public domain was fast coming to be regarded, not as a property—a mere asset from which to derive revenue for the government's current needs, or with which to discharge its obligations—but as a vast domain, which in large measure should be devoted to the settlement and habitation of its citizens, and that those willing to venture out into the frontier and there provide homes for themselves, and thus establish communities and build up the country, were primarily deserving of the nation's bounty. So the sentiment grew favorable to donating outright small tracts of the public lands to such of the citizens, present and prospective, of the government as would be willing to make settlement thereon, and show good faith in their purpose to make of such lands their permanent homes by living thereon and improving the same. Ultimately, May 20, 1862 (Act May 20, 1862, c. 75, 12 Stat. 392), Congress adopted the homestead law, which donates to those who desire to take advantage of its provisions 160 acres of public land, without cost except the fees attending the filings

and proofs in the land office, on condition only that they reside upon and cultivate the same for a period of five years. This law grew rapidly in favor, and soon became firmly established in public confidence and esteem as wise and justly beneficent.

It was not until early in the nineteenth century that Congress began the appropriation of public lands in aid of internal improvements. First the appropriations were of a certain proportion of the proceeds arising from sales of the land; but later they were of the land itself, which in the earlier stages was devoted to the construction of canals, river improvements, and wagon roads. This was followed by appropriations to aid in the construction of railroads. The grants were made first to the states, to be by them devoted to the ultimate purposes designed; but following a considerable time later grants were made to railroad corporations incorporated by act of Congress, and then to a few private corporations. During the fifties, and up to within the year 1866, numerous grants were made to states, covering many millions of acres, in aid of the construction of railroads. Most of these were similar in the manner of disposing of the lands; the states being made the intermediary through which the title was to pass, to insure good faith on the part of the railroad companies ultimately to receive the benefits. Generally the grants were of lands not sold, reserved, or otherwise disposed of. Later acts excluded lands also to which a pre-emption claim or right of homestead settlement had attached, and such as were in the occupancy of bona fide settlers. On July 1, 1862, Congress made a departure by granting lands to a company of its own incorporation, as well as to privately incorporated concerns under general state laws. I refer to the act creating the Union Pacific Railroad Company and the grant of lands thereto in aid of the construction of its road, including grants to some private corporations. Other grants were made to federal corporations, namely, one in 1864, another in 1866, and still another in 1871, being the last of all the grants made by Congress in aid of the construction of railroads. Some other grants to private corporations followed those provided for along with the Union Pacific grant, and among them the grants of lands under consideration here.

The earlier grants were attended with a doubling of the minimum price of lands within the railroad limits, that is, within the exterior boundaries of the grant not covered by it, but required that such lands be offered at public sale before they were subjected to private entry even at that price. But beginning with the Northern Pacific grant of July 1, 1864, the minimum price was doubled, and private entry was permitted upon such lands whether previously offered or not. Commencing with 1866 the provision was again readjusted, permitting the settler to make entry under the pre-emption act, at the price existing at the time of settlement, and of 80 acres under the regulations of the homestead act. The grants of 1869, as will be seen by the acts now under consideration, annexed provisions requiring the lands granted to be disposed of to actual settlers, in quantities not greater than one quarter section and at a price not above \$2.50 per acre. This policy was subsequently adhered to. This latter class of

provisions was the outgrowth of a widespread and persistent agitation among the people of the nation against the further granting of large areas in aid of railroad construction; it being urged that what remained of the public domain should be set apart for occupancy and acquirement by actual settlers and home seekers, with the privilege and right of acquiring small quantities of land in their own right. The appeal was made as a "measure of justice to the whole American people, as a rich legacy in trust" to the generation then existing and for those to come after, "never to be alienated." The legislation that followed was largely indicative of the reflex of public opinion pertaining to the subject.

Some allusion to the discussions in Congress immediately prior to and at the time these provisions were incorporated, with the legislation making grants of public lands to railroad corporations, will not, I think, prove uninteresting; not that what members may have said while the bills were under consideration should be taken as characterizing the legislative intent in adopting them, but as shedding light upon the conditions, historically, then attending the trend of public thought, and the vital need of such legislation to meet the public exigencies.

The idea was first advanced that, whenever it could be done, the lands proposed to be granted for railroad purposes should be set apart to the states in which they were situated, to be held in trust by them, to be disposed of to actual settlers only, with limitation as to acreage and a maximum price. Then it was urged that such granted lands should be administered by the Secretary of the Interior. This later idea came from Mr. Lawrence, of the House, by way of an amendment to the Denver Pacific bill, as follows:

"And be it further enacted, that all lands which may be granted or conveyed under or by virtue of this act or the acts relating to said railroad company, shall be sold only to actual settlers in quantities not exceeding one quarter section to any one person, and at a price not exceeding \$2.50 an acre; and the Secretary of the Interior shall have power to prescribe rules and regulations for carrying this section into effect."

This was defeated. The discussion drifted to another plan, embodied in an amendment offered by Mr. Julian, also of the House, as follows:

"Provided, that the lands granted * * * shall be sold to actual settlers only, in quantities not greater than one hundred and sixty acres to one purchaser, and for a price not exceeding \$2.50 per acre."

Speaking to the amendment, Mr. Julian had this to say:

"Under proper restrictions I would grant them public lands, and this House has already decided that those restrictions shall be such as I have proposed in the amendment I offered to this bill the other day, namely, that the lands shall be granted on the express condition that they shall be sold to actual settlers only, in quantities not greater than one quarter section to one purchaser, and for a price not exceeding \$2.50 per acre. This will avoid the complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to settlement and tillage the odd-numbered sections granted, while creating in this way established communities and a local business along the line of the road. This, sir, is the true policy, and the whole land grant system of our country will be repudiated by the

people, and ought to be repudiated, unless it shall be made to conform to the conditions I have stated."

Another plan was proposed by Mr. Logan, namely, that all lands theretofore granted to aid in the construction of railroads along that portion then unfinished should be subject to entry at the government land office at \$2.50 per acre; the money to be deposited in the Treasury of the United States as a sinking fund for the redemption or purchase of the bonds of the company so far as it might be sufficient therefor. Mr. Lawrence's plan was, in effect, to make the railroad company the trustee of the lands, with administration by the Secretary of the Interior. Mr. Logan's plan was to make the government trustee, as well as to subject the corpus of the estate to administration through its proper Land Department. Mr. Julian's amendment prevailed finally, and such in effect, by later enactment, became the law attending the grants in question. Other grants took this form of legislation in the main. I speak specifically of the Coos Bay Wagon Road grant of March 3, 1869 (Act March 3, 1869, c. 150, 15 Stat. 340); a revival of grant to the state of Alabama in aid of the construction of railroads (Act April 10, 1869, c. 24, 16 Stat. 45); and an act extending the time for the construction of a railroad under grant to the states of Missouri and Arkansas. As to this latter grant the amendment was subsequently repealed.

The discussion along the line was varied, and the opinions of members of the two Houses of Congress did not agree as to the effect of the clause. Senator Vickers was of the view that the grant was made "expressly on condition that the lands are to be sold to actual settlers"; that:

"If the lands are sold to actual settlers, there is no forfeiture. If a portion of the land is sold to actual settlers, the portion unsold will be forfeited to the government, if that condition is violated."

Senator Thurman was doubtful whether the provision would be effective, and suggested, as it then occurred to him, that Congress could not ingraft upon the grant a condition or a trust or a covenant of that kind in that indefinite and general way. Senator Williams, of Oregon, said:

"The lands granted are as open, under the provisions of this bill, to actual settlers as they are under the pre-emption laws of the country. It simply provides that when settlers go upon these lands they may buy them of the company, and the proceeds shall be applied to assist in the construction of the road."

Senators Stewart and Casserly agreed with him in this view.

With this abbreviated review of the conditions and of the policy of the government with reference to the public domain obtaining prior to and at the time of the adoption of the measures in question, we may proceed to the further discussion of the legislative intendment, considered from a legal standpoint, under the authorities.

There can be no two opinions about the literal meaning of the proviso. The language is so plain and explicit that it bears absolute impress upon the understanding. It constitutes a declaration that the granted lands shall be sold to actual settlers only, in quantities not

greater than one quarter section, etc., which is easily comprehensible, and it would seem that a simple duty or obligation was imposed, so simple that any one could, without taking further thought, readily discharge it. But the real question is: Are these provisions couched in such legal terms as to render them enforceable according to their letter and spirit? In other words, can the grantee be required to do what the language plainly directs shall be done; and what penalty, if any, is entailed by a failure or refusal to observe the plain wording of the provisos?

An estate upon condition is defined as—

"one which has a qualification annexed, by which, on the happening of a particular event, it may be created, enlarged, or destroyed. If set forth, the condition is express; and if it allows the estate to vest, and then to be defeated in consequence of nonobservance of the requirement, it is a condition subsequent." Blanchard v. D. L. & L. M. R. R. Co., 31 Mich. 43, 48, 18 Am. Rep. 142.

Some general observations concerning conditions subsequent may be made in passing. They are not favored in law, and ordinarily are amenable to strict construction, for the reason that, if not observed according to their tenor, they entail forfeiture and a destruction of the estate. A mere declaration touching the particular purposes for which the grant is made, or that the grantee is to do or not to do certain things, will not evidence a condition. And, generally speaking, a condition in a grant should be created by apt and appropriate words—words which ex proprio vigore import a condition. Furthermore, if there be doubt as to whether the words create a condition subsequent, or a covenant, the breach of which may be compensated in damages, courts will construe them favorably to the latter. Instances are not wanting, however, where words and terms appropriate to create a condition, when read in connection with the context of the grant and the intention of the parties, have been disregarded in their technical sense, and construed as in harmony with a covenant, and, conversely, the decision depending upon the real purpose and intent of the parties to the grant, as gathered from the manner and purpose of the conveyance and from the instrument itself, read in its entirety. And it has been held that, although a deed or conveyance contain a clause declaring the purpose for which it is intended the granted premises shall be used, if such purpose will not inure specially to the benefit of the grantor, but is in its nature general and public, and if there are no words in the grant indicating an intent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent. 11 Cyc. 1050; Raley v. Umatilla County, 15 Or. 172, 13 Pac. 612, 3 Am. St. Rep. 139; Gilbert v. Peteler, 38 N. Y. 165, 97 Am. Dec. 785; Rawson v. Inhabitants of School District No. 5 in Uxbridge, 7 Allen (Mass.) 125, 83 Am. Dec. 670.

Recurring to the old law, which comes down to us as sound to-day as it was then, Sheppard's Touchstone (8th Ed.) 121, has this upon the subject:

"Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern

and distinguish them. Know therefore that for the most part conditions have conditional words in their frontispiece, and do begin therewith; and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy, without any addition of other words of re-entry in the conclusion of the condition, do make the estate conditional, as proviso, ita quod, and sub conditione. And therefore if A. grant lands to B. to have and to hold to him and his heirs, provided that, or so as, or under this condition, that B. do pay to A. ten pounds at Easter next; this is a good condition, and the estate is conditional without any more words. But there are other words, as si, si contingat, and the like, that will make an estate conditional also, but then they must have other words joined with them, and added to them in the close of the condition, as that then the grantor shall re-enter, or that then the estate shall be void, or the like. And therefore if A. grant lands to B. to have and to hold to him and his heirs, and if, or but if it happen, the said B. do not pay to A. ten pounds at Easter, without more words, this is no good condition; but if these or such like words be added, that then it shall be lawful for A. to re-enter, then it will be a good condition.

"But here note that these words proviso, ita quod, and sub conditione, albeit they be the most proper words to make conditions, yet do they not always make the estate by the deed to be conditional, but sometimes do serve for other purposes; for the word proviso hath divers operations besides; for sometimes it doth serve for and work a qualification, or limitation, and sometimes it doth serve to make and work a covenant only. And then only (being inserted amongst the covenants of the deed) it doth make the estate conditional, when there are these things in the case: (1) When the clause wherein it is hath no dependence upon any other sentence in the deed, nor doth participate with it, but stands originally by and of itself; (2) when it is compulsory to the feoffee, donee, etc.; (3) when it comes on the part, and by the words of the feoffor, donor, lessor, etc.; (4) when it is applied to the estate, and not to some other matter."

A few modern cases will illustrate the significance given technical words appropriate to the creation of a condition, and when their technical sense will be disregarded; also, when a condition will be declared even where no technical words adapted to its creation attend it.

In *Gray v. Blanchard*, 8 Pick. (Mass.) 285, a deed contained the following provision:

"Provided, however, this conveyance is upon the condition, that no windows shall be placed in the north wall of the house aforesaid, or of any house to be erected on the premises, within thirty years from the date hereof."

It was objected to this conveyance that the words quoted did not constitute a condition, but evidenced a covenant only. Answering this objection, the court, speaking through Parker, Chief Justice, says:

"The words are apt to create a condition; there is no ambiguity, no room for construction; and they cannot be distorted so as to convey a different sense from that which was palpably the intent of the parties. The word 'provided,' alone, may constitute a condition; but here the very term is used which is often implied from the use of other terms. 'This conveyance is upon the condition' can mean nothing more nor less than their natural import; and we cannot help the folly of parties who consent to take estates upon onerous conditions, by converting conditions into covenants. It would be quite as well to say that the words mean nothing, and so ought to be rejected altogether. No authority has been cited which bears out this suggestion; indeed, the authorities are all against it."

It was further insisted that, because there was no clause of re-entry for breach of condition in the deed, the provision was not strictly a

condition going to the forfeiture of the estate; but the court here also held to the contrary, saying:

"The law seems to be clear the other way. A clause of re-entry is not necessary to make a condition. Proviso, ita quod, sub conditione, make the estate conditional. Com. Dig. Condition, A 2. Other words, such as si, si contingat, do not make a condition, which will work a forfeiture, without clause of re-entry. Lit. § 331; Shep. Touch. 121."

In the case of *Hooper v. Cummings*, 45 Me. 359, it appears that one Jonathan Cummings conveyed to Nathan Woodbury and others, a committee appointed to build a meetinghouse in the town, certain acreage, and that in the deed, succeeding the covenants, were these words: "Providing the said committee and proprietors fence the said land and keep the same in repair." Deciding as to the effect of these words, the court says:

"We may assume that the proviso in the deed created a condition subsequent, and, in this, we are sustained by most, if not all, the authorities, ancient and modern; notwithstanding it is to be construed strictly and most strongly against the grantor to prevent, if possible, a forfeiture of the estate. 'If the word proviso be the speaking of the grantor, feoffor, donor, etc., and obliges the grantee, etc., to any act, it makes a condition, in whatever part of the deed it stands; and, though there be covenants before or after, is not material.' 3 Com. Dig. 84 (Condition)."

Sharon Iron Co. v. City of Erie, 41 Pa. 341, is a case where the city of Erie conveyed by deed a piece of realty to the Sharon Iron Company, subject to the conditions, provisions, and stipulations of certain resolutions. These resolutions provided:

"First. That the alienees shall, 'within one year, erect a breakwater in front of each of said lots, under the direction of the city councils.' Second. 'That they shall, 'within two years, erect a good and substantial bloomery thereon, or within the limits of the city.'"

It being alleged that the iron company had failed to comply with these provisions, the city brought ejectment to recover the lots. The bloomery was not constructed as required by the resolutions, and the question came up as to whether the grantees had not forfeited the property by reason of the nonobservance of the condition. Speaking to that subject, the court says:

"The clause in the original resolution incorporated into the deed was a condition, not a covenant, and 'where the language imports a condition merely, and there are no words importing an agreement, it cannot be enforced as a covenant, but the only remedy is through a forfeiture of the estate'"—quoting from *Selden, J.*, in *Palmer v. Ft. Plain & Cooperstown Plank Road Company*, 11 N. Y. 389.

In Wilson et ux. v. Wilson, 86 Ind. 472, a deed was executed by father to son upon the consideration of a certain covenant contained in a separate instrument executed by the son. Upon these facts it was held that the deed was upon condition; the court saying:

"There was no other valuable consideration for the deed, and, unless the instrument can operate as a defeasance, it is difficult to see how, in respect to some, at least, of its terms, it could be enforced, or be made effective in any way. It may be said that the covenants contained in the writing are personal covenants merely, but that cannot affect the conclusion that the deed was made on condition that they be faithfully kept and performed."

In *Oliver Hayden et al. v. Inhabitants of Stoughton*, 5 Pick. (Mass.) 528, a devise of real estate to a town for the purpose of building a schoolhouse, "provided it is built within 100 rods of the place where the meetinghouse now stands," was held to be upon a condition subsequent.

Says Lyon, Judge, in *Horner v. Chicago, Milwaukee & St. Paul Railway Co. et al.*, 38 Wis. 165, 173:

"Although there are technical words, which, if used in a conveyance, unmistakably create a condition, yet the use thereof is not absolutely essential to that end, and a valid condition may be expressed without employing those words."

And again:

"It is not essential to a valid condition that, in case of a breach thereof, a right of re-entry be expressly reserved in the deed, or that it be expressed therein that the estate of the grantee shall terminate with a breach of the condition."

This was a case where the deed conveyed two parcels of land. After the description of the first parcel, and referring to it by the words, "the aforesaid piece or parcel of land hereby conveyed to the party of the second part only for depot and other railroad purposes," and after description of the other parcel, which in terms is granted for a railway, the deed contains these words: "Both of said pieces or parcels being granted solely for said road purposes." The court, speaking with reference to these clauses, says:

"The words 'only' and 'solely' are words of restriction or exclusion. As used in this deed, their effect clearly is to prohibit the grantee from using the lands for any other than the specified purposes."

So it was said by Page, J., in *Kilpatrick v. Mayor of Baltimore*, 81 Md. 192, 31 Atl. 806, 27 L. R. A. 643, 48 Am. St. Rep. 509, 511:

"Technical words are not absolutely essential to create a condition, nor on the other hand does their use necessarily raise one; such words may be controlled by the context of the instrument in which they are used, so that sometimes they work a limitation and condition, and sometimes a covenant or a trust only."

In this case the deed was to the "mayor and city council of Baltimore and its successors," with habendum "to have and to hold * * * unto the mayor," etc., "forever, as and for a street to be kept as a public highway." And it was held not to have been made upon condition.

Lurton, Circuit Judge, now a Justice of the Supreme Court of the United States, gave utterance to the principle in *Board of Commissioners v. Young*, 59 Fed. 96, 104, 8 C. C. A. 27. The deed under consideration contained neither technical words importing a conditional estate, nor any clause of re-entry. "Yet," says the distinguished jurist, "a condition subsequent may be so strongly and clearly implied from the whole tenor of the deed as to demand recognition, though not expressed in technical language." The deed in that case, however, was ultimately held not to have been executed upon condition.

In *Stanley v. Colt*, 5 Wall. 119, 166, 18 L. Ed. 502, the court says:

"It is true that the word 'proviso' is an appropriate one to constitute a common-law condition in a deed or will, but this is not the fixed and invariable meaning attached to it by the law in these instruments. On the contrary, it gives way to the intent of the parties as gathered from an examination of the whole instrument, and has frequently been thus explained and applied as expressing simply a covenant or limitation in trust."

Again, in *Atlantic & Pacific Railroad v. Mingus*, 165 U. S. 413, 428, 17 Sup. Ct. 348, 351 (41 L. Ed. 770), Mr. Justice Brown says:

"It cannot be supposed that Congress intended to vest a title in the railway company to this enormous grant of lands without contemplating that the government might in some way reacquire it in case of a failure of the company to comply with the conditions of the grant. No express provision for a forfeiture was required to fix the rights of the government. If an estate be granted upon a condition subsequent, no express words of forfeiture or reinvestiture of title are necessary to authorize the grantor to re-enter in case of a breach of such conditions."

It is not unusual for the crown or the government to annex conditions subsequent to grants, and such grants are subject to forfeiture for failure to observe the conditions imposed, as private grants may be forfeited unless the breach is subsequently waived by act of the grantor. *United States v. Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *United States v. Wiggins*, 14 Pet. 334, 10 L. Ed. 481; *United States v. De Repentigny*, 5 Wall. 211, 18 L. Ed. 627.

Indeed, it is a thing quite common in some form attending grants in aid of railroads and other internal improvements.

Two authorities may now be noted which have discussed conditions, one of similar import and the other identical with these under consideration. The first is *Nichols v. Southern Oregon Co.* (C. C.) 135 Fed. 232, a case decided in this court. By act of March 3, 1869 (chapter 50, 15 Stat. 340), a grant of lands was made to the state of Oregon in aid of the construction of a military wagon road, containing the following provision:

"Provided, further, that the grant of land hereby made shall be upon the condition that the lands shall be sold to any one person only in quantities not greater than one quarter section, and at a price not exceeding \$2.50 per acre."

The defendant company succeeded to a portion of these lands, and the plaintiff sued to require it to convey to him a tract of 160 acres, after tendering the price thereof at the rate of \$2.50 per acre, claiming that under the clause above quoted he was so entitled to purchase the land, and that the defendant was obligated to convey to him. Judge Bellinger, in disposing of the controversy, says:

"The grant was not a law for the sale of the granted lands. It did not offer them for sale. That was left to the state, subject to restrictions as to the price at which they should be sold and the quantity that should be sold to any one person. These restrictions were mere incidents of the grant, mere regulations that the state was required to observe in selling the granted lands, at such time after they were earned as the state should conclude to sell them. The object to be accomplished in no wise depended upon them. Whatever rights existed in respect to these restrictions belonged to the United States. No interest was created in the complainant. He is not a beneficiary in the grant, and he has no standing to complain that the state

has violated its conditions in the manner in which it has disposed of the granted lands. That is a matter that can only be taken advantage of by the United States. Furthermore, above 30 years ago Congress authorized patents to issue to the state or to any corporation or corporations to which it had transferred its interest, and patents have been issued to the state's grantees in pursuance of that law. It is not necessary to consider whether this act was a waiver by Congress of the conditions subsequent in the grant."

Three things seem to have been decided, namely: That the restrictions imposed by the clause quoted were mere incidents or regulations that the state was required to obey; that whatever rights vested in respect to such restrictions belonged to the United States; and that a third or outside party was not a beneficiary to the grant; and, incidentally, the conditions are spoken of as "conditions subsequent."

The other case is *Warrior River Coal & Land Company v. Alabama State Land Company*, 154 Ala. 135, 45 South. 53. The action was in ejectment, and involved a tract of land included in a grant by Congress to the state to aid in the construction of railroads. The grant, which was made by act of June 3, 1856 (chapter 41, 11 Stat. 17), seems to have lapsed in part, and a revival was accorded by act of April 10, 1869 (chapter 24, 16 Stat. 45), containing a clause identical with the one here under consideration amendatory of the act of July 25, 1866. Speaking with reference to the clause, the court says:

"The legal title to the granted lands having vested in the state, and the beneficial interest in the railroad company having become individualized as to the land and the companies, respectively, the land here in controversy included, by the performance of all conditions precedent erected by the national grant, the limitation quoted from the act was, at most, a condition subsequent, a violation of which rendered the estate in the particular instance amenable to forfeiture by the appropriate action of the granting government, and by that only."

There is here the intimation that the clause might create a condition subsequent, but that, if it did, the court was of the view that the forfeiture could be insisted upon only by the general government.

Without for the present concluding whether the provisions in question constitute a condition subsequent, the logical order requires that we first determine the contentions of cross-complainants and interveners.

[12] The position of cross-complainants is that these provisions—the settlers clause—devolved upon the grantee an executory trust to be administered by it, and that when any citizen, qualified to take and hold lands in his own right, became an actual settler upon the land selected by him, he then became qualified as a cestui que trust, to whom the grantee was bound to sell at the rate of \$2.50 per acre, and in due time to convey, and that equity will interpose its jurisdiction to enforce the trust. Under this theory, it is further asserted that it makes no difference that a cestui que trust was not in being and qualified as such at the time of the grant, but that the act has in contemplation any such qualified person, who may at any time make settlement and, with a tender of the purchase price, demand a deed.

A word as to the signification of the term "covenant," before proceeding to the inquiry thus suggested. It is:

"An agreement between two or more persons, entered into by deed, whereby one of the parties promises the performance or nonperformance of certain acts, or that a given state of things does or shall, or does not or shall not, exist." Bouvier's Law Dictionary.

In common parlance, however, the term is applied to any agreement whether under seal or not." 11 Cyc. 1043.

No specific or technical words are necessary to the creation of a covenant, nor is any particular or set form of expression; it being sufficient if, from the whole agreement, there appears upon any part of it an obligation or undertaking to do or not to do a particular thing or things. As stated in Sheppard's Touchstone, 161:

"And there needs not in this case formal and orderly words, as covenant, promise, and the like, to make a covenant on which to ground an action of covenant; for a covenant may be had by any other words; and upon any part of an agreement in writing, in what words soever it be set down, for anything to be or not to be done, the party to or with whom the promise or agreement is made may have his action upon the breach of the agreement."

The case of Hale v. Finch, 104 U. S. 261, 26 L. Ed. 732, is instructive upon the subject. The controversy was relative to the proper construction of a bill of sale of a boat which recited that the sale was upon express condition, etc.; it being claimed that there was liability in covenant. The bill of sale was not signed by the vendee, nor was it necessary in the form in which it was drawn for him to sign it. The court, after observing that, "Words of proviso and condition will be construed into words of covenant, when such is the apparent intention and meaning of the parties," quoting from 2 Parsons, Contracts, 23; and that, "There are cases in which the instrument to be construed was held to contain both a condition and a covenant; as, 'If a man by indenture letteth lands for years, provided always, and it is covenanted and agreed between the said parties, that the lessee should not alien,'" which was adjudged to be "'a condition by force of the proviso, and a covenant by force of the other words,'" citing Co. Litt. 203b; and after further observing that there was in terms a covenant to defend the title of the boat, which was immediately followed by language implying an agreement that the sale was upon the express condition that neither the boat nor the machinery should be used within a prescribed time upon certain waters—held that, the vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition stated in such form as to preclude the idea of personal responsibility upon the part of the vendee, effect should be given the intention thus distinctly declared, and hence that the writing created a condition and not a covenant.

In general a trust is:

"An obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed." 28 Am. & Eng. Enc. of Law, 858.

So:

"For the creation of a valid trust, three circumstances must concur: First, a definite subject-matter within the disposal of the settlor; second, a lawful definite object to which the subject-matter is to be devoted; third, clear and

unequivocal words or acts, devoting the subject-matter to the object of the trust." 28 Am. & Eng. Enc. of Law (2d Ed.) 865, 866.

But:

"The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal, that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." 2 Pomeroy's Eq. Jur. § 1009.

As it is with a covenant or condition subsequent, no particular form of words is essential whereby to create a trust. It depends wholly upon the intention of the person who it is avowed has made the settlement, and the intention is to be ascertained also, as in the other forms of obligation or condition, from all the words attending the instrument by which the relationship is claimed to have been established. So the inclination of construction, where it is doubtful whether a trust has been created or a condition subsequent has been imposed, is toward the trust relationship.

As to the settlers clause, there is absolute certainty as it respects the subject-matter. It consists of the lands granted. But what is to be said of the beneficiaries, and of the nature and quality of interest each or any of them is to have?

It should be borne in mind that in most jurisdictions a marked and vital difference is maintained between ordinary and charitable trusts, as it pertains to the essentiality of the element of identity and certainty of the cestui que trust. Those jurisdictions which do not recognize the distinction hold that charitable trusts are governed, as it respects this element, by the same rules as are applicable to ordinary trusts. In the ordinary trust the cestuis que trust must not only be definitely and specifically designated so that there can ordinarily be no uncertainty as to their identity, but they must be capable of taking the estate or property which is the subject of the trust. They may not be in esse at the time of the creation of the trust; but there must not be uncertainty as to who is the beneficiary, whoever it may or shall be, whether he is in existence, or is to come into being at some future time. If there be a valuable consideration to support the trust, the courts are solicitous to enforce it, to subserve the interest of the parties; but if the cestui que trust is not named, or so designated that he cannot be identified, the courts are powerless to give effect to the trust, however clearly it may be created in other respects. Says the court in Levy v. Levy, 33 N. Y. 97, 107:

"If there be a single postulate of the common law, established by an unbroken line of decision, it is that a trust, without a certain beneficiary who can claim its enforcement, is void, whether good or bad, wise or unwise."

On the other hand, it is not at all essential either that the beneficiaries of a charitable trust or use be ascertained, or any definite number thereof, for indefiniteness is said to be a characteristic of a legal charity (Russell v. Allen, 107 U. S. 163, 2 Sup. Ct. 327, 27 L. Ed. 397),

or capable of taking the legal title to the estate bestowed in trust. Says Mr. Beach:

"In a private trust, if the beneficiary or beneficiaries are not definitely and positively named, the trust fails on account of indefiniteness. But, in a charitable trust, the beneficiaries need not be definitely named, and, even where there is no adequate designation of a cestui que trust, the trust will be enforced in equity if the intention of the settlor can be ascertained beyond a reasonable doubt." Beach on Trusts & Trustees, § 322.

See, further, section 55, same work, and sections 66, 95, Perry on Trusts.

For emphasis of the essentiality respecting certainty as to the beneficiary, I will make further reference to the authorities, and in doing so will cite from some of the jurisdictions which do not recognize the distinction noted between the two classes of trusts. The force of the authorities is not weakened because the distinction is not observed. In *Weaver v. Spurr*, 56 W. Va. 95, 105, 48 S. E. 852, 856, it is said:

"There cannot be a trust without a cestui que trust; and, if it cannot be ascertained who the cestui que trust is, it is the same thing as if there was none."

In an earlier case from the same state (*Brown v. Caldwell*, 23 W. Va. 187, 48 Am. Rep. 376), a grant of land, upon trust that the trustee "shall at all times permit all the white religious societies of Christians and the members of such societies to use the land as a common burying ground and for no other purpose," was held to be void for want of certainty as to the beneficiaries. Speaking of this alleged trust, the court said:

"It is difficult to conceive of anything more vague, indefinite, and general in its character. The societies here designated are neither local nor fixed. They in fact embrace the whole Christian world, and are not only indefinite, but unascertainable."

In *Stonestreet v. Doyle*, 75 Va. 356, 40 Am. Rep. 731, a devise of land "to build a schoolhouse for the purpose of a free school, and further extending the education of poor children," was held inoperative and void for uncertainty as to the beneficiaries.

So it was held in *Heiss, Executor, etc., v. Murphey et al.*, 40 Wis. 276, 292, that a devise "to the Roman Catholic orphans," and empowering the Roman Catholic Bishop to sell the property and "use the proceeds for the benefit of the Roman Catholic orphans," was void for uncertainty in the description of the beneficiaries; the court saying:

"There are no ascertainable beneficiaries, either as a class or individuals, and therefore the trust cannot be effectually carried out."

A bequest as follows: "I leave the whole of said fund in the hands of my executor, to be by him applied to the support of missionaries in India"—was held void in *Board of Foreign Missions v. McMaster*, Fed. Cas. No. 1,586, because of uncertainty as to beneficiaries; the court saying:

"But whether there be a competent trustee or not, if the cestui que trusts are not clearly ascertained by the will, the devise or bequest is void."

So a bequest "to some disposition thereof which my executors may consider as promising most to benefit the town and trade of Alexandria, leaving the same entirely to their disposition of it, in such manner as appears to them promises to yield the greatest good," was held void, in *Wheeler v. Smith*, 9 How. 55, 13 L. Ed. 44; the court remarking, in the course of the opinion, that:

"A trust is vested in the executors, but the beneficiaries of the trust are uncertain, and the mode of applying the bounty is indefinite."

Authorities are cited by counsel for interveners which are apparently opposed to the holding of these cases; but, when examined with discrimination, it will be found that they are not. *Perin et al. v. Carey et al.*, 65 U. S. 465, 16 L. Ed. 701, and *Jones v. Habersham*, 107 U. S. 174, 2 Sup. Ct. 336, 27 L. Ed. 401, are fair illustrations of all. These two cases are based upon devises or bequests to charity, and it is a well-established principle of law that their validity is dependent upon the laws and the judicial interpretation thereof within the state where the lands lie if real property be the subject, or where the testator had his domicile if personal property. And the federal courts are controlled as well thereby. It was explicitly so held in the case last cited. That case arose in Georgia, and was declared to be subject to the laws of that state touching charitable uses, which are similar in purpose to the statute of 43 Elizabeth upon the subject. It is declared by such laws that:

"A court of chancery may, by approximation, effectuate the purpose (of the testator) in a manner most similar to that indicated by the testator."

In a sense the *cy pres* doctrine is made to apply in such a case. The trust to charity was therefore sustained by reason of the controlling force of the local law. But in the case of *Wheeler v. Smith*, *supra*, coming from Virginia, where neither the statute of 43 Elizabeth nor any similar statute obtains, the *cy pres* doctrine was not applied; the court saying that:

"In Virginia, charitable bequests stand upon the same footing as other trusts, and consequently, require the same certainty as to the objects of the trust and the mode of its administration."

While in the case of *Perin et al. v. Carey et al.*, *supra*, the state of Ohio being without a statute of charities, it was held that the courts of equity in that state had adopted the doctrine founded upon the statute of 43 Elizabeth, and that the doctrine was controlling, both locally and in the federal courts. Such was the principle announced in the case of *Vidal v. Girard's Executors*, 2 How. 127, 11 L. Ed. 205.

It is a principle that in equity the absolute interest is vested in the *cestui que* trust, and the trustee is but an instrument for effectuating the trust, and, where executory, for carrying it into effect. Equity will not allow the trust to fail for want of a trustee. But, if there is no *cestui que* trust susceptible of identification, the trust, other than for charity, is void absolutely, and equity is powerless to aid it in any way.

There is also a distinction between executed and executory trusts; but it does not consist in the fact that one is completely wound out

and the other is in process of being carried into effect. It depends rather upon the manner in which the trust is declared. An "executed trust" is one wherein the limitations and conditions attending it are fully and perfectly declared. An "executory trust" is one where the limitations are imperfectly declared; the intent of the creator being expressed in general terms, leaving the manner in which his intent is to be carried into effect substantially in the discretion of the trustee. The distinction has been illustrated by the act of a testator, as follows:

"Has the testator been what is called, and very properly called, his own conveyancer? Has he left it to the court to make out from general expressions what his intention is, or has he so defined that intention that you have nothing to do but to take the limitations he has given to you and convert them into the legal estate?" Beach on Trusts & Trustees, § 59.

See, further, Nicoll v. Ogden et al., 29 Ill. 323, 385, 81 Am. Dec. 311; Neves v. Scott, 9 How. 196, 211, 13 L. Ed. 102.

When, therefore, counsel for cross-complainants urge that Congress has created an executory trust, with the railroad company as trustee, they must mean that there was left, through the want of precisely defined limitations, something of discretion in the trustee as to the manner in which the trust was to be carried into effect. If not this, it is perfectly plain that the actual settler is not vested with the equitable estate simply by the terms of the act. If he were so vested, there would be nothing left for the trustee to do but to convey, on receipt of the \$2.50 per acre, and that would be an executed trust. But, even upon the theory of cross-complainants that the settler becomes a cestui que trust upon making settlement upon a tract of 160 acres of land and the tender of the price, there would be nothing left for the trustee to do but to convey the land. The trust would then be an executed one, and not executory. The question as to the nature of the trust, if one exists, is not material; but the discussion of it will serve to illumine the primary question touching the intendment of the settlers clause. If there is nothing of a discretionary character for the railroad company to do in the disposal of these lands, nothing to settle as to when it shall convey, or when or in what manner it will convey, or for what price, the act or grant executes itself, and the company is but an automaton, with nothing to do but to convey to actual settlers, whoever they may be, which would constitute a mere passive or dry trust, were it not that the trustee has a beneficial interest in the property.

Now, there is in this case no semblance of a charitable trust—not the remotest purpose manifest of bestowing any charitable gift or devise. Indeed, the "actual settlers" designated can claim nothing, nor any particular tract of the grant, as a charity. Nor do I understand that they found their demand upon any such claim. They are standing on the law as creating a trust, with themselves as beneficiaries. Could it be more uncertain who it was intended the beneficiaries were to be, pursuing the theory that the grant created a trust? True, actual settlers may be termed a class of individuals who have set up and established homes upon specific tracts of land; but this is a very large class, and the term is very broad. The bounty,

however, is not to the class as a whole, but to such actual settlers as may establish themselves upon some tract of this grant not exceeding 160 acres in area. There could be no actual settler until an actual habitation was established upon some specific parcel of this land. Logically, no one is a cestui que trust under the theory until and unless he becomes such a settler. This is a palpable demonstration of the uncertainty as to the beneficiary, for who, of the vast concourse of humanity, is going to come and claim the right and privilege of settling upon the land? Beyond this, the nature and quantity of interest is not specific or definite. The declaration of the law is—I call it a law because it is to be construed as a law as well as a grant or contract—that the grantee shall sell in quantities not greater than one quarter section to one person. If this be a maximum limitation, it is surely not a minimum limitation, and the grantee might sell to one purchaser less than one quarter section and be within the law; and so there is palpable uncertainty as to the amount of land each settler is entitled to demand under the supposed trust, he being the cestui que trust. It is clear to my mind that the theory of a trust must fail, because of uncertainty in these particulars, namely, as to the cestui que trust, and as to the quantity of interest he is entitled to receive.

Looking at the matter in all its phases, the act lacks the elements of a trust whereby the railroad company is constituted a trustee for the administration of the granted lands, in any specific quantities, for the benefit or use of any definite or certain beneficiaries.

In arriving at this conclusion, I have not overlooked the cases, such as *Rice v. Railroad Company*, 1 Black, 358, 17 L. Ed. 147; *Mills County v. Railroad Companies*, 107 U. S. 557, 2 Sup. Ct. 654, 27 L. Ed. 578; *United States v. Des Moines, etc., Co.*, 142 U. S. 527, 12 Sup. Ct. 308, 35 L. Ed. 1099; and *Ashuelot Nat. Bank v. City of Keene*, 74 N. H. 148, 65 Atl. 826, 9 L. R. A. (N. S.) 758—cited and relied upon by counsel for cross-complainants.

The Rice Case was concerning a grant of land to the territory of Minnesota to aid in the construction of a railroad, and it was held that the territory took the land in trust, without any beneficial interest therein, for disposal, and application of the proceeds to a specified public improvement. There was no cestui que trust, and none could enforce the trust except the general government, being the grantor.

The Mills County Case involved the construction of the proviso to the second section of the swamp land act of September 28, 1850 (Act Sept. 28, 1850, c. 84, 9 Stat. 519), requiring that the proceeds of the lands shall be applied exclusively, as far as necessary, to the purpose of reclaiming the same by levees and drains, and it was held that it imposed an obligation, resting upon the good faith of the states. The state of Iowa granted its swamp lands to the respective counties in which they were situated. A conflicting claim arose between Mills county and the Burlington & Missouri River Railroad Company. In the litigation Mills county insisted that the lands in suit had been disposed of by the state contrary to the proviso above alluded to, and

it was not only considered that the state was accorded a discretion as to the manner of disposal of such lands, but it was further determined that as to whether the state had faithfully performed its duty under the act of Congress in the disposal of its swamp lands to the counties was a question between the United States and the state, and that the obligation imposed constituted neither a trust following the lands, nor a duty which private parties could enforce as against the state.

In the case of *United States v. Des Moines, etc., Co.*, there was a grant to the territory of Iowa, to aid in the improvement of the Des Moines river, and, while the grant was not declared by the court to be a trust, it was so treated; the territory, afterward the state of Iowa, becoming the trustee to see that the purposes of the grant were properly executed. No *cestui que* trust was intended; but the grant was to the territory, to be appropriated by it to the promotion of a specific improvement.

In *Ashuelot Nat. Bank v. City of Keene*, the court construed the deed, with its accompanying contract, as a grant in trust rather than upon condition, considering all the terms of both instruments, in view of the circumstances under which they were executed. The transaction was, in effect, a conveyance for a charitable use. The city took no beneficial interest in the property, but took it upon trust, to devote the same to public use. The action was not by one claiming as a *cestui que* trust, but by the heirs of the grantor.

So it would seem that these authorities do not support the contention claimed for them.

[13] This brings us to the contention made on the part of the interveners, which is, that the grant is both a law and a contract, a contract as well as a law; that, being such, there is a standing and continuing offer, to which the grantee is a party, to whomsoever may desire to become an actual settler and to purchase a tract of the granted lands not exceeding 160 acres; and that any such person, by a declaration of his purpose and a tender of the purchase price, namely, \$2.50 per acre, brings himself into relation to the contract, thus making himself a party thereto, and is entitled to the rights of a contracting party to enforce a conveyance to him from the grantee.

In this connection, it is strenuously urged that, by declaring his purpose to become an actual settler and tendering the purchase price, the intending purchaser acquires a vested right in the property, which not only the grantee but the government also is bound to regard, and of which he cannot be divested without his consent, thus entitling him in due course to a proper conveyance. The position is based upon a supposed analogy to the acquirement of vested rights against the government by pursuing the acts and regulations established for the acquirement of pre-emption and homestead claims to tracts of the public domain. It is therefore well to determine: First, whether the analogy exists; and, second, whether a vested right can be acquired in some other way.

It is well settled, by a uniform line of decisions, that a settler under the pre-emption statutes of Congress does not acquire a vested

right as against the general government to appropriate the lands for other purposes, until he has done all that the law requires him to do, including the payment of the purchase money, to entitle him to a patent. When he has performed all these acts, observed all the requirements of the law, and nothing remains to perfect his title but the issuance of a patent, he becomes the equitable owner of the land settled upon, and, being the equitable owner, he is said to have acquired a vested right, of which he cannot be divested even by the government, much less by private parties in any capacity.

One of the earlier cases upon the subject is *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668. It arose in the following manner: Certain supposed grants by the Mexican government to one Vallejo, comprising a large tract of land in the state of California, were declared void by the Supreme Court. The land thereupon became public domain of the United States. Many persons were at the time occupants of the land, claiming right and title through Vallejo. In order to protect these occupants, Congress, on March 3, 1863, passed an act (Act March 3, 1863, c. 116, 12 Stat. 808) for their benefit. Frisbie was an occupant and claimant under this act. Whitney attempted to enter upon the same land, and claimed settlement thereon. This was prior to the act of 1863. After his settlement he tendered to the land officers his declaration of intention to occupy and cultivate the land as a pre-emptioner, but was refused. The judgment of the court followed on these facts; Whitney claiming that he had thus acquired such a right or interest in the land as could not be divested by the government. After reference to the requirements of the pre-emption acts for acquiring public lands, the court said:

"When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time, to enable the land officer to ascertain if there are superior claims, and if in other respects the claimant has made out his case, he is entitled to receive a patent, which for the first time invests him with the legal title to the land."

The court quotes as authoritative, and with approval, the opinion of Attorney General Bates on the subject, as follows:

"A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, however, give, under our national land system, a privilege of pre-emption. But this is only a privilege conferred on the settler to purchase land in preference to others. * * * His settlement protects him from intrusion or purchase by others, but confers no right against the government." 10 Opinions of the Attorney General, 57.

The next case following *Frisbie v. Whitney* is the *Yosemite Valley Case*, 15 Wall. 77, at page 87, 21 L. Ed. 82. Mr. Justice Field, speaking of the requirements necessary to the acquirement of title under the pre-emption laws, says:

"When these prerequisites (including the payment of the purchase price) have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. * * * The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that, in case any of their lands are thrown open for sale, the privilege to purchase them in limited quantities,

at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use."

Without following the line of authorities further, it is sufficient to say that the doctrine has since been several times reaffirmed. *Shepley v. Cowan*, 91 U. S. 330, 23 L. Ed. 424; *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732; *Wirth v. Branson*, 98 U. S. 118, 25 L. Ed. 86.

This as between the settler and the government.

As it relates to grants in aid of railroads and for internal improvements, there are numerous decisions determining when a pre-emption or homestead claim attaches, or at what period of time in the acquirement of such a claim the land has become appropriated, having in view the language of each particular act, denoting the exceptions from the grants. Thus in *Kansas Pacific Railway Co. v. Dunmeyer*, 113 U. S. 629, 5 Sup. Ct. 566, 28 L. Ed. 1122, it was held that the claim of homestead had attached when a homestead entry was made upon the land, and, having been made prior to the filing on the part of the railway company of its map of definite location, the land covered was excepted from the grant by the words:

"Not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached."

A like ruling was had in *Hastings, etc., Railroad Co. v. Whitney*, 132 U. S. 357, 10 Sup. Ct. 112, 33 L. Ed. 363, where the exception was of lands to which "the right of pre-emption or homestead settlement has attached." What is meant by a homestead entry is there explained. It is not a simple entering into possession or occupation of the land, but three things must concur to constitute an entry on public lands: First, the applicant must make an affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. "When," says the court, "these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made—the land is entered." Act May 20, 1862, c. 75, 12 Stat. 392.

In *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527, it was held that the mere occupation of public land, with a purpose at some subsequent time of entering it for a homestead, gave the party so occupying no rights against the railway company.

It is true that a man refused his right of entry by the officers of the local land office will not be deprived thereby of his priority in right. *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 524. But the principle has no bearing upon the question as to what constitutes a valid homestead entry.

In *Northern Pacific Railroad v. Colburn*, 164 U. S. 383, 386, 17 Sup. Ct. 98, 99 (41 L. Ed. 479), the court says:

"But frequent decisions of this court have been to the effect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office."

And further, quoting from *Lansdale v. Daniels*, 100 U. S. 113, 116, 75 L. Ed. 587:

"Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a pre-emptor; the rule being that his settlement alone is not sufficient for that purpose."

In *Tarpey v. Madsen*, 178 U. S. 215, 225, 20 Sup. Ct. 849, 853 (44 L. Ed. 1042), it was added:

"And the acceptance of such declaratory statement, and noting the same on the books of the local land office, is the official recognition of the pre-emption claim."

So that it was finally adjudged that the question whether a homestead or pre-emption had attached as it respects the filing of a map of definite location, must depend upon the record in the land office.

In line with the foregoing decisions, this court has held (*Eastern Oregon Land Co. v. Brosnan* [C. C.] 147 Fed. 807) that a mere settler, who had made no filing on the land under the land laws, was not an appropriator within the exception of the grant, but that, where such a settler was in occupancy under a pre-emption or homestead claim duly filed, there was an "appropriation."

These authorities illustrate and determine the point of time when rights are acquired by settlers, that give them superiority over grants made in aid of railroads and internal improvements, under the usual exceptions from the grants. Whenever it occurs that there has been an entry of a homestead, or a proper notation in the land office of a pre-emption application, so that there appears a record of the initiatory steps to obtain such a claim, then it may properly be said that the claimant acquires a vested right as against the person or corporation claiming under such grants, but not until then.

So much for vested rights in this relation.

As between contesting claimants of homestead or pre-emption rights, a still different rule obtains. The first in occupancy of the land, with a bona fide intention or purpose of appropriating the same under the laws and regulations providing therefor, has the better and superior right. As was said in *Atherton v. Fowler*, *supra*:

"During this preliminary period he had no vested right to the land; but, as we have elsewhere decided, he did thus acquire the right of preference in the purchase. That is to say, if he made the necessary settlement and improvement, and the necessary declaration in writing, no other person could buy the land until the period elapsed which the law gave him to pay the purchase money."

And again, in *Tarpey v. Madsen*, *supra*:

"So that any controversy between two occupants of a tract open to pre-emption and homestead entry is not determined by the mere time of the filing of the respective claims in the land office, but by the fact of prior occupancy."

In a sense the prior occupant has a vested right, but only as against another claiming under the same statutes. And so "vested right" is a relative term, depending for its acquirement upon the particular claim that is put forth.

I have thus developed the subject for present application; but, before coming to that, it will be instructive to examine another case con-

fidently relied upon by counsel for interveners. It is Jumbo Catle Co. v. Bacon (Tex.) 17 S. W. 136. A statute of Texas, with its amendment, provided for the sale of state lands at 50 cents per acre to any responsible person who would make application therefor and survey the same. In pursuance thereof, parties made regular application to purchase certain state lands, caused survey to be made, paid the fees therefor, together with the fees for recording, and tendered the purchase price. Under this state of facts, it was determined that the applicants acquired a vested right in the land, and that their interest thus acquired was not affected by a subsequent act repealing the statute under which the applicants proceeded. In the course of the decision the court said:

"When there is an offer made by an act of the Legislature, which is accepted by an individual, there is a contract which it is not within the power of the state to impair. * * * The expenses of the surveys, in connection with the price to be paid to perfect the title, are a sufficient consideration to support the contract."

This case is truly illustrative. There must be an offer to sell on some terms, and there must be an acceptance of the offer on the terms proposed, before there can be a meeting of minds, or any contractual relations can arise. The government has granted certain lands to the railroad company under a provision that the grantee shall sell to "actual settlers." The grant, however, is not accompanied by an offer to sell. Surely the government makes no such offer. Being a law as well as a grant, the act directs that the grantee shall sell. But, suppose the grantee refuses to obey the law, is there, notwithstanding, an offer on its part to sell? Does the law make the offer for it? There might perhaps have been some grounds for so holding if the railroad company had been accorded no discretion in the matter, and was simply required to perform a mere ministerial service in executing deeds to such actual settlers as should come and pay it the maximum price of \$2.50 per acre. But it has a discretion. It may sell in less than 160-acre tracts, and for less than \$2.50 per acre. So who shall say that, by reason of the law alone, it has offered to sell in tracts of 160 acres, and for \$2.50 per acre, so that any actual settler may purchase upon those terms. It has the right to sell upon those terms; but the law does not make any such offer for it. While the act is a law unto the grantee, it binds no one else. It is not an offer to sell to actual settlers. The general government withdrew these lands from the public domain, and from sale and settlement, under its administration, when it made the grant. Prior thereto the government's offer of sale was through the pre-emption, homestead, and other acts providing for the disposal of the public domain. No party could acquire any vested right as against the government, or as against railroad or other grantees, under exceptions favoring the settler, or as against adverse claimants, without a compliance with the acts and under the rules and regulations of the Land Department. The acts for the disposal of the public domain constitute standing offers of sale upon the terms designated, to any who are disposed to accept them and qualify themselves to become purchasers. But the accept-

ance consists in acceding to the terms of the offer, and no vested right can arise except by a compliance with the terms laid down.

For the due and orderly administration of the disposal of the public lands, through the pre-emption, homestead, and other acts according the privilege and right of purchase, regulations are established by the Land Department, and a code of rules adopted under authority of Congress, until a complete and thorough system of administration and judicatory has been established, by which to serve the demands of purchasers and claimants, and to determine and settle adverse interests as they arise. Experience has demonstrated the necessity for such a system of administration to subserve and preserve the interests and rights of purchasers. By the grant in question Congress has withdrawn a considerable body of the public domain from sale and disposal by the government, so that those lands are no longer offered under the pre-emption, homestead, or any other law of Congress unless it be under the act making the grant. But the grant, as we shall presently see, is one conveying title, so that the government is without further right or power of disposal. Congress has not attempted to regulate the sale of this large body of land in any way, but has simply declared that the grantee shall sell to "actual settlers." Having thus withdrawn these lands from the public domain, and from sale and disposal through the Land Department, and having granted them to the railroad company with a bare declaration that the grantee shall so sell the lands, without attempting in any way to prescribe the manner of sale, or to provide rules or regulations for the administration of the disposition of the grant, seems to me plainly to evidence an intendment that the grantee should itself administer the disposal of the grant, and should proceed about it in its own way and manner. As previously observed, a command to the company that it shall sell, or even an agreement to sell by the company with the government, cannot be construed in any way as an offer to third parties to sell. A breach of the law or obligation would entail its penalties as per the intendment of the law or contract; but the grantee would incur no liability to a person not a party to the compact.

It has been held that, where one party has paid money to another for the benefit of a third, or has paid a consideration for which a third party was to receive some benefit, the third party has a right of action directly against the party receiving the money or consideration. That rule can have no application here, because, if for no other reason, it is not known who the third party is. The land is to be disposed of to no specific person, but to actual settlers, in quantities not greater than 160 acres to each person—a great class of persons—and it was not intended that the bounty should be distributed among the entire class; no single third party can come forward and demand any specific tract of land from the company. This demonstrates the difficulty of selling to actual settlers without the adoption of some rule or regulation for determining who are actual settlers, and to test their good faith. In fact, in the administration of the sale of this grant, the grantee is given considerable discretion. It may require actual settlement upon the tract selected; it may require reasonable improvements; and it may

require residence for a reasonable time to insure good faith. It might regulate the payments, requiring cash in hand, or deferred payments; it might regulate the quantity of land to be sold to each person, not exceeding 160 acres to any one person; and it might regulate the price, not to exceed \$2.50 per acre. Indeed, it has a reasonable discretion as to when it shall open up the lands to occupancy and settlement, so that the lands may be disposed of to its advantage, as well as to the advantage of the settlers. How can it be said, then, that Congress has made the offer of sale, to which the grantee has acceded, and therefore that any one, coming forward asserting himself as intending actual settlement, and tendering the price, concludes a bargain with the grantee for the purchase of 160 acres of land? Such was not the intendment or purpose of Congress, and such is not the effect of the grant. Nor is the person claiming to be a settler, who has gone upon the land and is in occupancy of the tract selected, in any better position. There can be no purchase, either by right of settlement or otherwise, until the grantee or its successor has offered the lands for settlement and sale.

[14] It is hardly to be questioned that the act of 1866 in its original cast contemplated a granting to the railroad company designated by the Legislature of the state of Oregon, of the entire fee to these lands, accompanied with only two conditions, namely, that assent to the act should be filed with the Secretary of the Interior within one year from its passage, and that the road should be completed within the time designated in section 6. There were to be no other limitations of the estate in any way, and, if the conditions mentioned were complied with, the railroad company would be vested absolutely with an unconditional title. This it could sell or dispose of as it saw fit, and in any way or manner that might seem best for its individual purposes. As the clause limiting sales to 160 acres to one person, etc., was not then in the minds of the Congress, the intendment of the original act, of course, could not have been the same as with the amendment added. Amendments change intendment. That is the very purpose for which they are made—to give new or modified expression to the will and purpose of the Legislature. Amendments are not only effective for adding a new purpose to the old act, but they may reach back and give new cast and intendment as well. The amendments becoming part of the act itself, the whole must be construed together, as the original act would have been construed as one, harmonizing any seeming repugnance or incongruity, if possible, and so expounding as to give effect to every part. Logically, therefore, the intendment of the entire act as amended would differ from the original just so much as it was the legislative purpose to change it.

It is earnestly and stoutly urged that, as the lands were granted avowedly for the purpose of aiding in the construction of the railroad, and to secure the safe and speedy transportation of the mails, munitions of war, etc., and it being specifically directed that such lands should be applied to the building of the road, the primary and paramount purpose of the grant was the construction of the road and telegraph line, and that the sale of the lands to settlers was meant to be

secondary, subordinate, and subservient thereto. The lands themselves could not well aid in the construction, or be applied to the building, unless they could be disposed of or mortgaged, and the proceeds arising therefrom put to use in meeting the expense incident to such construction or building. Therefore it is argued that there was conferred along with the grant the implied authority to sell the granted lands, or any portion thereof, and the right to mortgage the fee thereof for the purpose of obtaining the means with which to carry on the work, and that the provision relating to the sale of the lands to settlers, being subservient to the paramount purpose, was intended as a directive regulation only, and not binding upon the company either as a covenant or a condition.

Reliance is placed upon *Platt v. Union Pacific R. R. Co.*, 99 U. S. 48, 25 L. Ed. 424, in support of this position. This case was concerning the Union Pacific grant, made by act of Congress of July 1, 1862, as amended by act of July 2, 1864 (Act July 2, 1864, c. 216, 13 Stat. 356). The grant there, as here, was for the purpose of aiding in the construction of a railroad, etc. but it contained a provision that:

"All such lands so granted * * * which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding \$1.25 per acre to be paid to said company."

The seventh section of the act required the road to be completed by the 1st day of July, 1874. The road was so completed, and patents to all the lands granted were directed to be issued to the company in November of that year. Long prior thereto, however, to wit, on April 16, 1867, the company executed a mortgage hypothecating all the lands granted to secure the payment of certain coupon bonds amounting to \$10,400,000. The plaintiff in said cause filed his declaratory statement upon a quarter section of the land as a pre-emptor September 21, 1878, more than three years after the completion of the entire road, made proper proofs, and tendered the purchase money, and the question presented for consideration was whether he was entitled to such quarter section as against the railroad company. The question turned upon the single inquiry whether the execution of the mortgage was a disposal of the land, and it was decided that it was, so that the quarter section in question was not subject to pre-emption at the time of filing plaintiff's declaration thereon. On the argument, it seems to have been urged that the interpretation given by the court to the words "sold and disposed of" was repugnant to the governmental policy of guarding against monopolies of public lands by single holdings. Answering this, it was conceded by the court that Congress even then had that policy in view, when it declared that the lands not sold or disposed of within three years after the road was completed should be subject to settlement; but it was said that such policy "was manifestly subordinated to the higher object of having the road constructed, and constructed with the aid of the land grant." All this in support of the court's position that a mortgaging of the lands was tantamount to a disposal thereof, and that this particular quarter section had been disposed of within the intendment of the grant at the time it was at-

tempted to pre-empt it. That is to say, the paramount object of Congress being to secure a construction of the road, it was rather to be assumed that it intended to permit the granted lands to be disposed of by mortgage, thereby providing the necessary funds for construction. There was no intimation that the clause providing for settlement and pre-emption was inoperative in any way as to any lands that might remain unsold or undisposed of for three years after the road was completed. Quite the contrary was the conviction of the court, for it declares that:

"The construction gives full effect alike to the paramount and the subordinate purposes of the act."

The grant, without words of restriction or limitation of title, would unquestionably authorize the grantee to sell, mortgage, or otherwise dispose of lands comprised thereby, as it might see fit, for a person is entitled to do as he pleases with his own, so that he does no wanton injury to another. But, if the grant does carry with it a restriction or limitation, then it must needs be given effect accordingly. Such must have been the view of the court in the Platt Case, for it says, in further argument in support of its position as to the significance of the words "disposed of":

"No limitation was set to the quantity of land which the company might sell to single associations, or single persons. It was left at liberty to sell, if it could, to any land association or private purchaser, the entire body of the lands or any lesser quantity, regardless of the general legislative policy. * * * With that power no pre-emptor was authorized to interfere"—that is, if sold at any time within three years after the entire road was completed.

It is quite probable that the paramount purpose of Congress in making the grant in question was to secure the construction of the road, and we might well let it be so conceded. It by no means follows, however, that that purpose has rendered inoperative and nugatory for any effective use any succeeding clause in the act, or that it renders any the less effective any limitation that may have been reserved as to title, or any restriction that may have been imposed as to sale of the lands. That the grant was in aid of the road, and to be applied to the construction thereof, does not argue that the lands were to pass in absolute fee simple, with no restriction or limitation. If Congress had so desired, it could have granted but half the amount of lands that it did, or could have granted the even sections instead of the odd, or could have withheld any indemnity for lands previously settled upon, or otherwise disposed of. It might have granted an estate for years only in the lands, or the timber thereon, reserving the lands, as it did in fact reserve the mineral lands. And so, without question, it might have made the grant upon any valid condition that it desired to annex, be it precedent or subsequent, and yet the estate, whatsoever it was that was in reality granted, would go in aid of construction, and the grantee would be bound so to apply it. It would simply have to deal with the estate, whatever its quality or quantity, that it had been given for raising funds with which to meet the expenses of building. So the fact that lands were granted in aid of construction, and were required to be applied in building the road, is not antagonistic to the

idea of a condition subsequent attending the grant, if such was the purpose of Congress. Manifestly the fee simple absolute would have been a more valuable and available asset; but if Congress did not choose to grant such a bounty, believing that the lesser estate would be adequate for the purpose, that would end the controversy, and it is sufficient to find out the intendment of Congress in that relation.

In this connection, it should be noted that Congress fixed the price of government lands lying within the limits of the grant, being the even-numbered sections, at double the minimum price of public lands outside, and reduced the quantity of land to which the homestead settler was entitled to 80 acres. The act of thus regulating the price of government lands within the railroad limits was an incentive and inducement to the company to dispose of its lands to settlers also, and was in harmony with the provision later annexed by amendment requiring it to sell to actual settlers only, at a price not to exceed double the minimum, namely, \$2.50 per acre, while it was left at liberty to sell for less if at any time it so desired. Without the amendment, however, and whatever may be its effect, the company was not restricted in any way as to the manner of its disposal of the grant. But the intendment of an amended act may be very different, as I have previously observed, from that which signalized the original.

It is worthy of remark in passing that the government not only granted the lands, but gave the right of way over such of the public lands as the road might pass through, together with all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, etc., and so much of the timber on mineral lands as should be required to construct the road over said lands—not an inconsiderable bounty—and all in aid as well of the construction of the road and telegraph line.

The government was to receive a consideration for its grant, namely, the transportation of its mails, troops, munitions of war, etc. This in a purely private grant, where technical words appropriate to the creation of a condition subsequent are wanting, would evidence an intendment not to create such a condition. But where technical words are in fact employed, and the grant is by the government, being public in nature, other considerations apply, and these facts should be taken into account, along with all other matters attending the adoption of the act, in endeavoring to ascertain the intendment of Congress.

Patents were to be issued as the road was completed, section by section of 20 miles each, for the lands granted to the extent of and coterminous with the completed sections. This was another incident of the grant. The patents became simply evidentiary of title, while they operated as further assurances thereof. The grant—that is, the act of Congress making it—yet remained the railroad company's primary and essential muniment of title, to which reference should always be had for the quantity and quality of the estate granted and the terms and conditions attending it. The provisions for patenting the grant are usual to most grants in aid of railroad construction, and throw no particular light upon the purpose of Congress in limiting the sale to settlers only.

Congress reserved the right and authority to enter into possession of the road in case the railroad company should fail at any time to keep the same in repair and fit for use, and, after assuming control, to repair it as needed. To meet the expenses thereof, it was empowered to devote the income of the road thereto, or it might fix pecuniary responsibility not to exceed the value of the lands granted. The purpose of this provision is plain. It was to insure the upkeep of the road, so that its use would be at all times available to the United States for the transportation of mails and troops, munitions of war, etc. This enhances the consideration which the government received, and is continuously to receive for its bounty, and speaks favorably of an intentment to grant an absolute title, for the larger the consideration the greater one would assume would be the value of the thing given for it.

The requirement to operate the road throughout its two divisions without discrimination as to rates and time of service was simply meant to afford compensation either to the government or to the public for any damages sustained in this relation, and has no particular bearing upon the question in hand.

It was further required that the company should file its assent within one year, and complete the first section of 20 miles within two years (extended by the amendment of June 25, 1868, to 18 months after the passage of that act), completing the entire road on or before July 1, 1875 (extended by the amendment to July 1, 1880). These were conditions subsequent, rendering the act null and void in case of failure to comply with the requirements, and subjecting the grant to reversion to the government.

It is argued with much force that, having made such specific provisions for a forfeiture of the lands for nonobservance of these provisions, Congress, if intending to annex a condition subsequent by the provisions of the amendment of April 10, 1869, under consideration, would have been equally specific in language, so that there would be no doubt as to its real purpose. To this argument, there are reasons contra. The amendment was adopted at another and a later session of Congress, when Congress was addressing itself specifically to the one object, while reviving the grant, that of devoting the lands ultimately to use and acquirement by actual settlers.

The provision contained in the amendment of April 10, 1869, that nothing therein should impair any rights previously acquired by any railroad company under the original act, has been commented upon sufficiently heretofore, and its purpose expounded.

This epitome of the provisions of the act of 1866, with its amendments, will suffice for inference and deduction as it respects the intentment of Congress in annexing the actual settlers clause.

At the time of the adoption of the actual settlers clause as an amendment, it was, as we have seen, the firm policy of Congress to dispose of its public lands to settlers, while as yet it had not entirely abandoned the policy of making donations in the way of grants to railroads. The purpose of Congress in requiring railroad grants, as well as the public domain, to be disposed of to actual settlers, is aptly and strongly emphasized by the clause under consideration; and can any one doubt that it

designed to make its edict in that behalf effective? The debates in Congress while a like proviso was earlier under consideration show unmistakably what the individual members thought of it, and the course the legislation took, to my mind, indicates quite as clearly the intentment of Congress itself. It will be recalled that Mr. Lawrence, in moving an amendment to the Denver-Pacific Railroad bill, which is in effect the same as the one under consideration, in connection therewith proposed further that the Secretary of the Interior be authorized to prescribe rules for carrying the enactment into effect, while Mr. Logan purposed making the lands subject to entry at the government Land Office; the price thereof at the rate of \$2.50 per acre to be deposited in the Treasury of the United States as a sinking fund for the redemption or purchase of the bonds of the company, so far as it was adequate. Congress, however, declined to incorporate either of these ideas into its legislation, but did adopt the Julian amendment in their stead; and this identical amendment was later incorporated in the act of July 25, 1866. The result was that the grantee company was liberated of all governmental control over the administration of the grant, and was left free to dispose of the lands in its own way, in pursuance of the terms of the amendment. This fact rather emphasizes than detracts from the obligation of the company to observe the letter of the law, and is in disparagement of the idea that it was to exercise a discretion only in the premises. It may have been, and presumably Congress was influenced by the thought, that the company had the discretion to dispose of these lands in less quantities than 160 acres, and at a price less than \$2.50 per acre, if it should so desire. However this may be, the effect was to give such a discretion in that way. This was an advantage to the company, for it operated to enable it to dispose of the grant more expeditiously.

Along with this idea was another operating to the benefit of the railroad company. Congress, while pursuing its policy of disposing of the public domain to settlers, increased the price under pre-emption, and decreased the amount by half that the homesteader was entitled to take, thus conceding to the company equal advantage with the government, and even the privilege of underselling it. The legislation was, however, not without benefit to the government also, for it was assumed that the construction of the road would open up the lands to settlement and occupation along its course, through the increased facilities for transportation that would thus be afforded. It is quite contrary to the purpose of both Congress and the company itself to say that actual settlement was not in contemplation of the parties. While a considerable portion of the Willamette Valley was then occupied by early settlers under the old donation act, yet it was with keenest anticipation of the settlement and upbuilding of the territory along the line that the road was authorized and constructed. Mr. Julian's words were strongly expressive of the purpose of the amendment, as well as of the expectation of those concerned, when he said:

"This will avoid complete monopoly of the lands, as sanctioned by the old system of land grants, and at the same time devote to settlement and tillage the odd-numbered sections granted, while creating in this way established communities and a local businesss along the line of the road."

The amendment was in its nature a revival of the grant, Congress and the promoters of the company both believing that the grant had lapsed; and, as the original grant was of the fee, the revival was effective to restore it in fee, but with the provisions in question subjoined. This argues with conclusive force against the idea of a trust. Congress did not take the lands back and regrant them, but in effect revived the old grant with limitations. So that, taking into consideration the course of the legislation resulting in the adoption of this amendment, and viewing it in the light of contemporaneous conditions, it would seem that it was the firm purpose of Congress to impose upon the grantees a positive and mandatory obligation and duty to observe the behests of the amendment.

The amendment contains apt words of a condition subsequent, namely, "provided that," and "only." It does not contain a clause of re-entry. It is quite sufficient, as we have seen, if it contains the one without the other, if from the entire act the intendment to create a condition subsequent nevertheless appears. Indeed, neither words of condition nor a clause of re-entry is indispensable to the creation of a condition subsequent. It is yet sufficient if it otherwise appears that such was the purpose of Congress. In this relation, the act is to be construed as a law, which is the voice of command, not of privilege or discretion, and the grant itself is to be construed most strongly against the grantees and in favor of the government. The grant is a private one, and not by nature general and public, and the limitation placed upon the sale of the lands is in no way repugnant to the grant. These matters are to be considered along with all the provisions of the original act, as well as of the amendments, the analysis of which as it relates to the question in hand I have given. And upon the whole, giving efficacy to all the provisions of the grant, I conclude that the amendment in question imposed thereon a condition subsequent, for a breach of which on the part of the grantees the lands would be subject to forfeiture to the United States. See *Nichols v. Southern Oregon Co.*, *supra*, and *Warrior River Coal & Land Co. v. Alabama State Land Co.*, *supra*.

Further than this, either this provision is purely a covenant, or, as is contended by defendants' counsel, a mere directive regulative covenant carrying with it no duty or obligation on the part of the grantees to do what the terms of the grant or the law, or the contract if so termed, plainly declares it shall do, depending entirely upon its own volition and discretion, or it is something more. As a covenant purely, the government has no such interest therein as will afford it any relief whatsoever, as it could lose nothing by maladministration of the grant. Was such the intendment of Congress, that the government should thus be left remediless, no matter how flagrant might be the violation of the terms of the provision? If so, the proviso might just as well have been omitted in toto, as it is thus rendered a dead letter, without force or effect, and with scarcely a purpose or design. It means nothing, and requires or compels nothing. In the case of *Mills County v. Railroad Companies*, *supra*, it is true the Supreme Court held, with relation to the swamp land grant as extended to the state of Iowa, that

it imposed an obligation and discretion, resting in the good faith of the state, as respects the application of such lands for the purposes designated in the grant. That, however, was a grant to the state, which had a purely public interest to subserve. I have been referred to no case where a purely private grant has been so construed, although in aid of the construction and maintenance of a public utility.

It is highly reasonable that Congress intended no such idle ceremony. Rather should we suppose that the proviso, annexed by specific amendment as it was, was designed to be a positive, efficient, and living condition, to be faithfully and punctiliously observed, with substantial and remedial consequences to follow a deliberate and willful infraction thereof. This could only be, as the provision does not create a trust, by entailing forfeiture for the infraction. I am not making this deduction ab inconvenienti, but because it is impossible to believe that Congress intended anything else. Leaving itself remediless upon the hypothesis of a covenant, it must have intended that the general government should have right of enforcement for noncompliance with the law by forfeiture of the grant.

It was the intendment of Congress that the railroad company should administer the grant in its own way, but that it should sell to actual settlers in quantities not greater than 160 acres to any one purchaser, and at a price not exceeding \$2.50 per acre. It could sell in less quantities and for a less price. The mandate of the law is that the "lands granted * * * shall be sold." This imposed upon the grantee the obligation to dispose of the lands, for it was the purpose that all the lands along the line of the road, both the granted lands and the public domain, should be opened to occupancy and settlement. Senator Williams and others were of the view, as it respects the West Side, that "The lands granted are as open under the provisions of this bill to actual settlers as they are under the pre-emption laws of the country." While Senator Vickers maintained that the grant "was expressly upon the condition that the lands are to be sold to actual settlers."

I am of the opinion, however, while it was designed that the lands covered by the grant should be opened to settlement, and this was made incumbent and compulsory upon the railroad company, that until it was done, and the company offered the lands for sale, no one could acquire any vested right therein, because, as I believe, the administration of the grant in disposing of it to settlers was reposed wholly in the railroad company. No time is named when the lands shall be sold; but this does not detract from the obligation to sell—to put the land upon the market. The company was required to enter upon its administration of the grant under the act within a reasonable time, taking into consideration the attending circumstances and conditions, and for a violation of duty in this regard the grant would be subject to forfeiture.

[15] Possibly the company could mortgage the grant in its entirety; but it would necessarily be subject to the condition subsequent attending it, and the mortgagee could acquire no greater interest.

These considerations render it unnecessary to consider further the defendants' eighth point of contention.

[16] As it pertains to the West Side grant, or that of May 4, 1870, while the provision relating to actual settlers does not contain the same words indicative of a condition subsequent as the amendment to the East Side grant, the provisions of section 5 show very clearly the purpose of Congress. A sinking fund was there provided for, to consist of the net proceeds of the sales of the granted lands, which were to be set apart and appropriated, through a mortgage or deed of trust to two or more trustees, for the purchase from time to time, and the redemption at maturity, of the first mortgage construction bonds of the company, on the road, depots, stations, side tracks, and woodyards, not exceeding \$30,000 per mile of road, payable in gold coin not longer than 30 years from date; and it was declared that no part of such fund should be applied to any other use until all of such bonds were purchased or redeemed and canceled. Thus it was contemplated that the lands were not to be hypothecated, with the road and its equipments, for raising funds generally, but were to be disposed of under the provisions of the settlers clause; the proceeds thereof going into the sinking fund, to be disposed of as above indicated. In this way, and in this way only, the lands were to be used in aid of the construction of the railroad and telegraph line. As Senator Williams said in the Senate:

"The entire object of this section is to make the grant insure the purpose contemplated by the bill, that is, to aid in the construction of the road, providing that the net proceeds of the land granted shall be invested and set apart to secure the bondholders who may advance money for its construction."

This does not comport with the idea that the grant was of the entire fee, without condition, entitling the company to sell at any price, and to receive the proceeds to its own use, whether above or below the price fixed by the act. It does not, therefore, seem reasonable that Congress designed that these provisions should be merely directive and regulative, to be observed or not within the discretion of the grantee.

Under the theory of counsel for defendants that the settlers clause constitutes "a mere directive covenant," the government would logically, and quite naturally, possess a nominal interest only in the grant, and hence could not enforce the obligation. The argument, while unsound in my opinion, affords the most cogent reason for inducing the belief that Congress had no such purpose in view. Upon the other hand, it intended that the legislation should be effective, and, in view of the rules of construction which have been previously discussed, the known policy of Congress relative to the disposition of the public domain, and the attending conditions, I am firmly impressed that it was the intention of Congress to impose a condition subsequent by the adoption of the actual settlers clause in this act, as well as by the April 10, 1869, amendment to the act of July 25, 1866.

We next come to the question urged that the suit cannot be maintained as one to enforce forfeiture nor to quiet title, because (1) the government has not declared forfeiture; (2) the fact of forfeiture has not been adjudicated by a court of law; and (3) the defendant railroad company holds the legal title and possession.

It is not, nor can it be, claimed that the government has not the same

rights and remedies accorded to a private person for a forfeiture of a grant for good cause existing. *Atlantic & Pacific Railroad v. Mingus*, 165 U. S. 413, 17 Sup. Ct. 348, 41 L. Ed. 770. The essential and particular contention of counsel for defendants is that they are entitled to a common-law proceeding in the determination as to forfeiture, and that this contemplates a trial by jury and not a proceeding in equity. Further, that equity is without jurisdiction to enforce a forfeiture, nor would it exercise such jurisdiction.

It is wholly unnecessary that I trace the history of office found and determine with nicety its common-law purposes, as the decisions of the Supreme Court have dealt with the subject by no uncertain deduction, and but slight reference need be made to authorities beyond these decisions. One thing is certain, that the jury there summoned, and before whom the issues were ascertained and determined, was not the common-law jury before whom a citizen has right in law and under Magna Charta, and under the Constitution of this government, to demand trial where his liberties or his rights, whether of person or property, are drawn in question. It has no relation to the great and long-revered right of trial by jury. Blackstone's definition of "inquisition" or "office found" proves this. It is:

"An inquiry made by the king's officer, his sheriff, coroner, or escheator, virtue officii, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. This is done by a jury of no determinate number, being either twelve, or less, or more. * * * These inquests of office were devised by law, as an authentic means to give the king his right by solemn matter of record; without which he, in general, can neither take nor part from anything. For," continues the author, "it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seize any man's possessions upon bare surmises without the intervention of a jury." 3 Blackstone, 258, 259.

It was a procedure peculiarly adapted for the king's use, and the important thing about it was that a record might be made and entered whereon the king could base his right to possess himself of the lands, goods, and chattels of his subject; and, as it respects lands, the office found put him into immediate possession, without the necessity of a formal re-entry. Although its frequent use was for the determination of attainder, escheats, and breaches of conditions annexed to grants, and the like, the record was not conclusive, and the subject was yet entitled to a trial suitable at common law for the final determination of his rights. A good illustration is found in escheats, and the procedure is thus stated by Mr. Justice Gray, in *Hamilton v. Brown*, 161 U. S. 256, 263, 16 Sup. Ct. 585, 587 (40 L. Ed. 691):

"The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the Court of Chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might, by leave of that court, file a traverse, in the nature of a plea or defense to the king's claim, and not in the nature of an original suit. * * * The inquest of office was a proceeding in rem; when there was a proper office found for the king, that was notice to all persons who had claims to come in and assert them; and, until so traversed, it was conclusive in the king's favor."

In this country, however, while the government may invoke the proceeding by nature of inquisition or office found for declaring forfeiture and establishing re-entry, it is not necessary to do so. The same object may be as adequately accomplished by legislative declaration. In one of the earlier adjudications upon the subject of forfeiture in this country (*United States v. Repentigny*, 5 Wall. 211, 267, 18 L. Ed. 627), the court says:

"We agree that, before a forfeiture or reversion with the public domain could take place, a judicial inquiry should be instituted, or, in the technical language of the common law, office found, or its legal equivalent. A legislative act, directing the possession and appropriation of the land, is equivalent to office found. The mode of asserting or of assuming the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation, or by taking possession directly, under the authority of the government, without these preliminary proceedings."

In a subsequent case it was declared that:

"Actual entry or office found is not necessary to enable the government to take advantage of a condition broken." *McMicken v. United States*, 97 U. S. 204, 217, 24 L. Ed. 947.

If a condition subsequent be broken, the circumstance does not, ipso facto, produce a reverter. The estate continues, notwithstanding, until proper and adequate steps be taken to consummate the forfeiture. Where, however, the grant is a public one, "the remedy," says Mr. Justice Brown, in *Atlantic & Pacific Railroad v. Mingus*, 165 U. S. 413, 431, 17 Sup. Ct. 348, 352 (41 L. Ed. 770), "is by an inquest of office or office found, a judicial proceeding but little used in this country, or by a legislative act directing the possession and appropriation of the land." After a discussion of the authorities in substantiation of the position, he concludes as follows:

"These cases are not put upon the ground that the United States reserved the right to declare a forfeiture, or even provided expressly for a reversion of title in case of a breach, but upon the general ground that the government was vested with the same right as a private grantor, upon breach of a condition subsequent, though such right was, from the necessities of the case, to be exercised in a somewhat different manner, viz., by legislative act instead of re-entry.

"But, while we think the practice of forfeiting by legislative act is too well settled to be now disturbed, we do not wish to be understood as saying that this power may be arbitrarily exercised, or that the grantee may not set up in defense any facts which he might lay before a jury in a judicial inquisition. It would comport neither with the dignity of the government, nor with the constitutional rights of the grantee, to hold that the government by an arbitrary act might deprive the latter of his title when there had been no breach of the conditions subsequent, or when the government itself had been manifestly in default in the performance of its stipulations. The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

In a later case (*New York Indians v. United States*, 170 U. S. 1, 24, 18 Sup. Ct. 531, 537 [42 L. Ed. 1165]) the same eminent jurist says:

"A distinction is drawn by the authorities between the case of a private grantor, who may re-enter in the case of the breach of a condition subsequent, and the government, which can only repossess itself of lands by legislative or judicial action."

In *Columbia Valley R. Co. v. Portland & S. Ry. Co.*, 162 Fed. 603, 606, 89 C. C. A. 361, 364, the Circuit Court of Appeals for the Ninth Circuit, speaking through Gilbert, Circuit Judge, of the purpose of legislative action, says:

"It is the 'legislative assertion of ownership of the property for breach of condition.' It is itself the entry of the grantor for condition broken."

See, further, *Schulenberg v. Harriman*, 21 Wall. 44, 63, 22 L. Ed. 551; *Farnsworth et al. v. Minn. & Pac. R. R. Co.*, 92 U. S. 49, 66, 23 L. Ed. 530; *McMicken v. United States*, 97 U. S. 204, 217, 24 L. Ed. 947; *Van Wyck v. Knevals*, 106 U. S. 360, 368, 1 Sup. Ct. 336, 27 L. Ed. 201; *Bybee v. Oregon & California R. Co.*, 139 U. S. 663, 674, 11 Sup. Ct. 641, 35 L. Ed. 305; *United States v. Tennessee & Coosa R.*, 176 U. S. 242, 256, 20 Sup. Ct. 370, 44 L. Ed. 452; *United States v. Northern Pacific Ry. Co.*, 177 U. S. 435, 441, 20 Sup. Ct. 706, 44 L. Ed. 836.

Office found for the king put him into immediate possession, without the necessity of a formal entry. So it seems in case of a legislative declaration of forfeiture for breach of condition subsequent, "It is itself the entry of the grantor." But, notwithstanding the entry, whether through office found or by legislative edict, the grantees are by no means precluded. It may be that it has the effect to change the manner of further procedure by putting the grantor into possession, so that it would have to proceed in equity to quiet title, rather than by action in ejectment; but, the grantees resisting, it needs yet the adjudication of a court of competent jurisdiction to terminate the controversy as to the right of forfeiture. The legislative edict determines no fact, except that it is an assertion of an election to re-enter for breach, and adjudicates nothing.

[17] Now, the government not having re-entered for breach of condition subsequent, it is urged that the defendants are entitled to a jury trial as to the fact of breach and forfeiture, and that equity will not entertain cognizance to enforce a forfeiture. Further than this, that equity is without jurisdiction to determine the cause, because the government has an adequate remedy at law, by ejectment, for possession.

Answering the first proposition, it is quite true that the right to have controverted questions of fact, in common-law causes, decided by a jury remains, but it is none the less true that matters cognizable in equity may be and generally are tried without the interposition of a jury. *North Pa. Coal Co. v. Snowden*, 42 Pa. 488, 492, 82 Am. Dec. 530.

And I see no reason why, if equitable jurisdiction is called into requisition upon some well-established equitable ground, the court may not try the fact of breach and forfeiture as well as any other fact in the case. We have seen that the jury trial incident to inquisition or office found is not the common-law jury trial preserved by Magna Charta and the Constitution of this government. If equity has jurisdiction to entertain the suit at bar, it has jurisdiction as well to determine whether breach has been suffered which entails the forfeiture by election of the government.

There can be no quarrel as to the proposition that the distinction between actions at law and suits in equity is rigidly maintained in the federal courts. *Anglo-American Land, M. & A. Co. v. Lombard*, 132 Fed. 721, 731, 68 C. C. A. 89.

It is quite strongly stated by many of the authorities that equity will not interpose its jurisdiction to enforce either a penalty or a forfeiture, and such may be said to be the general rule. Some of the expressions to be found are as follows:

"It is a universal rule in equity never to enforce either a penalty or a forfeiture. Therefore courts of equity will never aid in the devesting of an estate for a breach of a covenant on a condition subsequent, although they will often interfere to prevent the devesting of an estate for a breach of a covenant or condition." Story's Eq. Jur. (13th Ed.) § 1319.

"It is a well-settled and familiar doctrine that a court of equity will not interfere on behalf of the party entitled thereto, and enforce a forfeiture, but will leave him to his legal remedies, if any, even though the case might be one in which no equitable relief would be given to the defaulting party against the forfeiture." Pomeroy's Eq. Jur. (3d Ed.) § 459.

"Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." *Marshall v. Vicksburg*, 15 Wall. 146, 149, 21 L. Ed. 121.

"Equity abhors forfeitures, and will not lend its aid to enforce them." *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 628, 25 L. Ed. 1030.

See, also, *Craig v. Hukill*, 37 W. Va. 520, 16 S. E. 363; *M. & C. R. R. Co. v. Neighbors*, 51 Miss. 412.

In the last case cited it is further said:

"Nor will the court be induced to depart from its uniform course, and take cognizance of that question because the jurisdiction is sought on the ground of removal of clouds from the title; for the right of the complainants to a dispersion of the cloud is dependent upon a favorable adjudication of the first proposition, viz., that they are owners of the estate, by reason of a breach of the condition."

Yet, notwithstanding these strong statements, there is in the rule a flexibility which the Supreme Court has recognized, for it says, in *Henderson v. Carbondale Coal & Coke Co.*, 140 U. S. 25, 33, 11 Sup. Ct. 691, 694 (35 L. Ed. 332):

"Equity always leans against them (forfeitures), and only decrees in their favor when there is full, clear, and strict proof of a legal right thereto."

In the case of *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213, determined in the Court of Appeals, Eighth Circuit, which was a suit in equity to establish as matter of record the forfeiture of an oil and gas lease, and to cancel the same as a cloud upon complainant's title, in an exhaustive and very able opinion rendered by Mr. Justice Van Devanter, it was declared that:

"The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief."

In *Westbrook v. Schmaus*, 51 Kan. 558, 33 Pac. 306, the court entertained a suit to quiet title, where forfeiture was declared proper;

and in *Edwards v. Iola Gas Co.*, 65 Kan. 362, 69 Pac. 350, the court recognized the principle. So in *Brown v. Vandergrift*, 80 Pa. 142, 148, which was for the forfeiture of an oil lease, the court said:

"In a case like this equity follows the law, and will enforce the covenant of forfeiture, as essential to do justice. It is true as a general statement that equity abhors a forfeiture; but this is when it works a loss that is contrary to equity, not when it works equity and protects the landowner against the indifference and laches of the lessee and prevents a great mischief."

See, also, *Glocke v. Glocke*, 113 Wis. 303, 89 N. W. 118, 57 L. R. A. 458.

As said by Story, Eq. Jur. § 439:

"The beautiful character or pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes."

The Supreme Court has announced practically the same rule. In *Farnsworth et al. v. Minn. & Pac. R. R. Co.*, 92 U. S. 49, 68, 23 L. Ed. 530, that court says:

"But it is said that provisions for forfeiture are regarded with disfavor and construed with strictness, and that courts of equity will lean against their enforcement. This, as a general rule, is true when applied to cases of contract, and the forfeiture relates to a matter admitting of compensation or restoration; but there can be no leaning of the court against a forfeiture which is intended to secure the construction of a work, in which the public is interested, where compensation cannot be made for the default of the party, nor where the forfeiture is imposed by positive law."

A little later the court quotes from Lord Macclesfield, in *Peachy v. Duke of Somerset*, 1 Strange, as follows:

"Cases of agreement and conditions of the party and of the laws are certainly to be distinguished. You can never say that the law has determined hardly; but you may that the party has made a hard bargain."

See, also, *Chandler v. Crawford*, 7 Ala. 506; *Lafayette County v. Hall*, 70 Miss. 678, 13 South. 39.

Beyond this, the federal courts have entertained jurisdiction in equity to forfeit land grants. *United States v. Dalles Military Road Co.*, 140 U. S. 599, 11 Sup. Ct. 988, 35 L. Ed. 560; *United States v. California, etc., Land Co.*, 148 U. S. 31, 13 Sup. Ct. 458, 37 L. Ed. 354; *United States v. Oregon, etc., Railroad*, 164 U. S. 526, 17 Sup. Ct. 165, 41 L. Ed. 541; *United States v. Tennessee & Coosa R.*, 176 U. S. 242, 20 Sup. Ct. 370, 44 L. Ed. 452.

In the case cited next to the last the statement shows that it was instituted by bill to quiet title to about 90,000 acres of land in Oregon; and in the last-cited that the suit was brought "to forfeit a land grant made to the state of Alabama in aid of the construction of a railroad."

If it be said as to these cases that the government, by legislative declaration through acts of Congress, had forfeited the grant to all lands lying opposite the unconstructed portions of the roads, whether wagon roads or railroads, and therefore had resumed title and with it possession, so that the government was in a position, by being in possession, to interpose its relief by quieting title or removing a cloud, it may be answered that the grantee's possession was scarcely more than

fiction of law, if indeed the government was not in possession prior to the declaration of forfeiture.

[18] But without this, and conceding that the government is not in possession of the lands in controversy here, it is scarcely to be argued that the railroad company has possession other than such as may follow any grant. The company is not in absolute or actual possession. It has not planted its feet upon the soil in what is termed "pedis possessio." The lands in the main are wild and unoccupied, and are such that with reference to them the government may maintain a suit to quiet the title thereto, or to remove a cloud affecting them injuriously to the government. The bill of complaint shows quite sufficient for this.

Section 516 of the statutes of Oregon (B. & C. Comp.) provides as follows:

"Any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates."

Under the construction given to the statute by the state Supreme Court, if the plaintiff be not himself in possession, he must allege and prove that the property is not in the possession of another; otherwise he will be relegated to a court of law, where he has an adequate remedy by action in ejectment. *Moore v. Shofner*, 40 Or. 488, 492, 67 Pac. 511. And the possession that another holds to deprive the plaintiff of his suit must be actual as distinguished from constructive possession; the latter being such as follows the delivery of a deed merely. *O'Hara v. Parker*, 27 Or. 156, 167, 39 Pac. 1004.

The equitable relief afforded by state statutes of this nature might be availed of in the federal courts if they do not go to the extent of depriving the defendant of his right of trial by jury. If, however, plaintiff has an adequate remedy at law, he is compelled to resort to the law forum for his relief. Without a statute, bills quia timet, or to remove cloud from a legal title, cannot be brought by one not in possession, because the law provides a remedy by ejectment, which is plain, adequate, and complete. *United States v. Wilson*, 118 U. S. 86, 89, 6 Sup. Ct. 991, 30 L. Ed. 110.

In *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52, the Supreme Court sustained a suit to quiet title under a statute that permitted the same to be instituted by any person, "whether in actual possession or not"; the subject of the suit being "unoccupied, wild, and uncultivated land."

In a later case (*Wehrman v. Conklin*, 155 U. S. 314, 15 Sup. Ct. 129, 39 L. Ed. 167), the court, having under consideration an Iowa statute which purported to enlarge the jurisdiction of equity to quiet title, held that such enlarged jurisdiction, if sought to be availed of in a federal court sitting within the state, could only be exercised subject to the constitutional provision entitling parties to trial by jury, and to the provision in R. S. § 723 (U. S. Comp. St. 1901, p. 583), prohibiting suits in equity when a plain, complete, and adequate remedy at law exists. But the principle announced in the case of *Holland v. Challen* was not disturbed, where neither party was in possession; the subject

of the suit being wild and uninhabited land. So that the Oregon statute does not go beyond the principle, adhered to in the federal courts, that the suit will not lie if the plaintiff has a complete and adequate remedy at law.

Further discussion of the subject will be found in *Frost v. Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010, and *Whitehead v. Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, 34 L. Ed. 873.

The remedy at law which will suffice to deprive a court of equity of jurisdiction must be as "certain, prompt, and efficient to the ends of justice as the remedy in equity." *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. 594, 32 L. Ed. 1005; *Gormley v. Clark*, 134 U. S. 338, 349, 10 Sup. Ct. 554, 33 L. Ed. 909; *Davis v. Wakelee*, 156 U. S. 680, 688, 15 Sup. Ct. 555, 39 L. Ed. 578.

The remedy sought here includes the cancellation of a number of patents, as well as the determination of the question of forfeiture by the railroad company, and it must be conceded that the remedy at law is not as complete and adequate as in equity.

This brings us to the authority given by Congress for the institution of this suit. The Attorney General was "authorized and directed to institute and prosecute any and all suits in equity, actions at law, and other proceedings which he may deem adequate and appropriate to enforce any and all rights and remedies of the United States of America in any manner arising or growing out of or pertaining to" the acts in question granting lands, etc., "and in and by any and all such suits, actions, or proceedings, * * * in such manner as he shall deem appropriate, assert all rights and remedies existing in favor of the United States relating to the subject of such suits, actions, and proceedings, including the claim on behalf of the United States that the lands granted by each of said acts, respectively, or any part thereof, have been and are forfeited to the United States by reason of any breaches or violations of any of the terms or conditions of either or any of said acts which may be alleged and established in any such suits, actions, or proceedings; it not being intended hereby to determine the right of the United States to any such forfeiture or forfeitures, but it being intended to fully authorize the Attorney General in and by such suits, actions, or proceedings to assert on behalf of the United States and the court or courts before which such suits, actions, or proceedings may be instituted or pending to entertain, consider, and adjudicate the claim and right of the United States to such forfeiture or forfeitures, and if found to enforce the same."

It is plain that Congress did not, by the resolution, declare any of the lands in suit forfeited. It disclaimed any intention of so doing. But it is equally plain that it did authorize the Attorney General to institute such suit, action, or proceeding as he might deem appropriate to determine the vital question as to whether a forfeiture had been incurred. That is a question that necessarily would have to be litigated in an appropriate proceeding in any event, whether Congress declared a forfeiture in the first instance or not; the railroad company resisting. The declaration of forfeiture does not make it so in fact; and, if made contrary to the fact of forfeiture, it could not stand. Otherwise, it would be the most objectionable kind of taking of prop-

erty without due process of law. The declaration might be effective as a resumption of the grant, and therefore tantamount to a re-entry, so that a suit must recognize the relative positions of the parties as it respects possession; that is to say, that the government is in possession and the railroad company out. But this rests upon a fiction; no such transposition of possession has taken place in fact. However, an election on the part of the government to forfeit, and thus to resume its grant, may be signified by the bringing of an action or suit for the purpose. The language of Mr. Justice Harlan, in *Schlesinger v. Kansas City, etc., Railway Co.*, 152 U. S. 444, 453, 14 Sup. Ct. 647, 651 (38 L. Ed. 507), is pertinent:

"In the case of a public grant, the right of the government to repossess itself of the estate granted may be asserted through judicial proceedings, or by some legislative act showing an assertion of ownership on account of the breach of the condition upon which the original grant was made."

In *Ruch v. Rock Island*, 97 U. S. 693, 697, 24 L. Ed. 1101, it is said:

"Bringing suit for the premises by the proper party is sufficient to authorize a recovery, without actual entry or a previous demand of possession."

See, also, *Cowell v. Springs Company*, 100 U. S. 55, 25 L. Ed. 547; *Union Pac. Ry. Co. v. Cook*, 98 Fed. 281, 284, 39 C. C. A. 86; *Cornelius v. Ivins*, 26 N. J. Law, 376.

True, these cases arose in ejectment, and were between private parties. But suppose ejectment had been brought here, the parties being so situated as to possession that it was proper, could there be any question that the institution of the action was sufficient as an election to forfeit the grant and to resume possession on that ground? So it is that, the plaintiff having its remedy in equity, the bringing of the suit is tantamount to an election to forfeit, and to resume possession on account thereof.

The real question, as has been previously indicated, is whether any forfeiture has been incurred for breach of condition subsequent, and that is for judicial cognizance, and for judicial inquiry and determination. As said by Mr. Justice Brown in *Atlantic & Pacific Railroad v. Mingus, supra*:

"The inquiry in each case is a judicial one, whether there has been, upon either side, a failure to perform, and it makes but little practical difference whether such inquiry precedes or follows the re-entry or act of forfeiture."

In the present case, the judicial inquiry simply precedes the act of re-entry or forfeiture, and its cardinal purpose is to determine the fact of forfeiture. Further disposition of the property will follow the adjudication.

While Congress has not declared a forfeiture leaving the judicial inquiry to follow, it has clothed the Attorney General with ample authority to institute a suit for determining whether forfeiture has been incurred or not, and, the facts being such that equity may entertain jurisdiction of the cause, there remains no reason why it should not be maintained.

In view of these considerations, the demurrer to the bill of complaint must be overruled, and the demurrs to the cross-complaint and bills of intervention will be sustained, and it is so ordered.

ROBERTS et al. v. SOUTHERN PAC. CO. et al.

(Circuit Court, S. D. California, N. D. March 13, 1911.)

No. 177.

1. PUBLIC LANDS (§ 122*)—RAILROAD GRANTS—PATENTED LAND—CONTEST BY STRANGERS TO TITLE.

Strangers to the title to land patented by the United States to a railroad company as part of a railroad grant, whose alleged rights in the land adverse to the railroad company were not initiated until years after the issuance of the patents, could not complain of alleged frauds on the government in issuing the patents.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 339, 340; Dec. Dig. § 122.*]

2. STATUTES (§ 217*)—CONSTRUCTION—DEBATES IN CONGRESS.

While the meaning of a clause in a statute or congressional resolution is to be determined from the language used by Congress, and not by reference to the debates in Congress concerning the same, such debates are nevertheless sources of information from which the court may discover the meaning of the language intended by Congress in passing the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

3. PUBLIC LANDS (§ 78*)—RAILROAD GRANT—PATENTS—RESERVATION.

Act Cong. July 27, 1866, c. 278, § 3, 14 Stat. 294, granted to the Atlantic & Pacific Railroad Company, afterwards to its successor the Southern Pacific Railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile, on each side of the railroad line, to be adopted by the company, through the territories, and 10 alternate sections through states, whenever on the line thereof the United States has full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of the road is designated by a plat filed in the office of the Commissioner of the General Land Office. Thereafter, on June 28, 1870, by a joint resolution (Joint Resolution 1870, June 28, No. 87, 16 Stat. 382), the Secretary of the Interior was directed to have made an examination of the road as constructed, and on the report of commissioners to cause patents to be issued to the corporation for the sections of land coterminous to each constructed section, to the extent and amount granted by Act July 27, 1866, expressly saving and preserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of such act. Held, that neither the act of 1866, the joint resolution, nor any other law directed, or authorized the insertion in patents to land so granted of a clause, excepting mineral lands other than coal and iron lands, should any such be found within the tracts patented; it being the intention of Congress that the Interior Department should determine the character of the lands by an examination before patent, and that, on the lands being patented, such patent should convey the government's entire title to the land described therein.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 243; Dec. Dig. § 78.*]

4. PUBLIC LANDS (§ 117*)—CONVEYANCE—CHARACTER OF LAND—DETERMINATION BY LAND DEPARTMENT—COLLATERAL ATTACK.

Where Congress has provided for the disposition of any portion of the public domain of a particular character, and has authorized the officers of the Land Department to issue a patent for such land on the ascertainment of certain facts, such department has jurisdiction to

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Inquire into and determine the existence of those facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 324; Dec. Dig. § 117.*]

In Equity. Suit by George D. Roberts and others against the Southern Pacific Company and others. On demurrer to bills. Sustained and bills dismissed.

T. S. Minot, Horace Smith, and B. D. Townsend, for complainants.

Wm. Singer, Jr., Guy V. Shoup, J. E. Alexander, D. V. Cowden, Platt & Bayne, and O'Melveny, Stevens & Millikin, for defendants.

ROSS, Circuit Judge. Stripped of the mass of irrelevant and redundant matter contained in the pleadings, the case presented is this: Can a citizen of the United States, or one having declared his intention to become such, lawfully enter upon and claim as mineral ground land theretofore patented by the government to a railroad company under a congressional grant; such patents, after describing the land thereby conveyed, containing the clause:

"Yet excluding and excepting 'all mineral lands,' should any such be found in the tracts aforesaid. But this exclusion and exception according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

The complainants' alleged rights to the lands in question in this suit were according to their express allegation not acquired until 15 years after the issuance of patents to the Southern Pacific Railroad Company therefor, at which time they claim to have made mineral locations upon them, and by this suit, the nature of which is variously characterized by their counsel, they ask the court to protect their alleged rights as such mineral locators by some sort of injunctive process by "controlling" the patents which were issued by the government, and which they expressly allege conveyed the legal title to the land to the grantee therein named.

If the above quoted clause inserted in the patents had the effect of excepting from the lands described in the granting clause thereof all of such lands in which mineral might thereafter be found, the discovery of mineral in the lands in suit by the complainants, if such has been made as alleged, 15 years after the issuance of the patents, would undoubtedly defeat the grant under which the defendants hold, for the reason that the clause is without limitation as to time, and a determination by a court or jury, as the case might be, at any subsequent date, however remote, that any of the land described in the granting clause of the patents had turned out to be mineral land would thereby necessarily determine that such land was never within the terms of the railroad grant made by Congress, notwithstanding the fact that the officers of the government charged with the duty of inquiring into and determining the question and of issuing the government patent for the lands granted had issued such conveyance. A mere statement of the necessary consequences of the complainants' contention is enough to show that it cannot be sound. It would make

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

of the patents a delusion and a snare, instead of a muniment of title designed for the peace and security of those holding under them. Undoubtedly, if the lands in suit were known to be mineral lands at the time they were applied for by the railroad company under the congressional grant to it, and if the patenting of them was, as alleged by the complainants, procured by means of the false affidavit of its land agent, or through any other fraud on its part, the government, or any one in privity with the government, could justly complain, and by suit brought within the time fixed by Congress for that purpose procure a cancellation of such patents. But this is not such a suit. Neither the government nor any one in privity with the government title is here complaining. The suit is by strangers to that title, for by the express averments of the bill the complainants' alleged rights were not initiated until years after the issuance of the patents which they expressly allege conveyed to the railroad company the legal title to the lands.

[1] That the complainants cannot be heard to complain of the alleged frauds upon the government is thoroughly settled by decisions so numerous as to make their citation unnecessary. They must be familiar to all lawyers at all acquainted with the law in respect to the public lands. The only real question, therefore, in the case, is whether the lands in suit are excluded from the patents by reason of the alleged subsequent discovery of mineral therein by the complainants under the exception clause inserted in the patents, already quoted, but which I here repeat:

"Yet excluding and excepting 'all mineral lands' should any such be found in the tracts aforesaid. But this exclusion and exception, according to the terms of the statute, shall not be construed to include 'coal and iron lands.'"

Where did the officers of the government charged with the duty of issuing patents for lands granted by Congress get authority to cast upon courts or juries the duty or power of ascertaining and determining the character of the public lands applied for under the grant which Congress devolved upon the Land Department of the government as a prerequisite to the issuance of a patent therefor? The statutes of the United States will be searched in vain for any such authority, unless it can be deduced from the joint resolution of Congress of June 28, 1870 (No. 87, 16 Stat. 382), relating to the grant to the Southern Pacific Railroad Company made by its preceding act of July 27, 1866 (14 Stat. 292, c. 278). By the latter act Congress chartered the Atlantic & Pacific Railroad Company, empowered it to build a railroad commencing at a point at or near Springfield, Mo., along a generally described route to the Colorado river, and, after crossing that river, by the most practicable and eligible route to the Pacific Ocean, granting to such company by the third section of the act:

"Every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office."

The eighteenth section of the act made a grant to the Southern Pacific Railroad Company, and is as follows:

"And be it further enacted, that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for."

By section 4 of the act it was provided that, whenever the railroad company "shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

As recited in the foregoing act of Congress, the Southern Pacific Railroad Company was a corporation of the state of California, and by its charter was authorized to build a railroad "from some point on the Bay of San Francisco, in the state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the eastern line of said state of California, there to connect with a contemplated railroad from said eastern line of the state of California to the Mississippi river."

The act of 1866, as has been seen, authorized the Southern Pacific Railroad Company to connect with the Atlantic & Pacific Railroad "at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco." That company undertook to lay out a different route from that designated in its articles of incorporation, and on the 3d day of January, 1867, filed with the Commissioner of the General Land Office a map showing the line of route so adopted by the company, and on the 4th of the succeeding month the then Secretary of the Interior directed the Commissioner of the General Land Office to cause to be withdrawn from sale or disposal the odd sections within the granted limits of 20 miles on each side of the road, as shown on the map so filed January

3, 1867, and also the odd sections outside of the 20 miles and within 30 miles on each side of the said route, from which indemnity for land otherwise disposed of by the government within the granted limits should be taken. July 14, 1868, the said order of withdrawal was revoked, and the lands included therein were opened to sale. On the 20th of August following the latter order was suspended, so far as it related to lands south of San Jose, Cal., and November 2 and 11, 1869, the then Secretary of the Interior revoked the suspension of August 20, 1868, and directed the restoration to sale, after 60 days' notice, of the lands included in the suspension order. On the 15th of the next month the orders of November 2d and 11th, made the preceding month, were suspended. Opinions of Attorney General, Vol. 16, pp. 80-89. July 25, 1868, the time for the construction of the road by the Southern Pacific Railroad Company was extended by Congress (Act July 25, 1868, c. 242, 15 Stat. 187), and on June 28, 1870, Congress passed the joint resolution in question, which is here set out in full:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

In their brief counsel for the complainants ask the court to "account for, explain, construe, interpret, and apply" the foregoing saving clause. The reason for and purpose of it is quite fully set forth in the debate in the Senate upon the resolution, where it was first introduced (Congressional Record, part V, 2d Session, 41st Congress 1869-1870, pp. 3950, 3951, 3952, 3953).

[2] While asking the court to account for and explain the clause, counsel at the same time assert that the court is not at liberty to refer to the debate in the Senate upon the subject. It is quite true that the meaning of the clause is to be determined from the language used by Congress, but counsel are mistaken in supposing and asserting it to be improper for the court to refer to the debate. In *Binns v. United States*, 194 U. S. 486, 495, 24 Sup. Ct. 816, 819 (48 L. Ed. 1087), the Supreme Court said:

"While it is generally true that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body (*United States v. Freight Association*, 166 U. S. 290, 318 [17 Sup. Ct. 540, 41 L. Ed. 1007]), yet it is also true that we

have examined the reports of the committees of either body with a view of determining the scope of statutes passed on the strength of such reports (*Holy Trinity Church v. United States*, 143 U. S. 457, 464 [12 Sup. Ct. 511, 36 L. Ed. 226]). When sections 461 and 462 were under consideration in the Senate, the chairman of the committee on territories, in response to inquiries from senators, made these replies: "The committee on territories have thoroughly investigated the condition of affairs in Alaska and have prepared certain licenses which in their judgment will create a revenue sufficient to defray all the expenses of the government of the territory of Alaska. * * * They are licenses peculiar to the condition of affairs in the territory of Alaska on certain lines of goods, articles of commerce, etc., which, in the judgment of the committee, should bear a license, inasmuch as there is no taxation whatever in Alaska. Not one dollar of taxes is raised on any kind of property there. It is therefore necessary to raise revenue of some kind, and in the judgment of the committee on territories, after consultation with prominent citizens of the territory of Alaska, including the governor and several other officers, this code or list of licenses was prepared by the committee. It was prepared largely upon their suggestions and upon the information of the committee derived from conversing with them." Vol. 32, Congressional Record, part III, p. 2235."

In *Jennison v. Kirk*, 98 U. S. 453, 459, 25 L. Ed. 240, the same court, in construing an act of Congress and in referring to and setting forth certain statements of one of the senators made in the Senate, said:

"These statements of the author of the act in advocating its adoption cannot, of course, control its construction, where there is doubt as to its meaning; but they show the condition of mining property on the public lands of the United States, and the tenure by which it was held by miners in the absence of legislation on the subject, and thus serve to indicate the probable intention of Congress in the passage of the act."

In the case of *People v. Stephens*, 62 Cal. 209, 235, 236, the Supreme Court of California, in construing one of the provisions of the Constitution of the state, referred to the purpose of the provision as explained in the debates in the constitutional convention by the member at whose instance it was inserted and became a part of the Constitution. See, also, *Wadsworth v. Boysen*, 148 Fed. 771, 778, 78 C. C. A. 437; *Ho Ah Kow v. Nunan*, Fed. Cas. No. 6,546.

Turning to the debate in the Senate upon the saving clause added to the joint resolution of June 28, 1870, it is readily seen that its purpose was to protect those settlers who had located upon public lands along the line of the proposed changed route of the Southern Pacific Railroad Company, as indicated by the map filed by that company in the General Land Office on the 3d of January, 1867. By the joint resolution Congress sanctioned the change of route and made to the Southern Pacific Railroad Company a precisely similar grant of land on each side of that line that it had made to the same company by the 18th section of the act of July 27, 1866, on each side of the line of road therein authorized; but to protect not only those who had acquired or might acquire prior to the attaching of the grant a legal right to lands along the line of the changed route, but also all actual settlers thereon, Congress provided in and by the joint resolution that the change of route thereby authorized and the grant of lands thereby made should not affect the rights of any actual settler, and, further, that the grant of lands thereby made to the Southern Pacific Railroad

Company along the new route was and should be subject to the same conditions and restrictions as applied to the original grant made to that company in and by the act of July 27, 1866—the language of the joint resolution being, as has been seen:

"Expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act."

Those conditions and restrictions are specifically stated in the act of 1866, and are, in substance, that the grant should not apply to any mineral land nor to any land reserved, sold, granted, or otherwise appropriated, nor to any land to which the United States did not have full title, and which was not free from pre-emption or other claims or right at the time the line of the road should be designated by a plat thereof filed in the office of the Commissioner of the General Land Office. Such are the express provisions of the grant of July 27, 1866, expressly referred to in the joint resolution for the conditions and restrictions of the grant of the lands thereby made along the line of road thereby authorized to be built.

[3] There is absolutely nothing in the saving clause of the joint resolution in my opinion either requiring or authorizing the patents thereby directed to be issued for the granted lands to contain those conditions or restrictions or any of them. If such patents were thereby required or authorized to contain one of the conditions or restrictions, then manifestly they were required to contain all of them, for no distinction is made between them by Congress and none can be found in the language of its acts in question. Clearly, therefore, if the contention of the complainants' counsel is correct, that by the joint resolution of June 28, 1870, Congress required that the patents to be issued to the railroad company for lands within the grant made to it should contain an exception of all mineral lands, they were likewise required to contain a similar exception of all lands reserved, sold, granted, or otherwise appropriated, and all land to which the United States did not have full title and which was not free from pre-emption or other claims or rights at the time the line of the grantee's road was designated by a plat thereof filed in the office of the Commissioner of the General Land Office. There is no escape from this conclusion, for I repeat that the statute makes no distinction between the conditions and restrictions of the grant, save only the rights of actual settlers therein expressly specified, and no distinction in the other conditions and restrictions of this grant has been or can be suggested by counsel for the simple reason that the statute contains none. The result is that according to the contention of counsel for the complainants, we would have Congress providing for the issuance of government patents for lands under its grant which upon their face would leave open for all time, to be decided by courts or juries, as the case might be, not only the question as to the character of the land patented, but also as to whether it had been reserved, sold, granted, or otherwise appropriated, and as to whether the United States had full title, and whether it was free from pre-emption or other claims or rights at the time the railroad company designated

the line of its road by filing a plat thereof in the office of the Commissioner of the General Land Office. As a matter of course Congress never intended anything of the sort, and there is nothing in the acts in question nor in any other grant to any railroad company that has ever come under my observation, or in any decision of the Supreme Court, that gives any support to any such conclusion.

The patent was the last step in the proceedings provided for by Congress, and was designed, as the statute expressly declares, to convey the government title to the grantee. Of what avail would such an instrument, intended for the peace and security of the holder, be if the antecedent facts upon which it is required to be based are open to subsequent inquiry and contestation by strangers to the title? As well might it be contended that questions of fact in respect to the marking of the boundaries of a patented mining claim or the previous discovery of mineral therein, or any other fact made essential by the statute to the issuance of a mining patent, are open to inquiry by the courts subsequent to its issue. In respect to such a contention this court said in the case of *Doe v. Waterloo Mining Co.* (C. C.) 54 Fed. 935, 940:

"If the rights conferred by the patent can be defeated by showing a want of parallelism of the end lines in the original location, it is difficult to understand why the patent may not likewise be defeated by showing that the original location was void because its boundaries were not properly marked upon the ground, or because no vein, lode, or ledge was discovered within them, or because the statutory requirement in respect to the posting of the notice of location was not complied with, or because of an omission on the part of the locator to comply with any other provision of the statute regarding the location of such lode claims. All such matters I understand to be absolutely concluded by the patent so long as it stands unrevoked. If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Great reliance is placed by counsel for the complainants on this clause from the opinion of the Supreme Court in the case of *Barden v. Northern Pacific Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992:

"The delay of the government in issuing a patent to the plaintiff, of which great complaint is made, does not affect the power of the company to assert, in the meantime, by possessory action (as held in *Deseret Salt Company v. Tarpey*, 142 U. S. 241, 12 Sup. Ct. 158, 35 L. Ed. 999), its right to lands which are in fact nonmineral. But such delay, as well observed, cannot have the effect of entitling it to recover, as is contended in this case, lands which it admits to be mineral. The government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without excepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought, sufficiently explored to justify its declaration in the patent, which would be taken as its determination, that no mineral lands exist therein."

The observation that "the government cannot be reasonably expected to issue its patent, and it is not authorized to do so, without ex-

cepting mineral lands, until it has had an opportunity to have the country, or that part of it for which a patent is sought sufficiently explored to justify its declaration in the patent," is very far from saying, much less deciding, that a patent issued for lands in pursuance of such a grant must or may except from the lands described in the granting clause thereof all mineral lands. The court could not have so decided in that case, for there was no such question before the court, and could not have been, as no patent had been issued in the case there under consideration. It was an action by the Northern Pacific Railroad Company to recover certain lands, confessedly mineral in character, as a part of its land grant, which grant, like the one here in question, excluded all mineral land therefrom, on the ground that, when that grant became attached to the various sections within it by the definite location of the company's line of road, the land in suit was not known to be mineral land; and the question in the case, as will be readily seen from the prevailing as well as the dissenting opinions, was whether that fact entitled the railroad company to the land sued for as part of its grant, or whether such land was excluded from the grant by the discovery of its mineral character at any time prior to the issuance of the government patent therefor. The majority of the court held that the character of the land was open to inquiry at any time prior to the issuance of the patent, and that the discovery of its mineral character at any time before it was patented necessarily excluded it from the grant, because the grant was of nonmineral land only.

[4] But the court in the prevailing opinion distinctly pointed out that the duty of ascertaining and determining the character of the land rested upon the officers of the Land Department, and there is, I think, nothing in it even tending to show that that or any other matter of fact could be left by them to the ascertainment and determination of a court or jury subsequent to the issuance of the government patent. The court said:

"The law places under the supervision of the Interior Department and its subordinate officers, acting under its direction, the control of all matters affecting the disposition of public lands of the United States, and the adjustment of private claims to them under the legislation of Congress. It can hear contestants and decide upon the respective merits of their claims. It can investigate and settle the contentions of all persons with respect to such claims. It can hear evidence upon and determine the character of lands to which different parties assert a right; and, when the controversy before it is fully considered and ended, it can issue to the rightful claimant the patent provided by law, specifying that the lands are of the character for which a patent is authorized. It can thus determine whether the lands called for are swamp lands, timber lands, agricultural lands, or mineral lands, and so designate them in the patent which it issues. The act of Congress making the grant to the plaintiff provides for the issue of a patent to the grantee for the land claimed, and, as the grant excludes mineral lands in the direction for such patent to issue, the Land Office can examine into the character of the lands, and designate it in its conveyance.

"It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, that department has jurisdiction to inquire into and determine as to the existence of such facts, and, in the absence of fraud, imposition, or mistake, its determination is conclusive against collateral attack.

"In *Smelting Co. v. Kemp*, 104 U. S. 636, 640, 641, 26 L. Ed. 875, this court thus spoke of the Land Department in the transfer of public lands: 'The patent of the United States is the conveyance by which the nation passes its title to portions of the public domain. For the transfer of that title the law has made numerous provisions, designating the persons who may acquire it and the terms of its acquisition. That the provisions may be properly carried out, the Land Department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain title from their commencement to their close. In the course of their duty, the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact properly determinable by them is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action of law.'

"In *Steele v. Smelting Co.*, 106 U. S. 447, 450 [1 Sup. Ct. 389, 392, 27 L. Ed. 226], the language of the court was that: 'The Land Department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualification of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation.'

"In *Heath v. Wallace*, 138 U. S. 573, 585 [11 Sup. Ct. 380, 384, 34 L. Ed. 1053], it was held that 'the question whether or not lands returned as "subject to periodical overflow" are "swamp and overflowed lands" is a question of fact properly determinable by the Land Department.' And Mr. Justice Lamar added: 'It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts of the country.' If the Land Department must decide what lands shall not be patented because reserved, sold, granted, or otherwise appropriated, or because not free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, it must also decide whether lands are excepted because they are mineral lands. It has always exercised this jurisdiction in patenting lands which were alleged to be mineral or in refusing to patent them because the evidence was insufficient to show that they contained minerals in such quantities as to justify the issue of the patent. If, as suggested by counsel, when the Secretary of the Interior has under consideration a list of lands to be patented to the Northern Pacific Railroad Company, it is shown that part of said lands contain minerals of gold and silver, discovered since the company's location of its road opposite thereto, he would not perform his duty, stated in *Knight v. Land Association*, 142 U. S. 161, 178 [12 Sup. Ct. 258, 35 L. Ed. 974], as the 'supervising agent of the government to do justice to all claims and preserve the rights of the people of the United States,' by certifying the list until corrected in accordance with the discoveries made known to the department. He would not otherwise discharge the trust reposed in him in the administration of the law respecting the public domain.

"There are undoubtedly many cases arising before the Land Department in the disposition of the public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive.

"In the case of Central Pacific Railroad Company v. Valentine, 11 Land Dec. Dep. Int. 238, 246, the late Secretary of the Interior, Mr. Noble, speaks of the practice of the Land Department in issuing patents to railroad lands. His language is: 'The very fact, if it be true, that the office of the patent is to define and identify the land granted, and to evidence the title which vested by the act, necessarily implies that there exists jurisdiction in some tribunal to ascertain and determine what lands were subject to the grant and capable of passing thereunder. Now, this jurisdiction is in the Land Department, and it continues, as we have seen, until the lands have been either patented or certified to or for the use of the railroad company. By reason of this jurisdiction, it has been the practice of that department for many years past to refuse to issue patents to railroad companies for lands found to be mineral in character at any time before the date of patent. Moreover, I am informed by the officers in charge of the mineral division of the Land Department that ever since the year 1867 (the date when that division was organized) it has been the uniform practice to allow and maintain mineral locations within the geographical limits of railroad grants, based upon discoveries made at any time before patent or certification where patent is not required. This practice having been uniformly followed and generally accepted for so long a time, there should be, in my judgment, the clearest evidence of error as well as the strongest reasons of policy and justice controlling before a departure from it should be sanctioned. It has, in effect, become a rule of property.'

"It is true that the patent has been issued in many instances without the investigation and consideration which the public interest requires; but if that has been done without fraud, though unadvisedly by officers of the government charged with the duty of supervising and attending to the preparation and issue of such patents, the consequence must be borne by the government until by further legislation a stricter regard to their duties in that respect can be enforced upon them. The fact remains that under the law the duty of determining the character of the lands granted by Congress, and stating it in instruments transferring the title of the government to the grantees, reposes in officers of the Land Department. Until such patent is issued, defining the character of the land granted and showing that it is nonmineral, it will not comply with the act of Congress in which the grant before us was made to plaintiff. The grant, even when all the acts required of the grantees are performed, only passes a title to nonmineral lands; but a patent issued in proper form, upon a judgment rendered after a due examination of the subject by officers of the Land Department, charged with its preparation and issue, that the lands were nonmineral, would, unless set aside and annulled by direct proceedings, estop the government from contending to the contrary, and, as we have already said, in the absence of fraud in the officers of the department, would be conclusive in subsequent proceedings respecting the title."

I do not find in this language of the prevailing opinion in the Barden Case any support for the contention of the complainants' counsel that the officers of the Land Department were required or authorized to insert in the patents here in question, or in any other similar patent, after describing the lands falling within the railroad grant, a clause "excluding and excepting all mineral lands, should any such be found in the tracts aforesaid." And that the Supreme Court itself takes the

same view of the decision in the Barden Case is, I think, shown by its reference thereto in the case of Shaw v. Kellogg, 170 U. S. 313, 339, 18 Sup. Ct. 632, 643 [42 L. Ed. 1050], where it says:

"Defendant relies largely on the decision of this court in *Barden v. Northern Pacific Railroad*, 154 U. S. 288 [14 Sup. Ct. 1030, 38 L. Ed. 992], in which it was held that lands identified by the filing of the map of definite location as within the scope of the grant made by Congress to that company, although at the time of the filing of such map not known to contain any mineral, did not pass under the grant if before the issue of the patent mineral was discovered. But that case, properly considered, sustains rather the contentions of the plaintiff. It is true there was a division of opinion, but that division was only as to the time at which and the means by which the nonmineral character of the land was settled. The minority were of the opinion that the question was settled at the time of the filing of the map of definite location. The majority, relying on the language in the original act of 1864 making the grant, and also on the joint resolution of January 30, 1865, which expressly declared that such grant should not be 'construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States,' held that the question of mineral or non-mineral was open to consideration up to the time of issuing a patent. But there was no division of opinion as to the question that when the legal title did pass—and it passed unquestionably by the patent—it passed free from the contingency of future discovery of minerals."

I am also of the opinion that the case last referred to—*Shaw v. Kellogg*—is direct authority for the proposition that the officers of the Land Department had no authority to insert in the patents under consideration the clause excepting from the lands described in its granting clause "all mineral lands, should any such be found in the tracts aforesaid." The grant involved in *Shaw v. Kellogg* was made by section 6 of an act of Congress passed June 21, 1860 (12 Stat. 71, c. 167), in settlement of a claim under a Mexican grant to land in the vicinity of Los Vegas by which the claimants were given an equal amount of nonmineral and vacant land to be by them elsewhere selected in the territory of New Mexico, to be located in a certain form and within a certain time. It was by the act made the duty of the Surveyor General of New Mexico to make survey and location of the land so selected. The grantees made their selection and applied for the land. Certain correspondence occurred between the Land Department and the Surveyor General in respect to the form of the application and in respect to the evidence relating to the character of the land; that is to say, whether or not it was mineral land, which resulted in the Land Department instructing the Surveyor General to approve the selection and make a survey thereof. The Land Department subsequently approved the survey, field notes, and plat of the Surveyor General, but in doing so added the words, "Subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860," which, as has been seen, excluded mineral land from the grant. The act of Congress did not provide for the issuance of a patent, but the Land Department noted on its maps that this tract had been segregated from the public domain and had become private property and so reported to Congress, which never questioned the validity of such action. The grantees were also notified and took possession of the land. Many years afterwards a portion of it was claimed as mineral land by a

party whose contentions were thus stated by the Supreme Court in its opinion:

"These contentions are that Congress granted only nonmineral lands; that this particular tract is mineral land, and therefore by the terms of the act is not within the grant; that no patent has ever been issued, and therefore the legal title has never passed from the government; that the Land Department never adjudicated that this was nonmineral land, but, on the contrary, simply approved the location, subject to the conditions and provisions of the act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries of mineral within the tract."

In considering the limitation undertaken to be imposed by the Land Department upon its approval of the selection of the land by the grantees and the Surveyor General's survey, field notes, and plat thereof, the Supreme Court said:

"What is the significance of and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of the opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide, and not to decline to decide; to execute, and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent, and not principal. Congress had made a grant, authorized a selection within three years, and directed the Surveyor General to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect, and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time. The general statutes of Congress in respect to homestead, pre-emption, and town-site locations provide that they shall be made upon lands that are nonmineral; and in approving any such entry and issuing a patent therefor could it be tolerated for a moment that the Land Department might limit the grant and qualify the title by a stipulation that if thereafter mineral should be discovered the title should fail? It cannot in that way avoid the responsibility of deciding and giving to the party seeking to make the entry a full title to the land or else denying it altogether. As said in *Deffebach v. Hawke*, 115 U. S. 406 [6 Sup. Ct. 101, 29 L. Ed. 423]: 'The position that the patent to the plaintiff should have contained a reservation excluding from its operation all building and improvements not belonging to him, and all rights necessary or proper to the possession and enjoyment of the same, has no support in any legislation of Congress. The land officers, who are merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribed.'

It results from what has been said that the demurrers must be, and are, sustained, and the bills dismissed, at the complainants' cost.

UNITED STATES V. NORTHERN PAC. TERMINAL CO.

(Circuit Court, D. Oregon. April 28, 1911.)

Nos. 3,216, 3,217, 3,218, 3,219, 3,220.

1. CARRIERS (§ 211*)—TRANSPORTATION OF CATTLE—TWENTY-EIGHT HOUR LAW.

The time consumed in loading and unloading stock is not to be considered as a part of their confinement in the cars permitted by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]).

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 926-928; Dec. Dig. § 211.*]

2. CARRIERS (§ 37*)—TRANSPORTATION OF CATTLE—TWENTY-EIGHT HOUR LAW—CONNECTING CARRIERS.

Where connecting carriers are engaged in a continuous transportation of cattle in interstate commerce, the fact that the initial carrier had kept the cattle confined without unloading for a period longer than that authorized by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), when they were delivered to defendant, the connecting carrier, did not authorize the latter to confine the cattle for another period equal to the statutory time before it would be liable for violating the act, since, while there is no violation of the act so long as the carrier does not exceed the time fixed, yet, whenever the continuous carriage without unloading does exceed it, then every carrier forming any part of an interstate line over which the stock is being shipped that participates in such carriage beyond the limit is guilty of an independent offense.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

3. CARRIERS (§ 37*)—CONNECTING CARRIERS—TRANSPORTATION OF CATTLE—TWENTY-EIGHT HOUR LAW—TERMINAL COMPANY.

Where a terminal company's railroad formed a part of a continuous line of interstate transportation over which live stock was transported, and the animals had been confined in the cars without being unloaded for food, water, and rest for a period longer than that prescribed by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]), before being delivered to the terminal company for transportation to the stockyard for unloading, the terminal company could not relieve itself from liability for continuing such transportation on the ground that it found the cattle so confined at a place where they could not be unloaded except by being taken to the stockyards, nor except in exceptional cases, because its violation of the law would subserve a humane purpose; the terminal company being under no obligation to accept the cattle from its connecting carrier under such circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

4. CARRIERS (§ 37*)—TRANSPORTATION OF LIVE STOCK—TWENTY-EIGHT HOUR LAW—PRINCIPAL AND AGENT.

A terminal railroad company, though controlled by associated railroads for which it operated terminal yards, was nevertheless a distinct corporation and separate entity from any of such associated railroads. The terminal company operated under a contract providing that its employés should be regarded as the servants of the associated railroad companies during the time they were working for them. One of such companies, after having retained certain cattle transported in interstate commerce in the cars for a time longer than that authorized by the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909,

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

p. 1178]), turned over the cattle to the terminal company, which continued the transportation to the stockyards where the cattle were unloaded. *Held*, that the fact that the original company was convicted and fined because of such transportation did not relieve the terminal company from its violation of the act on the theory that it was acting merely as an agent of the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. § 37.*]

Action by the United States against the Northern Pacific Terminal Company to recover penalties for an alleged violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]). Judgment for plaintiff.

John McCourt, U. S. Atty.

Dolph, Mallory, Simon & Gearin, for defendant.

WOLVERTON, District Judge. Five cases instituted by the government against the Northern Pacific Terminal Company to recover for violation of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607 [U. S. Comp. St. Supp. 1909, p. 1178]) upon five shipments of beef cattle have been consolidated. The cattle were carried by the Southern Pacific Company in two train loads from Gazelle, in the state of California, to Portland, Ore., being destined to Tacoma, Wash. The Terminal Company received and carried them to the Union Stockyards, where they were unloaded for rest, food, and water. One train load, containing two shipments, was 34 hours and 45 minutes in transit to Portland. Accompanying these were written requests to extend the time for confining the stock in cars to 36 hours. Another train load, comprising three shipments was 36 hours and 10 minutes in transit. The Terminal Company had the first train load in transit 1 hour and 55 minutes, making a continuous carriage of the cattle without unloading of 36 hours and 40 minutes. It had the second load in transit 50 minutes, making a continuous carriage of 37 hours. The distance from the point where the Terminal Company received the stock from the Southern Pacific Company to the Union Stockyards is about 1,000 feet. The Terminal Company maintains terminal facilities at Portland for the use of the Northern Pacific Railway Company, the Oregon Railroad & Navigation Company, and the Southern Pacific Company, they owning the capital stock of the Terminal Company and bearing proportionally the expenses of conducting the terminal yards. All interstate shipments by any one of these railroad companies to be carried also over the lines of another are delivered to such other through the yards of the Terminal Company. The Terminal Company issues no bills of lading or shipping receipts, and receives none to itself, and neither charges nor receives freight, but in all such relations acts solely at the request and direction of the company so delivering or receiving the shipment. The terminal yards consist of 38 acres of land in area, over which the Terminal Company maintains tracks and switches, running the distance of about 3,000 feet. The Union Stockyards are adjacent to these tracks. The cattle in question were received by the Terminal Com-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

pany for the purpose of transporting the same to the stockyards for unloading and rest before forwarding them to destination by connecting carrier under instructions from the Southern Pacific Company, and such transportation and unloading were done pursuant to the provisions of an agreement among the several railroad companies for whose use the Terminal Company is maintained, by the terms of which the employés of the Terminal Company are deemed to be the separate employés for the time being of the railroad company for which the Terminal Company is acting. The Terminal Company, upon receiving the cattle from the Southern Pacific Company, promptly switched the cars containing them to and upon the tracks entering the Union Stockyards, and without unnecessary delay unloaded the same. The Terminal Company was notified and informed by the chief dispatcher of the Southern Pacific Company before the former received the cattle from the latter as to the length of time the latter had same in transportation. The Southern Pacific Company has been prosecuted for a violation of the law as to each of the five shipments, and has paid a fine.

Upon these facts, which are in substance as stipulated, the question of the liability of the Terminal Company also to prosecution under the act is presented.

Apparently there is some mistake respecting the prosecution of the Southern Pacific Company for the two shipments by the first train load designated above, as the company was not legally liable therefor, by reason of the extension of time for confinement of the cattle by request of the shipper. In reality, there had not been 36 hours of continuous carriage when the Terminal Company received the cattle; but, adding the two periods named, the time in which the Southern Pacific Company had the stock in transit and that consumed by the Terminal Company in delivering to the stockyards, 36 hours and 40 minutes elapsed, being 40 minutes in excess of the time limited by law. As it pertains to the second train load, there had been a continuous carriage of more than 36 hours before taken in charge by the Terminal Company.

Four objections are interposed against the prosecution, which will be considered in the order adopted by counsel.

[1] First. It is urged that the time consumed in loading and unloading stock is not to be considered as a part of the time of confinement in cars. This is undoubtedly a sound construction of the law. But the allegation of the complaint as to each of such shipments is that the cattle were confined in transit for more than 36 consecutive hours, namely, in the one case 36 hours and 40 minutes, and in the other 37 hours, without unloading, and this is admitted by the stipulation to be true. The language of the stipulation is as follows:

"That said cattle were not unloaded from the time of reloading at Gazelle, California, as set forth in said amended complaint, until they were placed by the Terminal Company in the stockyards at Portland, as stated in said amended complaint."

This objection is therefore not well taken.

[2] Second. Counsel say:

"The time limit as fixed by the act had already expired when the cattle were received by the defendant. That constituted violation of the act. Recovery has been had for the offense against the act thereby committed, and the time thus accounted for cannot be charged against this defendant."

The time limit had undoubtedly run as to the three shipments comprising the second train load, but not as to the two shipments by the first, whatever might have been done towards prosecuting the Southern Pacific Company for its part in the carriage. But, conceding the fact, I am unable to agree with counsel that because the offense had been committed by the Southern Pacific Company, and prior to the time when the stock was received in charge by the Terminal Company, the latter company is not amenable for what it did in continuing the carriage. The act includes all carriers and connecting carriers. If it be that one carrier has held stock in transit for less than the time limit, and delivers to another who continues the transportation, so that the combined time of carriage would exceed such limit, although the latter may not have carried for the full limit, it would undoubtedly be liable, if it had knowledge of the time consumed in carriage by the former. This must be conceded. Otherwise the law would be in many instances a dead letter. In such a case, the first carrier would not be liable, because he would not have been concerned in confining the stock for a longer time than limited by law. But suppose the first carrier has held stock in transit for more than the statutory time, and then delivers to another carrier who continues the transportation for 27 hours longer, with knowledge of what preceded, would not the latter, being a connecting carrier, be concerned in carrying stock for a longer time than the law has prescribed, and would he not be just as guilty as the carrier who took up stock that had not been carried the limit as to time, and carried beyond such limit counting the combined time of carriage? Manifestly there is no escape from the conclusion. Suppose, again, that stock confined in cars has passed in transit through and upon the lines of three connecting carriers. Let the time consumed in passing over the first be 27 hours, that over the second 3 hours, and that over the third 27 hours, all continuous and with full knowledge of what had been previously done; could it be said that the second alone is liable in the carriage of the stock so confined for a period of 57 hours, more than double the time limit? The illustration may be varied so that each would carry 27 hours, totaling 81 hours continuous confinement of the stock, and yet could it be that only one of these carriers would be liable? The purpose of the statute is perfectly manifest. It is to inhibit any railroad company whose road forms any part of a line of road over which stock shall be conveyed from one state or territory into or through another from confining such stock in cars for a greater length of time than therein specified, without unloading for rest, feed, and water. There is no violation of the law so long as the carriage does not exceed the time fixed, but, whenever the continuous carriage without unloading does exceed the limit, then every railroad company forming any part of an interstate line, over which such stock is being shipped, that participates in such

carriage beyond the limit, acts in contravention of the law. The deduction seems logical, and to follow as of course. Now, can it make any difference that any one of the railroad companies whose lines form a connecting link in the route of shipment has violated the law and been fined, if a company whose railroad forms a succeeding link in the through line also carries with knowledge that the stock has been in cars longer than the time fixed by law? The one participates in so carrying the stock as well as the other, and does so contrary to the inhibition of a direct statute. Why is not the one as guilty as the other? I am of the firm opinion that the true intendment of the statute is to make all carriers amenable thereto who participate in the carriage of stock in cars beyond the time limit for unloading. The liability is a several one, and all that have had a hand in the carriage beyond the time limit are alike guilty of the offense denounced. My attention has been called to a contrary holding in the case of United States v. Stockyards Terminal Co. (C. C.) 172 Fed. 452, but, with all due respect for the opinion of the learned judge who decided that case, I am unable to agree with him. See opinion of Attorney General hereafter cited.

[3] Third. It is insisted that, finding the cattle so confined at a place where they could not be otherwise unloaded for rest, water, and feed, except by being taken to the stockyards, it became the Terminal Company's humane duty to carry them to the stockyards for unloading. It must be borne in mind in this case, as will appear later on, that, while the Terminal Company was carrying the stock to the stockyards, it was also carrying it over one link of the through line of transportation from Gazelle, Cal., to Tacoma, Wash., and I find no such exception in the law that a connecting carrier may carry stock on to stockyards, although the same has been confined beyond the limit of time, for the purpose of releasing such stock. Nor is the Terminal Company excusable in violating the law that it might subserve a humane purpose, unless it be in exceptional cases. The enforcement of the law will be better subserved if connecting carriers will refuse to carry any stock that has been confined in cars by a preceding carrier beyond the time limit. Indeed, as I interpret the statute, they violate the law if they do not so refuse. The Terminal Company could not be made amenable to the state law for prevention of cruelty to animals so long as it did not have charge or was not in possession of the stock. It was not bound to take it from the possession of the Southern Pacific Company. The dilemma was that company's, and none other was called upon to relieve it. Hence I hold that the Terminal Company rendered itself liable when it assumed possession for the purpose of forwarding the stock on its way to destination.

[4] Fourth. The point here made is that the defendant was acting as the agent of and under the direction of the Southern Pacific Company, and, the principal having been recovered against, this action cannot be maintained. This objection is answered in part under the second point. The further answer is that the Terminal Company is a distinct corporation and entity from any of the associate railroad

companies for which it operates its terminal yards, and is not specially controlled in its action by any of such associate companies. While it does the switching for said companies, and this possibly in the capacity of an agent, it has a distinct function to perform, and that it performs in its own way, and as it can at its own behest. Almost the identical question arose through the action of the St. Louis Merchants' Bridge Terminal Railway Association, and was submitted to the Honorable W. H. Moody, Attorney General, for his decision. The National Stockyards lie directly across the Mississippi river from St. Louis, Mo. The St. Louis Merchants' Bridge Terminal Company is a distinct corporation, but controlled by the Terminal Railroad Association of St. Louis, Mo., by reason of the latter company's ownership of a majority of the capital stock. By means of its owned, operated, and leased lines the Terminal Railroad Association is the only company which can transport live stock from St. Louis to the National Stockyards, the run to which is made in from one to three hours. Answering the Secretary of Agriculture under this state of facts, the Attorney General says:

"You state: 'The view of the officers of the department having the matter in charge has been that any railroad company whose road forms any part of a line over which live stock is conveyed from one state to another which confines said live stock in cars for a period longer than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of at least 5 consecutive hours, unless prevented from so doing by storm or other accidental causes, or unless the live stock is carried in cars in which it can and does have opportunity for feed, rest, and water, is a violator of the law; further, that, following the plain language of the statute, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included in estimating such confinement.' I concur in this interpretation of the law, and upon the facts stated it is my opinion that the law applies to these terminal railroad companies. The statute is unambiguous, and is clearly designed to prevent any railroad company within the United States whose railroad forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, from transporting such animals under conditions other than those set forth in the statute. It seems to be clear from your statement of the facts that these terminal companies accept stock for transportation to the National Stockyards that has already been confined for more than 28 consecutive hours without unloading for feed, rest, and water. That being so, the companies are undoubtedly liable for the penalty which the statute provides." Circular No. 27, U. S. Department of Agriculture, issued December 10, 1909.

To the same purpose is the holding of the United States Court of Appeals for the Eighth Circuit. *Union Stockyards Co. v. United States*, 169 Fed. 404, 94 C. C. A. 626. See also *United States v. Sioux City Stockyards Co.* (C. C.) 162 Fed. 556. It has been held by this court that this Terminal Company is a connecting carrier within the purview of the safety appliance act while engaged in moving cars used in interstate traffic. *United States v. Northern Pac. Terminal Co.* (D. C.) 144 Fed. 861. However, it has been recently held by the Supreme Court that the shipment does not constitute the integer contemplated by the statute as the objective thing to which the offense relates, as has been supposed, but that the time of confinement, regardless of ownership or consignment, determines the offense. For instance, the loading of numerous cars might proceed concurrently, and

this of stock belonging to different parties and under different consignments, and if not discontinuous or unduly prolonged, the period of lawful confinement on the same train would end at the same time and place, and, if carried beyond that time, there would be but one offense. *Baltimore & Ohio Southwestern Railroad Company v. United States*, 220 U. S. 94, 31 Sup. Ct. 368, 55 L. Ed. —, Advance Sheets Sup. Ct. of U. S., decided March 20, 1911. This was practically what happened in loading at Gazelle, Cal., and under the decision cited there would be but two offenses for which the Terminal Company would be liable in the present controversy.

As the Southern Pacific Company has been heretofore prosecuted for its part in the carriage of these cattle beyond the lawful period, the lightest penalty should be imposed here, namely, \$100 in each of said two offenses.

In re LE SUEUR CO-OPERATIVE CO.

(District Court, D. Minnesota, Second Division. April 27, 1911.)

BANKRUPTCY (§ 314*)—CLAIMS—GENERAL CREDITOR.

Pursuant to the articles of incorporation of the bankrupt and its by-laws, a contract was made between it and the claimant, by which the latter sold to the corporation his stock of merchandise, valued at \$5,427.36, and agreed to take in pay therefor excess shares of the stock of the corporation, which, by the terms of the articles of incorporation, its by-laws, and the contract were to remain in the control of the corporation and sold by it; the proceeds to be paid to the claimant. Enough had been sold to pay to claimant \$2,391.12, when the corporation went into bankruptcy. *Held*, that claimant under such transaction did not become a general creditor of the corporation so as to authorize proof of his claim for the balance against the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 469; Dec. Dig. § 314.*]

In Bankruptcy. In the matter of the Le Sueur Co-operative Company. On petition to review a referee's order allowing the claim of J. M. Drozda. Reversed and claim disallowed.

Mr. Geddes, for claimant.

Morphy, Ewing & Bradford, for trustee.

WILLARD, District Judge. This matter is before the court for a review of an order made by the referee on March 28, 1911, allowing a claim of J. M. Drozda in the sum of \$2,467.46, with interest. Drozda on August 1, 1907, was the owner of a stock of merchandize at Lonsdale, Le Sueur county, Minn., of the appraised value of \$5,427.36. On that day he made a contract with the promotion bureau of the Right Relationship League by the terms of which the Right Relationship League agreed to organize a co-operative store and shipping company, to be composed of producers and consumers residing in and about Lonsdale, and to cause to be transferred to it all of Drozda's stock of merchandize, according to a proposal made by Drozda of the same day. Drozda, on his part, agreed to pay to the Right Relation-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ship League a commission of 2½ per cent. upon the valuation of said merchandize, and also agreed to assist in organizing the co-operative company jointly with the representatives of the league. The co-operative company was organized on the 8th of August, 1907, pursuant to the statutes of Minnesota.

Article 5, § 2, of the articles of incorporation, provides as follows:

"Sec. 2. No person shall receive or be entitled to receive any dividend on the capital stock of this corporation in excess of one share thereof, except such persons as may become the owners of excess shares by reason of having same transferred to them by the board of directors as provided in by-laws, and no person shall be entitled to more than one vote at any regular or special meeting or election of this corporation. In case a going business is purchased, acquired or taken over by said corporation, then in that case, the owner or owners of such going business shall have the right and be entitled to a credit for a sufficient amount of excess shares of stock to pay for such going business, and shall be entitled to dividends thereon at the same rate as the other shareholders, but not to exceed six per cent. per annum, said excess shares to be held in trust by the board of directors for the purpose and until they can be disposed of to new members or otherwise. And said owner or owners shall not be entitled to more than one vote as hereinbefore provided."

On the same day, August 8, 1907, the corporation adopted by-laws. Section 16 (a), art. 6, of the by-laws, is in part as follows:

"Sec. 16 (a). The directors are authorized to purchase established stores and other industries at their proper inventory values, and to pay for same in whole or in part in fully paid up shares of the capital stock of this corporation at par value in accordance with sec. 5, art. IV, of these by-laws, subject to the following conditions: * * *

"Third. When said inventory has been properly taken and the total value of the business to be purchased has been ascertained and agreed upon, shares of capital stock in this corporation at par value to the amount of said inventory may be given as full and final payment for any said business, provided the person or persons, accepting said shares of capital stock for said business, will deposit with the directors of this corporation all of said shares of stock in excess of the equal share \$100 worth or the vendor shall at the option of the board of directors take a proper credit on the books of the corporation for all his excess shares being for the amounts of said inventory less the one equal share for himself. Said shares, so deposited, to be held in trust by the directors of this corporation, to be sold as rapidly as possible to new members, in lots of not less or more than \$100 worth to any one person or otherwise, and, as the said shares so deposited are sold and paid for, the proceeds of said sales shall be paid to the owners of said shares of capital stock."

On the same day August 8th, a contract was made between Drozda and the company for a sale by him to it of his said stock of merchandize.

Paragraphs 1 and 2 of said contract are as follows:

"1st. As soon as twenty or more persons shall have subscribed for an equal share of \$100 each, I hereby agree to turn over to the above-named company my stock of goods and fixtures in accordance with the terms set forth in sec. 16a, art. VI, of the by-laws of your company, as recommended by the Right Relationship League of Minneapolis, Minn., the value of same to be determined by appraisers as provided in said by-laws.

"2nd. Said appraisement to be made and clear bill of sale and possession given by me to your company as above specified, it being hereby understood and agreed that I shall have the right and be entitled to be a credit on the books of the company for a sufficient amount of excess shares of stock to pay

for such stock of goods and fixtures and store property, and shall be entitled to capital stock dividends thereon at the same rate as the other stockholders, but not in excess of the net profit in any one year, said excess shares to be held in trust for me by your board of directors for the purpose and until they can be disposed of to new members or otherwise, but they shall not be issued until fully paid for, nor shall they participate in the purchase dividend."

It was provided in paragraph 5 that the money advanced by Drozda for organizing expenses should be refunded to him out of the first money paid in by subscribers to his department. It was also provided in the sixth paragraph that Drozda should become the manager of the department at Lonsdale, and should continue as such until such time as said excess shares should have been sold. His salary was fixed at \$75 a month, and he apparently continued to be the manager, and received that sum as his salary until the bankruptcy of the corporation.

It was further provided in paragraph 7 of said contract that said excess shares should bear their proportion of any loss or damage.

Paragraphs 8 and 9 of said contract are as follows:

"8th. That neither said company, nor board of directors, nor members shall incur or assume any liability by holding said excess shares in trust for me, but shall sell said excess shares as rapidly as possible and before any new shares are sold, unless a new department or store shall be taken over by said company in territory where sales of new shares would not adversely affect the sale of stock in territory within trading distance of Lonsdale.

"9th. That I also agree to do everything in my power to advance the best interests of said company and to assist in organizing this department, jointly, with the representatives of said league."

The stock of merchandize was turned over to the company in pursuance of the contract, Drozda became the manager, and on October 22d a certificate of credit was issued to him, which is as follows:

"Certificate of Credit.

"This is to certify that the board of directors of the Le Sueur County Co-operative Company of Montgomery and state of Minnesota has authorized that there be credited on the books of said company an amount equal to the par value of fifty and $\frac{94}{100}$ (5.094.18) shares of its capital stock in the name of J. M. Drozda of Lonsdale, Minn., said credit to be held in trust for said J. M. Drozda for the purpose and until it can be disposed of to new members or otherwise, and as additional shares in the Lonsdale department of said company are sold and paid for, the proceeds of said sales shall be paid to said J. M. Drozda in the reduction of the above credit.

"It is further understood and agreed that the amount so held in trust for said J. M. Drozda shall be entitled to draw interest at the same rate as that drawn by shareholders as capital stock dividends, but not to exceed six (6%) per cent. per annum, nor in excess of the net profits in any year, nor shall said J. M. Drozda be entitled to more than one vote at any election or meeting of said company, all these provisions being in accordance with the by-laws of said company.

"Dated at Montgomery, state of Minnesota, this 22d day of October, A. D. 1907.

Le Sueur County Co-operative Company.

"By H. M. Meyer, President.

"By Benjamin Richter, Secretary.

"I herewith approve and accept the above provisions and agreements this _____ day of _____ A. D. 190____ at _____.

"_____."

From time to time thereafter, he was paid from the sales of such excess shares and from dues the sum of \$2,391.12. He also received from the corporation notes of various persons to whom stock had been sold on credit amounting to \$2,200. These notes, however, he refused to accept, on the ground that the makers were not solvent, and the notes were afterwards taken back by the manager of the company. The company having gone into bankruptcy, Drozda claims that he is a creditor, and not a stockholder; while the trustee claims that he is a stockholder, and not a creditor.

The question now presented is not whether by the contracts and documents referred to Drozda became a stockholder of the company, and assumed all the obligations of a stockholder to the extent of the excess shares mentioned in the documents. The question here is, rather, Did he become a general creditor of the corporation to the extent of the value of the merchandise turned over by him to it, so that he is now entitled to prove his claim against it for the purchase price thereof? If Drozda had expressly agreed to turn over his merchandize to the corporation, and to receive in payment therefor only the amount of money which might be received by the corporation from the sale of the excess shares assigned to him by the company, and had expressly agreed never to press any claim against the corporation for any balance remaining unpaid, by reason of the failure of the company to sell all of said shares, there could be no doubt but that such a contract would have been valid, that it would have been binding upon Drozda, and, the company having gone into bankruptcy, that he could not have appeared against it as a general creditor.

The papers in the case do not show that he expressly agreed to this; but they do show that he impliedly made such an agreement. This agreement is necessarily to be inferred from the contract which he made. An examination of the documents in the case shows very plainly what the plan of operations was. All of the separate papers are consistent one with the other, and indicate no change in such plan. The first agreement made before the company was organized between Drozda and the Right Relationship League, by which he employed them to dispose of the stock of merchandize, declared that the sale should be made in accordance with the proposal of the same day. The articles of incorporation expressly provided that, when a business such as Drozda's was purchased, the seller should be entitled to credit for "excess shares of stock to pay for such going business." The contract between the parties provided that the stock of goods and fixtures should be turned over to the company in accordance with the provisions of section 16 (a), art. 6, of the by-laws.

Counsel in this case seem to consider that that section provided for two methods of paying for such a business as Drozda's. It, however, in effect, provides for only one. It authorizes the directors in the first paragraph to purchase stores and other industries, and to pay for the same in whole or in part in fully paid-up shares of the capital stock of the corporation. After the inventory has been taken, and the value of the business ascertained, shares of the capital stock may be actually made out, and issued to the amount of the inventory, and these may

be given as the full and final payment for the business. But these same shares, if actually made out and delivered, must be at once deposited by the seller with the directors. By the terms of that article, the directors instead of actually making out the certificates, issuing them and then requiring the seller to at once deposit them with the directors, have the option of giving to the seller proper credit on the books of the corporation for all of his excess shares. If the shares are actually issued and then deposited, or if a credit is taken for the excess shares, without their issue and deposit, the directors in either case have the right, and it is their duty, to sell such shares and pay the proceeds to the seller of the merchandize. In no event do the articles or by-laws authorize the directors to issue stock and deliver it to the seller, so that he can carry it away and treat it as his own. By the terms of the articles and the by-laws, the excess shares given in payment for merchandize must always remain under the control of the directors, and they must be sold by them. In no case has the seller of the merchandize any power over the excess shares. The contract made between the parties on the 8th of August expressly states that the stock of goods and fixtures is to be taken over in accordance with section 16 (a), art. 6, of the by-laws. It also expressly states that, when a clear bill of sale and possession of the stock is given by Drozda to the company, he shall be entitled to credit on the books of the company for a sufficient amount of excess shares to pay for the goods. It also provides that the excess shares shall be held in trust for him by the board of directors of the corporation until they can be disposed of to new members. These documents, viz., the articles, the by-laws, and the contract, as has been said, are all consistent with each other. They all provide that what Drozda shall receive for his merchandize is not money or the obligation of the company to pay money. What he did agree to receive was what the company might realize from the sale of excess shares which were credited to him at the time of the transfer by him of the possession of the goods. In the eighth paragraph of the contract he requires the company to sell the excess shares credited to him as rapidly as possible and before any new shares are sold.

It is said in the brief of counsel for the claimant that the transaction shows a sale of merchandize by one person and a purchase by another, and that such a transaction implies a payment by the purchaser, or an obligation to pay, and that, therefore, the relation of debtor and creditor is at once established. But that contention overlooks entirely the fact that, when the merchandize was turned over to the company by Drozda, he expressly agreed that he would take his pay in a certain way. What is there in any of the papers which indicates if the company did not sell the excess shares that Drozda was to become a general creditor? The very complicated scheme for the organization of this company and the very voluminous by-laws carefully provide for what shall be done with the profits, but, like most other plans of this character, they make no provision for what shall be done in case of a loss.

There is nothing anywhere in any of these papers which expressly states what shall be the relation of Drozda to the company if it does not sell all of the shares. It would have been a very easy matter for Drozda to have inserted in his proposal a provision that, if the company did not sell the shares, he should stand as a general creditor; but no such provision is anywhere found in any of the papers. On the contrary, in section 7 of the contract, it is expressly provided that the excess shares assigned to Drozda shall bear their proportion of any loss or damage. If this means anything, it means that Drozda, who was entitled to what such excess shares might produce, must be the person who was to suffer such loss or damage.

The evidence shows that Drozda himself was apparently the moving spirit in organizing this company, or at least that department of the company which was located at Lonsdale. He employed the Right Relationship League on the 1st of August to sell his stock of merchandize to such a company, and agreed to assist in its organization. The persons subscribing to the capital stock of the company must have done so in reliance upon the by-laws, and must have believed that Drozda was interested in procuring new members to the extent of his excess shares. The more new members secured the more prosperous would be the company, and less the liability of each subscriber. It is doubtful if any subscriber could have been procured upon the theory that Drozda, the organizer of the Lonsdale department, and the seller to the company of his own stock of merchandize, was a creditor of the company, and for the value of such stock of merchandize could at any time maintain a suit against the company. He became the manager of the department at a salary of \$75 a month, and, so far as appears, remained such manager until the bankruptcy of the company.

It is not necessary to consider here the effect to be given to that provision of section 3075 of the Revised Laws of 1905 of Minnesota, which says that no member of a company like this shall own shares of a greater par value than one thousand dollars.

As has been said before, the question whether Drozda became a stockholder in the company or not in respect of these excess shares is not here decided. The only thing decided is that he agreed to take his pay for the merchandize in a certain way, and did not by his contract with the company become its general creditor.

The order of the referee is reversed, and the claim of Drozda is disallowed.

In re LE SUEUR CO-OPERATIVE CO.

(District Court, D. Minnesota, Second Division. April 27, 1911.)

In Bankruptcy. In the matter of the bankruptcy proceedings of the Le Sueur Co-Operative Company on petition to review a referee's order allowing the claims of A. C. Meinke and Meinke Brothers against the bankrupt's estate. Order reversed and claim disallowed.

Mr. Geddes, for claimants.

Morphy, Ewing & Bradford, for trustee.

WILLARD, District Judge. This matter is before the court for review of an order made by the referee on March 28, 1911, allowing a claim of A. C. Meinke and Meiuke Bros., in the sum of \$2,500 and interest.

In the brief of counsel for claimants it is stated that the facts are nearly identical with the facts in the case of the claim of J. M. Drozda against the same bankrupt estate, which has just been decided. 186 Fed. 953.

An examination of the papers in the case shows that there is no material difference between the two cases.

For the reasons stated in the opinion in the Drozda Case, the order of the referee is reversed, and the claim of A. C. Meinke and of Meinke Bros. is disallowed.

CRAVEN v. CLARK.

(Circuit Court, D. Massachusetts. February 6, 1911.)

JURY (§ 31*)—ACTION AT LAW--APPOINTMENT OF AUDITOR.

In an action in a federal court at law to recover damages alleged to have been suffered by mill machinery held by the defendant under an attachment, involving numerous complicated items of damage, the court was authorized to appoint an auditor to state an account to be used at a jury trial; the admission of the report in evidence not being a violation of the parties' constitutional right to trial by jury.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 31.*]

Action by Michael Craven against Embury P. Clark. On objections to the appointment of an auditor. Overruled.

Samuel W. Emery, for complainant.

Christopher T. Callahan and Hurlburt, Jones & Cabot, for defendant.

LOWELL, Circuit Judge. The plaintiff brought an action at common law against the defendant, a deputy sheriff, to recover damages suffered by mill machinery which was held by the defendant under attachment. The declaration alleged that the defendant had not suitably cared for the property attached. While the case was awaiting jury trial, the defendant moved for the appointment of an auditor. After having conferred with counsel on both sides at several times, and having given the matter long and careful consideration, I am of the opinion, and find as a fact, that the items of alleged damage are so numerous and so complicated that a jury cannot profitably or prop-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

erly deal with the issues presented, except after a preliminary examination by an auditor. The plaintiff objects to the auditor's appointment, and contends that this court has no authority to appoint one, except with the consent of the parties. The logical result of his contention goes much further. He urges that a preliminary trial before an auditor, even with the consent of both parties, is a substitute for a trial before a jury or before a court in the nature of an arbitration, which cannot be joined to either of the last-mentioned modes of trial, so as to give to the unsuccessful party therein his writ of error. In other words, he contends that a jury trial which follows upon an auditor's report is an erroneous proceeding, inasmuch as the auditor's report is not admissible in evidence at a jury trial under the statutes of the United States. Hence it follows, according to the logic of his argument, that a jury trial at which an auditor's report is admitted in evidence is not a jury trial within the federal Constitution. In support of his contention that an auditor's report cannot be used at a jury trial, not being admissible evidence under the provisions of the federal Constitution and statutes, the plaintiff refers to *Swift v. Jones*, 145 Fed. 489, 76 C. C. A. 253; *Howe Machine Co. v. Edwards*, Fed. Cas. No. 6,784; *Sulzer v. Watson* (C. C.) 39 Fed. 414; *Kearney v. Case*, 12 Wall. 275, 20 L. Ed. 395. The plaintiff's contention comes to this: That every trial which has been had in this court in which an auditor's report has been admitted in evidence, whether with the consent of both parties or without, has been an irregular and an illegal proceeding.

The practice of appointing an auditor as preliminary to a jury trial is so well established in this circuit that a single judge cannot properly reverse it. *Fenno v. Primrose*, 119 Fed. 801, 56 C. C. A. 313; *Brock v. Fuller Lumber Co.*, 153 Fed. 272, 82 C. C. A. 402; *Corporation of St. Anthony v. Houlihan*, 184 Fed. 252 (decision handed down December 13, 1910). Moreover, I am of the opinion that, without authority in the court to appoint an auditor in a case like that at bar, jury trials would lose their efficiency, and come into contempt by the needless bewilderment of jurymen. If ultimate convenience and the interests of justice are to be taken into account in the interpretation of the federal statutes and of the federal Constitution, I am of opinion that in this case the evidence of that convenience and of that justice is overwhelming.

Ordered that an auditor be appointed.

FLOREN V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 20, 1911.)
No. 3,367.

(Syllabus by the Court.)

1. CRIMINAL LAW (§ 970*)—POST OFFICE (§ 48*)—INDICTMENT—UNMAILABLE MATTER—MOTION IN ARREST—SUFFICIENCY TO PREVENT ANOTHER PROSECUTION—IDENTITY OF LETTER.

An indictment under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658), which charges defendant with depositing on a day named in the United States mail a letter containing information where and of whom articles intended to prevent conception could be obtained, addressed to a person named at Goshen, Ind., but which contains no copy of the letter, no averment that it is so indecent as to be unfit to be spread upon the record of the court, and no allegation of its date, of the name signed to it, of the place where it was mailed, or of any words, figures, or marks which it contains, whereby it can be identified, does not state the facts which constitute the offense charged with such clearness and certainty as to enable the defendant to avail himself of a conviction or acquittal thereon in defense to a second prosecution for the same offense, and it is insufficient in the face of a motion in arrest of judgment.

On a motion in arrest of judgment, as well as on a demurrer, it is essential to the validity of the indictment that it contain averments of the facts which constitute the offense intended to be charged, so certain and specific that upon conviction or acquittal thereon the indictment will show the offense intended to be charged so accurately that the record of it and the judgment upon it will constitute a defense to a second prosecution for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445-2462; Dec. Dig. § 970; * Post Office, Cent. Dig. §§ 66-80; Dec. Dig. § 48.*]

2. INDICTMENT AND INFORMATION (§ 121*)—BILL OF PARTICULARS—EFFECT—BILL OF PARTICULARS WILL NOT CURE SUBSTANTIAL INSUFFICIENCY.

An indictment so fatally defective in its statement of the facts alleged to constitute the offense charged that a judgment of conviction or acquittal thereon constitutes no defense to another prosecution of the defendant for the same offense may not be cured by a bill of particulars.

The office of a bill of particulars is, not to make a bad indictment good, but to grant to a defendant who faces a good indictment further information to enable him to meet it.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 320; Dec. Dig. § 121.*]

In Error to the District Court of the United States for the District of North Dakota.

S. A. Floren was convicted of depositing illegal matter in the mails, and brings error. Reversed and remanded.

Scott Rex, for plaintiff in error.

P. H. Rourke, for the United States.

Before SANBORN and ADAMS, Circuit Judges, and WILLIAM H. MUNGER, District Judge.

SANBORN, Circuit Judge. The plaintiff in error sued out this writ to reverse his conviction and the denial by the court below of his motion in arrest of judgment on the ground that the indictment on which he was convicted did not allege the facts which constituted the

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

offense charged with such clearness and certainty as to enable him to avail himself of his conviction thereon in defense of a second prosecution for the same offense.

[1] On a motion in arrest of judgment, as well as on a demurrer, it is essential to the validity of an indictment that it contain averments of the facts which constitute the offense it charges so certain and specific that upon conviction or acquittal thereon it, and the judgment upon it, will constitute a complete defense to a second prosecution of the defendant for the same offense. *United States v. Hess*, 124 U. S. 483, 486, 487, 8 Sup. Ct. 571, 31 L. Ed. 516; *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; *Miller v. United States*, 66 C. C. A. 399, 403, 133 Fed. 337, 341; *Brown v. United States*, 74 C. C. A. 214, 216, 143 Fed. 60, 62; *Armour Packing Co. v. United States*, 153 Fed. 1, 17, 82 C. C. A. 135, 151, 14 L. R. A. (N. S.) 400; *United States v. Breakwater (D. C.)* 174 Fed. 78, 79, 80.

The offense charged in this indictment was the depositing in the mail of a letter which conveyed information where and of whom articles for the prevention of conception could be obtained in violation of section 3893 of the Revised Statutes. The charge of the offense in the indictment was in these words:

"That on, to wit, the seventh day of January, in the year of our Lord one thousand nine hundred and six, in the county of Nelson, in the state and district of North Dakota, and within the jurisdiction of this court, S. O. Florin and J. Wold, late of the county of Nelson, in said district, did willfully and unlawfully deposit and cause to be deposited in the United States mail, for transmission by said mail, a letter addressed to Mrs. Cora Dillingham, Goshen, Indiana, which letter did then and there contain and convey information as to where, how, of whom, and by what means certain articles, things, and devices intended for the prevention of conception could be obtained."

The indictment contained no averment that any of the contents of the letter were too indecent to be pleaded, and hence no excuse on that ground for the failure to set it forth therein. *Rosen v. United States*, 161 U. S. 29, 37, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; *Dunlop v. United States*, 165 U. S. 486, 489, 17 Sup. Ct. 375, 41 L. Ed. 799. The allegation of the date of the mailing of the letter in no way specified or identified it, because proof of the mailing of a letter on any day before the finding of the indictment and within the statute of limitations was permissible under that averment. The indictment neither set forth the letter, nor averred its date, nor the place where it was mailed, nor the signature to it (which appeared upon the trial not to be that of the defendant), nor specified any words, figures, or other identifying marks it contained. Every letter addressed to Mrs. Cora Dillingham, Goshen, Ind., conveying any information how articles intended to prevent conception could be obtained, signed by any one whomsoever, mailed at any place whatsoever, at any time whatever within the statutory limitation, was equally well described by this indictment. And, now that the defendant below has been convicted upon it, there is nothing in the indictment or in the judgment to prevent his conviction again for the same offense, because they contain no description by which the letter for the mailing

of which he was convicted can possibly be identified or distinguished from any other letter of the same nature, signed by any one whomsoever, and mailed to the same address at any place and at any time whatsoever, within the time limited by the statute. These facts render this indictment fatally defective. An indictment under section 3893 of the Revised Statutes should either set forth the letter, card, circular, book, pamphlet, advertisement, or notice charged to have been mailed, or, if it is too indecent to be spread upon the records of the court, the indictment should contain an averment of that fact, and of its date, of the name signed to it, and of such other distinguishing characteristics as will clearly identify it. *Grimm v. United States*, 156 U. S. 604, 608, 15 Sup. Ct. 470, 39 L. Ed. 550; *United States v. Tubbs* (D. C.) 94 Fed. 356, 359, 360; *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 38 L. Ed. 830.

In *Grimm v. United States*, 156 U. S. 608, 15 Sup. Ct. 471, 39 L. Ed. 550, which involved an indictment under the same statute, the letter was set out in full, and the objection was that the letter did not specify a picture to which the information contained in the letter referred. Mr. Justice Brewer, in overruling this criticism and the argument that the pleader should have incorporated the picture in the indictment or given a full description of it, said:

"The charge is not the sending of obscene matter through the mails, in which case some description might be necessary, both for identification of the offense and to determine whether the matter was obscene, and therefore nonmailable. * * * There the gist of the offense is the placing of a certain objectionable article in the mail, and therefore that article should be identified and disclosed. So here the gist of the offense is the mailing of a letter giving information, and therefore it is proper that the letter should be stated, so as to identify the offense."

In *Rosen v. United States*, 161 U. S. 32, 34, 40, 16 Sup. Ct. 438, 40 L. Ed. 606, the indictment charged the depositing in the mail of a lewd and lascivious paper, which was specified by a statement in the indictment of its name, its volume, its number, its date, and by a further description of it with such minuteness as to leave no doubt of its identity. The indictment was challenged by a motion in arrest of judgment, not because it did not so particularly describe and identify the paper as to enable the defendant to avail himself of a conviction or acquittal in defense of another prosecution for the same offense, but because it did not so point out the parts of the paper claimed to be lewd and lascivious that the defendant was fairly informed of the nature and cause of the accusation against him, so that he could well defend against it. The Supreme Court said:

"The doctrine to be deduced from the American cases is that the constitutional right of the defendant to be informed of the nature and cause of the accusation against him entitles him to insist, at the outset by demurrer or by motion to quash, and after verdict by motion in arrest of judgment, that the indictment shall apprise him of the crime charged with such reasonable certainty that he can make his defense and protect himself after judgment against another prosecution for the same offense; that his right is not infringed by the omission from the indictment of indecent and obscene matter, alleged as not proper to be spread upon the records of the court, provided the crime charged, however general the language used, is yet so described as reasonably to inform the accused of the nature of the charge

sought to be established against him; and that in such case the accused may apply to the court before the trial is entered upon for a bill of particulars, showing what parts of the paper would be relied on by the prosecution as being obscene, lewd, and lascivious, which motion will be granted or refused, as the court, in the exercise of a sound legal discretion, may find necessary to the ends of justice."

[2] It is not material to the present issue that the defendant demanded no bill of particulars, and none was furnished. Where an indictment is so fatally defective in its statement of the facts alleged to constitute the offense charged that a conviction or acquittal upon it constitutes no defense to another prosecution for the same offense, a bill of particulars cannot cure it. The office of such a bill is to give to the defendant some further information to which the court deems him entitled in cases in which the indictment is substantially good. The granting or refusing of such a bill of particulars is discretionary with the court, and as District Judge (now Circuit Judge) Carland said in *United States v. Tubbs* (D. C.) 94 Fed. 356, 360:

"To hold that the right to demand a bill of particulars would cure a bad pleading would make the returning of a good indictment by the grand jury discretionary with the court, which could not be entertained for a moment. It is because the indictment is good as against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If it is bad, he has his remedy by demurrer or motion in arrest."

In that case the indictment was identical in legal effect with that in the case at bar, and a motion in arrest of the judgment was granted.

The Supreme Court has never departed from this declaration of the law which it made in *Evans v. United States*, 153 U. S. 584, 587, 14 Sup. Ct. 934, 936; 38 L. Ed. 830:

"Even in cases of misdemeanors, the indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that, upon a plea of former acquittal or conviction, the record may show with accuracy the exact offense to which the plea relates. *United States v. Simmons*, 96 U. S. 360 [24 L. Ed. 819]; *United States v. Hess*, 124 U. S. 483 [8 Sup. Ct. 571, 31 L. Ed. 516]; *Pettibone v. United States*, 148 U. S. 197 [13 Sup. Ct. 542, 37 L. Ed. 419]; *In re Greene* [C. C.] 52 Fed. 104."

The record in this case fails to come up to this requirement of the law, fails to show what letter the defendant was charged with mailing, fails to show the offense with which the defendant was charged with sufficient clearness and certainty to constitute a defense to another prosecution for the same offense, and the judgment below must be reversed, and the case must be remanded to the District Court, with instructions to grant the motion in arrest of the judgment and to discharge the defendant.

It is so ordered.

BLACKMAN V. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1911.)

Nos. 2,878-2,891.

POST OFFICE (§ 50*)—PROSECUTION FOR USING MAIls TO DEFRAUD—INSTRUCTIONS.

In a prosecution under Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), for using the mails to effect a scheme to defraud, instructions are erroneous which permit a conviction on a finding of any stated group of facts, from which a purpose to defraud is omitted.

[Ed. Note.—For other cases, see Post Office, Dec. Dig. § 50.*

Nonmailable matter, see note to Timmons v. United States, 30 C. C. A. 79.]

In Error to the District Court of the United States for the District of Colorado.

Criminal prosecutions by the United States against C. L. Blackman, against A. E. Keables, against W. B. Cameron, against William E. Wilson, against Arthur Levan, against David H. Lawrence, and against Lee DuBois. Judgment of conviction in each case, and defendants bring error. Reversed.

Charles W. Franklin and Harry B. Tedrow, for plaintiffs in error.
H. J. Bone, Special Asst. U. S. Atty.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge. The plaintiffs in error were convicted, as charged in two indictments which were consolidated for trial, of using the mails in aid of a scheme to defraud, contrary to section 5480, Rev. Stat. (U. S. Comp. St. 1901, p. 3696), and of conspiring to commit that offense, contrary to section 5440, Rev. Stat. (page 3676). They prosecuted these writs of error.

In general terms the fraudulent scheme charged was the organization of a corporation called the Lost Bullion Spanish Mines Company, with a capital of \$10,000,000 in shares of \$1 each, and the inducement of the public to purchase the shares by means of false and fraudulent representations and communications through the post office as to the history, condition, and value of the company's property. This was stated with much detail in the indictments, and specific instances of the use of the mails in aid of the scheme were given. In the charge to the jury the trial court said it was not necessary that all things specified in the indictments as constituting the fraudulent scheme should be proved. It then grouped the fraudulent representations charged in the indictments into five paragraphs, connected disjunctively, and said:

"Either of these, if proven, is sufficient to constitute the fraudulent scheme charged in either of the indictments."

This was error. A vital element of the scheme was omitted from all but one of the paragraphs, namely, the purpose to sell the shares of stock to those to whom the representations might be made, and thereby defraud them. This purpose was expressly charged in the indict-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ments, and necessarily so, because without it there was no scheme to defraud.

There are many other assignments of error; but, as the cases will have to be retried, the grounds for them may not again arise, and we therefore refrain from discussing them. It should be said, however, that we think the objections to the indictments are clearly untenable.

The judgments are reversed, and the causes remanded for a new trial.

McCABE et al. v. ATCHISON, T. & S. F. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. February 10, 1911.)

No. 3,054.

1. STATES (§ 9*)—FORMATION—ENABLING ACTS—CONSTRUCTION.

The authority conferred by the act (Act June 16, 1906, c. 3335, 34 Stat. 267) enabling the people of Oklahoma and Indian Territory to form a constitution, which provides that the delegates to the constitutional convention shall adopt the federal Constitution, and shall form a state constitution which shall be republican in form, and which shall make no distinction in civil and political rights on account of race or color, and which shall not be repugnant to the federal Constitution, is a working rule, addressed to the delegates forming a constitutional convention, and, where a constitution formed by the convention has been declared by the President of the United States as authorized by the enabling act to conform to the enabling act, the obligations of the character indicated imposed by the enabling act cease, and individuals may not invoke the act as a prohibition against state legislation, though the enabling act also requires that the constitutional convention shall accept its terms and adopt an ordinance to that effect.

[Ed. Note.—For other cases, see States, Cent. Dig. § 4; Dec. Dig. § 9.*]

2. CONSTITUTIONAL LAW (§§ 206, 218*)—EQUAL PROTECTION OF THE LAWS.

The provision of Comp. Laws Okl. 1909, § 434 et seq., requiring every railway company doing business in the state to provide separate coaches for the accommodation of the white and negro races, equal in points of comfort and convenience, and to maintain separate waiting rooms at their passenger depots for the accommodation of the races, does not abridge the privileges and immunities of the negro race, and deny to them the equal protection of the laws, in violation of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-648, 715; Dec. Dig. §§ 206, 218.*]

3. CONSTITUTIONAL LAW (§ 218*)—EQUAL PROTECTION OF THE LAWS.

The proviso in the statute that nothing contained therein shall be construed to prevent railway companies in the state from hauling sleeping cars, dining, or chair cars attached to their trains to be used exclusively by either white or negro passengers separately, imposes no obligation on carriers to haul such cars for either race, but permits them to haul such cars for the separate use of either of the races, and it is not discriminatory against either race, and does not deprive the negro race of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 715; Dec. Dig. § 218.*]

4. CONSTITUTIONAL LAW (§ 218*)—EQUAL PROTECTION OF THE LAWS.

Equality of service does not mean identity of service. It is only when conditions and circumstances are substantially alike, and when demand

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Taxes

for luxuries like sleeping cars, dining cars, and chair cars is of a substantial character, that they must be furnished for one race, if furnished for the other.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 715; Dec. Dig. § 218.*]

5. CONSTITUTIONAL LAW (§ 218*)—EQUAL PROTECTION OF THE LAWS.

That carriers operating under Comp. Laws Okl. 1909, § 434 et seq., requiring carriers to provide separate coaches for the accommodation of the white and negro races, equal in all points of comfort and convenience, operate unevenly and oppressively to the negro race by their interpretation and execution of the statute, does not render the statute violative of the fourteenth amendment to the federal Constitution, as depriving the negro race of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 715; Dec. Dig. § 218.*]

6. CONSTITUTIONAL LAW (§ 48*)—COMMERCE CLAUSE—CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY.

Comp. Laws Okl. 1909, § 434 et seq., requiring every railway company doing business in the state to provide separate coaches for the accommodation of the white and negro races, equal in all points of comfort and convenience, must be construed to apply to intrastate commerce alone, and, when so construed, it is not violative of the commerce clause of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

7. INJUNCTION (§ 195*)—INCIDENTAL RELIEF—BILL—SUFFICIENCY.

The allegations of a bill in a suit to enjoin railroads from obeying Comp. Laws Okl. 1909, § 434 et seq., requiring every railway company to provide separate coaches for the accommodation of the white and negro races, brought before the statute became operative, that the railroads are making distinctions in the civil rights of the negro race and persons of the white race in the operation of its trains, in that equal comforts and accommodations will not be provided for the negro race, that passenger coaches maintained for the negro race are not provided with separate and equal toilet and waiting rooms for male and female passengers of the negro race, nor equal smoking accommodations, nor separate and equal chair cars, sleeping cars, and dining car accommodations, are too vague to constitute a cause of action, and, where the court denies the injunctive relief sought, it may not award damages as incidental legal relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 415; Dec. Dig. § 195.*]

Sanborn, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western District of Oklahoma.

Suit by E. P. McCabe and others against the Atchison, Topeka & Santa Fé Railway Company and others. From a decree of dismissal rendered after sustaining a demurrer to the bill, complainants appeal. Affirmed.

E. O. Tyler, E. T. Barbour, and William Harrison, for appellants. S. T. Bledsoe (J. R. Cottingham, C. O. Blake, Clifford L. Jackson, R. A. Kleinschmidt, and C. E. Warner, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This case turns upon the validity or true construction of an act of the Legislature of Oklahoma, approved De-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

ember 18, 1907 (Comp. Laws Okl. 1909, p. 271, c. 9, art. 2, § 434 et seq.), requiring every railroad company doing business in that state as a common carrier of passengers to provide separate coaches or compartments for the accommodation of the white and negro races; equal in all points of comfort and convenience, and to maintain separate waiting rooms at all their passenger depots for the accommodation of those races also equal in all points of comfort and convenience.

The complainants, five negro citizens of Oklahoma, instituted this suit against the defendants, several railway companies doing business throughout Oklahoma in state and interstate commerce, to enjoin them from obeying this law, on the grounds (1) that it violates the provisions of the act enabling the people of Oklahoma and the Indian Territory to form a constitution and be admitted into the Union, approved June 16, 1906 (part 1, 34 Stat. 267), in this: that it makes a distinction between the civil rights of the negro and white race of men, contrary to the condition imposed by section 25 of that act; (2) that it is in conflict with the fourteenth amendment to the Constitution of the United States, in that it abridges the privileges and immunities of citizens and deprives them of the equal protection of the laws; (3) that it violates the provisions of the commerce clause of the Constitution, in that it is an attempt to regulate commerce among the several states; and (4) that the several defendants are not in fact conforming to the requirements of the law by furnishing cars and waiting rooms for the negro race equal in point of comfort and convenience to those furnished for the white race. The learned trial judge sustained a demurrer to the bill, and, upon complainants declining to plead further, dismissed it. From this an appeal followed.

[1] It is very clear, we think, that complainants cannot invoke the enabling act as in itself a prohibition against the legislation in question. The first paragraph of section 3 of that act reads as follows:

"That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory, * * * and, after organization, shall declare on behalf of the people of said proposed state that they adopt the Constitution of the United States; whereupon the said convention shall, and is hereby authorized to form a constitution and state government for said proposed state. The Constitution shall be republican in form, and make no distinction in civil and political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

The authority conferred by this section with its limitations and prohibitions was most obviously addressed to the delegates chosen under the provisions of section 2 of the act, when they should have assembled in convention for the purpose of forming a constitution and state government. A constitution which should make no distinction in civil or political rights on account of race or color was the only kind of a constitution the delegates were empowered to make. When it should be made and the provisions of the enabling act found to have been "complied with in the formation thereof" by the President, who was the arbiter constituted for that purpose by the fourth section of the act, the state became a member of the federal Union "on an equal footing with the original states." The working obligation or instructions imposed by the enabling act in the respect now under considera-

tion upon the delegates chosen to make the Constitution ceased to have force or effect when that instrument was made and found and proclaimed by the constituted umpire to be in accordance with the act which authorized it. *Permoli v. First Municipality*, 3 How. 589, 609, 11 L. Ed. 739; *Escanaba Co. v. Chicago*, 107 U. S. 678, 688, 2 Sup. Ct. 185, 27 L. Ed. 442; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 8 Sup. Ct. 811, 31 L. Ed. 629; *Ward v. Race Horse*, 163 U. S. 504, 16 Sup. Ct. 1076, 41 L. Ed. 244; *Boln v. Nebraska*, 176 U. S. 83, 20 Sup. Ct. 287, 44 L. Ed. 382; *United States ex rel. v. United States Express Co.* (D. C.) 180 Fed. 1006.

The requirement of section 22 of the enabling act that the constitutional convention should accept the terms and provisions of that act and adopt an ordinance to that effect, to which our attention is specially directed by counsel for complainants, affords no additional warrant for their contention. The provisions which called the convention into being and fixed boundaries and limitations upon its powers were not enlarged by the adoption of that ordinance; neither were they diverted from their object and purpose as plainly expressed. Whatever effect the acceptance of the terms and provisions of the enabling act may have upon other questions to which they might be applicable, we are clearly of opinion it was never intended by the language employed to transfer the limitation upon the powers of the convention itself to the state Legislature after statehood should have been accomplished.

Therefore, even if the Oklahoma statute in some of its provisions made a distinction in civil rights on account of race or color contrary to the instructions of the enabling act (which, however, is not admitted), no cause of action could be predicated upon that act itself, and no relief could be granted unless the distinction (or discrimination as it was called in argument) violated some of the prohibitions of the federal Constitution, which after statehood became the exclusive federal chart of complainants' civil and political rights.

[2] The argument is next made that the statute in question violates the fourteenth amendment to the Constitution of the United States, in that the enforced separation of the negro race from the white race in railroad cars and waiting rooms abridges the privileges and immunities of the former, and denies to it the equal protection of the laws. This question in our opinion is not an open one. The Supreme Court of the United States in *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, has foreclosed further discussion. Mr. Justice Brown, speaking for that court, made these observations:

"The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state Legislatures in the exercise of their police power. * * * So far, then, as a conflict with the fourteenth amendment is concerned, the

case reduces itself to the question whether the statute of Louisiana [similar to that here involved] is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the Legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state Legislatures."

In view of this decision further discussion of the general question is neither necessary nor seemly on our part.

[3] But there is one special feature of the Oklahoma statute which counsel for the complainants contend is in itself discriminatory and operates to deprive the negro race of the equal protection of the laws within the meaning of the Constitution. This is found in the proviso to section 7, which reads as follows:

"Provided that nothing herein contained shall be construed to prevent railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately, but not jointly." Laws 1907-08, c. 15.

In our opinion this contention is not sound. Other parts of the statute make ample provision for the actual transportation of both races in reasonable comfort and convenience. Separate coaches or compartments equal in all points of comfort and convenience must, under severe penalties, be carried on each trip by every train moving within the state. Sections 1 and 5. Sleeping cars, dining cars, and chair cars are, comparatively speaking, luxuries, and properly enough no such imperative provisions are made concerning them as are made concerning the common and indispensable coach or compartment. The proviso imposes no obligation upon carriers to haul such cars for either race, but out of abundant caution lest the former provisions of the act, the keynote of which is equality of service between the races, should be construed to require the carriers to constantly haul separate sleeping, dining, and chair cars for them, it is provided that they might haul them for the separate but not joint use of either of the races. This provision in itself makes no more discrimination against one race than the other. The Legislature having in mind doubtless, what we judicially know, that the ability of the two races to indulge in luxuries, comforts, and conveniences was so dissimilar that sleeping and dining cars which would be well patronized by one race might be very little if at all by the other, legislated accordingly, and made a provision by which carriers might supply them for the exclusive use of either race as circumstances might dictate.

It may be conceded that the general principle of equality of service which pervades the Oklahoma statute and which is also required by the common and interstate commerce law (24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]) must be observed by all carriers. As a general rule, if carriers haul cars of special and peculiar convenience for citizens

of one race, they must provide equal service for citizens of the other race. Equality of service, however, does not necessarily mean identity of service; and manifestly this rule does not require permanent provision for equal service, irrespective of the demand for it. No mere question of abstract or theoretical right can require the constant and regular equipment and hauling of substantially empty dining, sleeping, or chair cars for either race. Practical considerations, which are potent in reaching a correct interpretation of any statute, cannot be ignored in applying the principle of equality of service to the two races in Oklahoma. Neither can any such interpretation be given to the statute of that state as would in effect require carriers to render service to either race without compensation. That would deprive them of their property without due process of law.

We conclude, in view of these and other like considerations, that the principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same.

[4] But it is contended that the carriers operate under this law unevenly and oppressively to the negro race and by their interpretation and execution of its provisions demonstrate that it is discriminatory. The contention is made on the supposed authority of the case of *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220, and cases there cited. That was a case where the public authorities representing the state, against which alone the prohibition of the fourteenth amendment operates, exercised certain arbitrary powers conferred upon them by certain ordinances so as to unjustly discriminate against the Chinese. The Supreme Court held that:

"Whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

This doctrine in our opinion is totally inapplicable to the facts of the present case.

It may well be that the interpretation and application of a law of the state by the properly constituted authorities control its meaning within the purview of the Constitution; but most obviously such interpretation and application of it by private citizens, the defendant carriers in this case, can have no such effect. If it could, lawbreakers might, by their continued violation of a law, convert their own lawlessness into law, and the lawbreaker and not the lawmaker might become its final interpreter.

[5] Is this statute an invasion of the exclusive prerogative of Congress over interstate commerce?

It may be conceded that, if it applies to interstate transportation, it is a regulation of interstate commerce within the meaning of the Constitution. We think this follows from the doctrine laid down by the Supreme Court in *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547. In that case a law of Louisiana as interpreted by its highest judicial tribunal required carriers of interstate commerce when operating within the limits of the state to receive colored passengers into cabins set apart for white persons. The court said:

"It [the statute] does not act upon the business through the local instruments to be employed after coming within the state, but directly upon the business as it comes into the state from without or goes out from within."

This, it was held, interfered directly with the freedom of interstate commerce, and therefore encroached upon the exclusive power of Congress. See, also, *Louisville, etc., Ry. Co. v. Mississippi*, 133 U. S. 587, 590, 10 Sup. Ct. 348, 33 L. Ed. 784, and *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, 391, 21 Sup. Ct. 101, 45 L. Ed. 244.

For like reasons, the Oklahoma law, if, as properly construed, it embraces or relates to interstate commerce at all, would also be a regulation of that commerce. It compels carriers when operating in that state to exclude colored persons from cars or compartments set apart for white persons. The only difference between the Louisiana and the Oklahoma law is that the one compels carriers to receive into and the other to exclude colored persons from cars or compartments carrying white persons. They act alike directly upon the carrier's business as its passenger crosses the state line. Hence, if one is a regulation of interstate commerce, the other must be. The contention, therefore, that the provisions of the Oklahoma statute do not amount to a regulation of interstate commerce, if they concern that commerce at all, is untenable.

The question, then, is whether that statute when properly construed applies to interstate transportation or whether it is limited in its application to that transportation which has its origin and ending within the confines of the state. No provision is found in the act indicating in any express terms that it was intended to apply to interstate commerce. All its provisions concerning the subject of legislation are general.

Thus section 1 provides that "*Every railway company * * * doing business in this state, * * * shall provide separate coaches,*" etc. Sections 2 and 6 make it unlawful "*for any person*" to occupy any waiting room or ride in any coach not designated for the race to which he belongs. While, therefore, the language of the act literally construed is comprehensive enough to include railroads doing interstate business and include passengers while making interstate trips, it neither in express terms nor by any implication other than that involved in the general language employed manifests any intention to invade the exclusive domain of congressional legislation on the subject of interstate commerce.

Local transportation or that which is wholly within the state only,

being within the competency of the state Legislature, would naturally be presumed to have been alone contemplated in the law enacted by it. The constitutional inhibition against a state legislating concerning interstate commerce and the uniform decisions of courts of high and controlling authority emphasizing and enforcing that inhibition, without doubt, were actually as well as constructively known to the members of the Legislature of Oklahoma. It is unreasonable to suppose they intended to legislate upon a subject known by them to be beyond their power and upon which an attempt to legislate might imperil the validity of provisions well within their power. Any other view would imply insubordination and recklessness which cannot be imputed to a sovereign state. This conclusion is supported by abundant authority.

In the case of Louisville, etc., Ry. Co. v. Mississippi, *supra*, a statute of Mississippi similar to that under consideration requiring all railroads carrying passengers in that state to provide equal but separate accommodations for the white and colored races, and obliging the conductors of passenger trains to assign each passenger to his appropriate car, was under consideration. The case was a writ of error to the Supreme Court of Mississippi which had ruled (*Louisville, N. O. & T. Ry. Co. v. State*, 66 Miss. 662, 6 South. 203, 5 L. R. A. 132, 14 Am. St. Rep. 599) that the statute, although general and comprehensive in its language, was intended to affect only commerce within the state, and was therefore not in violation of the commerce clause of the Constitution.

The Supreme Court in its decision had regard to the interpretation of the statute by the Supreme Court of Mississippi, and held that commerce wholly within a state was not subject to the constitutional provision, and as a necessary consequence that the law was not an infraction of the commerce clause of the federal Constitution.

In *Chesapeake & Ohio Ry. Co. v. Kentucky* *supra*, a statute was under consideration requiring all railroads to furnish separate coaches or compartments of equal convenience and accommodation for its white and colored passengers, empowering conductors to assign each white or colored passenger to his appropriate car or compartment, and authorizing them to decline to carry any passenger who refused to occupy such car or compartment. The language of the statute was, literally speaking, sufficiently comprehensive to include interstate as well as intrastate transportation. In deciding the case the Supreme Court reviewed the Mississippi Case and *Plessy v. Ferguson*, *supra*, and also the case of *Ohio Val. Ry.'s Receiver v. Lander*, decided by the Court of Appeals of Kentucky, 47 S. W. 344, 20 Ky. Law Rep. 913. It quoted liberally from the last-mentioned case upon the authority of which the case then under consideration had been decided by the Kentucky court, to the effect that the Kentucky Legislature did not intend by the general language there employed to embrace transportation of interstate passengers, but only domestic or intrastate passengers. The Supreme Court then said:

"This ruling effectually disposes of the argument that the act must be construed to regulate the travel or transportation on railroads of all white and colored passengers, while they are in the state. * * *"

But the court added:

"Indeed, we are by no means satisfied that the Court of Appeals did not give the correct construction to this statute in limiting its operation to domestic commerce. It is scarcely courteous to impute to a Legislature the enactment of a law which it knew to be unconstitutional, and, if it were well settled that a separate coach law was unconstitutional as applied to interstate commerce, the law applying on its face to all passengers should be limited to such as the Legislature were competent to deal with. * * * While we do not deny the force of the railroad's argument in this connection, we cannot say that the General Assembly would not have enacted this law if it had supposed it applied only to domestic commerce; and, if we were in doubt on that point, we should unhesitatingly defer to the opinion of the Court of Appeals, which held that it would give it that construction if the case called for it."

In the more recent case of *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936, decided May 31, 1910, the Supreme Court again considered the contention of a colored person made under the Kentucky statute that he could not be required to occupy a car set apart exclusively for the transportation of persons of his race. It there reviewed its own decisions on the subject which have already been referred to, and refrained from discussing the constitutional restraint upon state Legislatures based upon the distinction between white and colored races, on the ground, as stated in the opinion, that it had been so much discussed in their own cases reviewed and cited "that we are relieved from further enlargement upon it." The judgment of the state court against the contentions of the colored person was affirmed; the court seeming to regard the great question now in controversy as foreclosed.

From the foregoing it appears to us that the decisions of the Supreme Court point to a harmonious and consistent attitude on its part adverse to complainants' present contention, and, while some of the decisions are fortified by local courts' interpretation of statutes, there seems to be a willing acquiescence in the interpretation so placed upon them.

Our own court likewise stands committed to a principle leading inevitably to the same result. In the case of *Butler Bros. Shoe Co. v. United States Rubber Co.*, 84 C. C. A. 167, 156 Fed. 1, we had before us the right of a foreign corporation doing business in Colorado to recover on certain contracts made by it with a domestic corporation. The defense was that the foreign corporation had not qualified to do business in Colorado and had not paid the annual license tax required by all foreign corporations by the Constitution and statutes of that state as a condition for doing business therein. This court, speaking by Sanborn, Circuit Judge, said:

"If the Constitution and statutes of Colorado are to be interpreted to mean, as they clearly read, to prohibit every foreign corporation from exercising any corporate power whatever, or doing any business whatever, in the state, unless they pay the fees and the annual license tax which this legislation requires as a condition thereof, they are unconstitutional and void, so far as they apply to interstate commerce conducted by foreign corporations or suits for and against them in the national courts. There is, however, another view of this case which is both reasonable and persuasive. The law upon the subject which has been considered was the same when the Colorado Constitution was adopted and when her statutes were enacted that it is to-day,

and the legal presumption, in the absence of persuasive evidence of another purpose, is that the people and the Legislature of that state intended in the adoption of this Constitution and the enactment of these laws to obey the supreme law of the land, that they intended to prohibit the doing of intra-state business only * * * without a license from their state. Hence this Constitution and these statutes should be read and interpreted, if possible, in the light of this presumption, so that they will not conflict with the Constitution and the laws of the United States. * * * An interpretation of this legislation so it may conform to the national law, and so that acts done in undoubted violation of its plain terms may be held to be without its true meaning and purpose, is rational and just, and it is supported by high authority."

The Employer's Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, are thought to be authority against the conclusion reached by us in this case. In those cases it was held that the act of Congress approved June 11, 1906 (34 Stat. 232 [U. S. Comp. St. Supp. 1909, p. 1148]), subjecting any common carrier engaged in trade or commerce in the District of Columbia or in any territory of the United States or between the states to liability to "any of its employés," etc., was unconstitutional. Careful consideration of the opinions, however, has convinced us that the unconstitutionality of the act was not made to rest solely upon the provision creating a liability to "any" employé of a railroad company whether he was engaged in interstate commerce or not. As pointed out by Mr. Justice White, who wrote the opinion of the majority, the act of Congress had relation not only to railroads doing transportation business between the states, but to those engaged in that business within the District of Columbia and within any of the territories of the United States over which Congress had plenary legislative power. It might in the District of Columbia and territories regulate the relation of carrier to employé in both inter and intra state transportation. Hence came the dilemma. If the words "any employé," etc., were limited to such employé as was engaged in interstate commerce, as argued in support of the constitutionality of the act, it would destroy its applicability to all railroad employés engaged otherwise than in interstate commerce in the District of Columbia and territories. Mr. Justice White, speaking of this situation, said:

"Thus it would come to pass, if we could bring ourselves to modify the statute by writing in the words suggested—that is, by causing the act to read 'any employé when engaged in interstate commerce'—we would restrict the act as to the District of Columbia and the territories, and thus destroy it in an important particular. To write into the act qualifying words, therefore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy."

He then adds:

"Of course, if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that, where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies

only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

Because, therefore, of the disposition of the Supreme Court uniformly shown in prior cases of like character to that now before us, we cannot believe the Employers' Liability Cases, involving as they did a totally different subject and one complicated by statutory provisions which would have been irreconcilable if the desired limitation had been imposed, were intended to be applicable to a case like this, or that on their authority we are required to overturn a well understood national policy concerning a troublesome interracial question.

The doctrine of this court as announced in Denver & R. G. R. Co. v. Wagner, 92 C. C. A. 527, 167 Fed. 75, 81, and that of the Supreme Court as stated in the Employer's Liability Cases, is that the legal provisions of the statute may be severed from those which are illegal, "where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated." Applying this rule to the present case, we have no doubt the Legislature of Oklahoma would have enacted the statute in question had it in terms related only to domestic transportation. Why? As already pointed out, it knew it could go no further. It knew that legislation regulating interstate commerce was beyond its power. Most obviously, then, it would not have imperiled the separation of the races in domestic transportation which, without doubt, comprehended the great bulk of that which materially concerned the convenience and sensibilities of the people of the state by deliberately invading the forbidden field of interstate commerce.

Our conclusion is that the act of Oklahoma is not violative of the commerce clause of the Constitution.

It is next contended that the demurrer to the bill was improperly sustained because its averments disclosed that the defendant railroad companies were not in fact furnishing for the negro race coaches or waiting rooms equal in point of comfort or convenience to those furnished for the white race; that complainants were thereby damaged and that they could secure relief of this kind as incidental to the injunctive relief prayed for. It is argued that equity has jurisdiction to avoid a multiplicity of suits and also because no adequate remedy could be had at law.

[6] The allegations of the bill thus brought into judgment are as follows:

"That, notwithstanding the terms of said act of Congress and of the Constitution of the state of Oklahoma, the said above-named defendants and each of them are making distinctions in the civil rights of your orators and of all other persons of the negro race and persons of the white race in the conduct and operation of its trains and passenger service in the state of Oklahoma, in this, to wit: that equal comforts, conveniences, and accommodations will not be provided for your orators and other persons of the negro race; that said passenger coaches are not constructed or maintained so as to enable persons of the negro race to be provided with separate and equal toilet and waiting rooms for male and female passengers of said negro race, nor have equal smoking car accommodations, nor separate and equal chair cars, sleeping cars, and dining car accommodations by providing for your orators and

other persons of the negro race who may become passengers on said railroad, that separate waiting rooms with equal comforts and conveniences have been or are bound to be constructed by said defendants and each of them for your orators and other persons of the negro race desiring to become passengers on said railroad, and that said orators are not being and will not be provided with equal accommodations with the white race under the provisions of said act."

These allegations are too vague and uncertain to constitute a cause of action either in equity or at law. Moreover, the suit was instituted before the Oklahoma statute went into effect. Of course, therefore, no cause of action for damages could be stated. But, even if that were possible, such incidental legal relief could not be awarded in this case after the main injunctive relief sought by the bill and which was alone prayed for had been denied. *Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Lewis Publishing Co. v. Wyman* (C. C. A.) 182 Fed. 13, decided August 20, 1910, and cases cited.

Some questions of practice were argued at the bar and in the brief of counsel, but the disposition of the case on its merits dispenses with any consideration of them.

The decree below is affirmed.

SANBORN, Circuit Judge (dissenting). The fourteenth amendment to the Constitution of the United States provides that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. * * * nor deny to any person within its jurisdiction the equal protection of the laws."

If each of two citizens of unobjectionable mental, moral, and physical character, one a white man and the other a colored man, tenders and pays to one of the defendant railroad companies in Oklahoma that is operating upon its trains chair cars, sleeping cars, and dining cars the same lawful rate for his transportation between the same places in a chair car, or in a sleeping car, and for the customary use of a dining car on his journey, and the white man is furnished by the company with his ride in a chair car, or in a sleeping car, and with his dinner in the dining car, and the railroad company by authority of the separate coach law of Oklahoma, solely by reason of his color, prevents the colored citizen from riding in or using all of those cars and all other cars of a similar character, ejects him from any such car into which he enters, and refuses to carry him at all unless he rides in an ordinary coach, is the colored citizen accorded "the equal protection of the laws" enjoyed by the white man and the unabridged privileges and immunities of citizenship which he enjoyed before this coach law was enacted? To me this question seems to bear its own answer, and after repeated readings of the opinion of the majority my mind still refuses to assent to any other than the negative answer to this question. The majority answer it in the affirmative. They argue that the railroad companies cannot afford to haul separate chair cars, sleeping cars, or dining cars for colored citizens, and meet their complaint with the felicitous words:

"The principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same."

But no separate chair cars or sleeping cars or dining cars for the members of the two races are required of the companies to enable them to give to colored citizens all the comforts and conveniences of travel which they furnish to the white citizens. They may furnish them in separate compartments in the same chair cars, sleeping cars, and dining cars that are occupied by the whites, and, if this separate coach law of Oklahoma is unconstitutional, they may provide the colored citizens with equal service in the same cars occupied by white persons without separate compartments.

Nor are the rights of citizens to unabridged privileges and immunities and to the equal protection of the laws measured by the expense or inconvenience to railroad companies that the existence and enforcement of those rights may entail. While the expense and inconvenience to the railroad companies of maintaining separate coaches and compartments for the two races is a matter worthy of serious consideration by a state when it is determining the question whether or not such a requirement is a reasonable exercise of its police power, the constitutional rights of citizens to their privileges and immunities and to the equal protection of the laws are not dependent upon such considerations, nor upon the varying conditions and circumstances which may surround them.

As I understand the fourteenth amendment to the Constitution, the purpose of its enactment, its express terms, and its legal effect are to prohibit the conditioning of the privileges and immunities of citizens and the equal protection of the laws by the respective conditions and circumstances in which citizens may find themselves, and to secure to those suffering under adverse conditions and unfavorable circumstances the same civil rights and the same protection of the laws that the more fortunate and prosperous enjoy. Citizenship, and citizenship alone, under this amendment to the Constitution, entitles every man, white or black, to all his civil rights and privileges unabridged by the action or legislation of any state and to the equal protection of all the laws. Before the law, by the express terms of the fourteenth amendment, all citizens are equal in their civil rights, and the humblest is the peer of the most powerful. It regards a citizen as a citizen, and takes no account of his surroundings or of his color when his civil rights, as guaranteed by this the supreme law of the land, are involved.

Distances in the state of Oklahoma are magnificent, so great that the time necessarily occupied in many journeys within that state far exceeds 12 hours. Would one traveling through the day who was forbidden to purchase and take his dinner in a dining car upon his train which the railroad company furnished to his companion travelers be of the opinion that the service provided for him was equal in convenience or comfort to that furnished to his companions? Would one riding all night upon a train that carried a sleeping car who was legally expelled from or forbidden by law to enter or occupy it believe that he was provided with equality of service, or equal comforts and conveniences with his companions who were permitted to purchase berths and beds therein? Is one who is ex-

cluded from a chair car with the use of which his traveling companions are furnished provided with the same or equal service, convenience, and comfort with his companions? The complaint in this case is not that the state or the defendant railroad companies required white and colored citizens to occupy separate cars or separate compartments. It is that the state of Oklahoma by means of its separate coach law authorizes the defendants to deny to colored citizens facilities, comforts, and conveniences substantially equal to those which they give to white citizens.

Under the common law and under the Constitution of the United States before the enactment of this Oklahoma statute, railroad companies in that state were legally bound to furnish equality of service, comforts, and conveniences of travel to white and colored citizens without discrimination against either. The colored citizen had the legal right to these facilities, comforts, and conveniences, and that right was as effectively protected by the law as was that of the white man. He had the same right as the white citizen to the use of chair cars, dining cars, and sleeping cars furnished by the carrier, and any infringement of that right was as actionable and remediable as was the infringement of any white man's right to such a use.

The fourteenth amendment to the Constitution provides that:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."

And that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This Oklahoma statute provides that the railroad companies in that state shall furnish separate coaches or compartments equal in points of comfort and convenience for the members of the white and the colored races (section 1); that each coach or compartment shall bear letters indicating the race for which it is set apart (section 2); that the railroad companies may haul sleeping cars, dining cars, and chair cars set apart exclusively for white passengers or exclusively for colored passengers (section 7); that any passenger who rides in any coach or compartment not designated for his race, after having been forbidden so to do by the conductor in charge of the train or car, shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$5 nor more than \$25 (section 6); that any conductor in charge of a train shall have authority to refuse any passenger admittance into any coach in which he is not entitled to ride under the act, and that it shall be his duty to remove from the train or coach any passenger not entitled to ride therein, and that, if he knowingly refuses to do so, he shall be guilty of a misdemeanor and subject to a fine of not less than \$50 nor more than \$500, and neither the company nor the conductor shall be liable for damages on account of any such removal (section 10). Does not this law abridge

the privileges and immunities held by colored citizens before its passage? They had the same right and privilege as white men to ride in chair cars, in sleeping cars, and in dining cars before this law was passed, and the railroad companies were liable in damages for any infringement of that right. This law deprives them of that right and privilege, and subjects them to a fine of from \$5 to \$25 for attempting to exercise it; for the railroad companies comply with this law when they set apart and mark for white passengers all their chair cars, all their dining cars, and all their sleeping cars and only furnish separate compartments equal to each other in points of comfort and convenience in coaches, however inferior all these compartments and coaches may be in comfort and convenience to the chair cars, the sleeping cars, and the dining cars. These separate compartments or coaches may be under this law so inconvenient and comfortless that no white passengers will use them, that all the white passengers will ride in the chair cars, or in the sleeping cars so that none but colored citizens can be found in the separate coaches or compartments. Nor may one readily wink so hard as not to perceive that this may be the natural effect of this law; for, if carriers may set apart all their chair cars for white passengers exclusively, their separate compartments for white persons in coaches may be very restricted, and the comforts and conveniences of these coaches very inferior.

Does this act deprive colored citizens of the equal protection of the laws? Before its passage colored citizens had the privilege and right to ride in the chair cars, the sleeping cars, and the dining cars operated by the railroad companies, and that right was protected by the law which gave them damages for its infringements. By the express terms of this statute that protection is withdrawn, they can recover no damages for any infringement of this civil right, and they are subjected to fines of from \$5 to \$25 for every attempt to exercise it. These considerations leave my mind no avenue of escape from the conclusion that this Oklahoma statute abridges the privileges and immunities of the colored citizens of that state and deprives them of the equal protection of the laws.

Nor is any authority cited by the majority in conflict with this conclusion. None of the laws considered in those cases, neither the statute of Louisiana (*Laws of Louisiana*, 1890, No. 111, p. 152; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256), nor the statute of Mississippi of March 2, 1888 (*Acts 1888*, c. 27), which is considered in *Louisville, etc., Railway Company v. Mississippi*, 133 U. S. 587, 588, 10 Sup. Ct. 348, 33 L. Ed. 784, nor the act of Kentucky of May 24, 1892 (*Laws of Kentucky* 1891-1892-1893, c. 40, p. 63), treated in *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244, either authorized or permitted the railroad companies to deny to colored citizens accommodations equal in convenience and comfort to those provided for white citizens. None of these statutes either empowered or permitted railroad companies to exclude from their chair cars or sleeping cars or dining cars all colored citizens, or to deprive colored pas-

sengers of the same right that the white passengers had to equal accommodations or to legal protection for that right. On the other hand, each of these statutes expressly required the accommodations to the citizens of the two races to be equal, and the Kentucky statute prohibited any "difference or discrimination in the quality, convenience or accommodations in the cars or coaches set apart for white and colored passengers." Section 2.

In *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, the Supreme Court held only that the Louisiana statute which expressly required the accommodations furnished by the carriers to colored citizens to be equal to those provided for white citizens was not unconstitutional because it required railroad companies to carry the members of the two races in separate coaches or compartments.

The cases of *Louisville, etc., Ry. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784, and *Chesapeake & Ohio Ry. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244, were prosecutions of railroad companies for failures to provide separate coaches under the Mississippi and Kentucky statutes cited above, and neither of them presented any question of the rights of colored passengers under the fourteenth amendment or under the statutes themselves, as is clearly stated by the Supreme Court in 133 U. S. 589, 10 Sup. Ct. 348, 33 L. Ed. 784, in these words:

"It will also be observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train, and hence there is no question of personal insult or alleged violation of personal right."

In *Chiles v. Chesapeake & Ohio Ry. Co.*, 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936, the only question presented was whether or not a railroad company in the absence of statutory authority might lawfully separate white from colored passengers on condition that it furnished them equal accommodations, and its right so to do was upheld. The fourteenth amendment is leveled only at the action of a state, and, as no state action was in question in this case, the rights and privileges of colored citizens under that amendment were neither considered nor adjudged.

The Oklahoma statute expressly authorizes every railroad company doing business in that state, by its mere arbitrary will, to mark all its chair cars, all its sleeping cars, and all its dining cars hauled in that state for white persons exclusively and to provide none for colored persons, or to mark them all for colored persons exclusively and to haul none for white persons. It thereby authorizes any such railroad company to deprive all passengers for whom it does not mark these classes of cars of the privilege and right to use them which they had before this act was enacted of the equal protection of that right by the laws, which they had before that act was passed, and subjects them to a fine for attempting to exercise this right. Suppose the railroad companies doing business in Oklahoma should mark all their chair cars, all their sleeping cars, and all their dining cars for colored passengers exclusively, should exclude all

white passengers therefrom, and should provide no cars of these classes for white passengers in the same way that they now designate all such cars for white passengers exclusively, exclude colored passengers, and haul no cars of these classes for colored passengers; would any one conceive that white passengers were furnished with equality of service with colored passengers, or that their privileges and immunities were not abridged by this law, or that they were not deprived of the equal protection of the laws thereby, when in this way they would be deprived of all protection of their previous right and privilege to the equal use of such cars and made liable to fine for attempting to exercise that right, while the same right and privilege of colored persons to that use would remain undisturbed and securely protected by the law?

The validity of this statute under the fourteenth amendment is not conditioned by the character of the parties empowered to determine what citizens may use the chair cars, the sleeping cars, and the dining cars. It is not conditioned by the answer to the question whether such parties are public officials or private citizens. Nor is it conditioned by the manner of the exercise of this power or by the answer to the question whether it is exercised fairly and justly or "with an evil eye and an unequal hand"; for the proposition is self-evident that whenever a privilege and right of person or of property, whenever any civil right of any persons or of any class of persons, or its legal protection is made dependent by law upon the arbitrary will of third persons that right is not only abridged, but it is destroyed, it is no longer a right, and the equal protection of the law is entirely withdrawn from it.

While the Supreme Court in *Yick Wo v. Hopkins*, 118 U. S. 356, held at page 373, 6 Sup. Ct. 1064, at page 1073 (30 L. Ed. 220), that, "though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution," yet it had also held in the earlier part of the opinion in that case that an ordinance of the city of San Francisco violated the fourteenth amendment of the Constitution, and was void because it made the right and privilege of citizens to conduct laundries in that state dependent upon the arbitrary will of the board of supervisors. It supported that conclusion by extended argument and numerous authorities, and said:

"When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power; * * * for the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." 118 U. S. 369, 370, 6 Sup. Ct. 1064, 1071 (30 L. Ed. 220).

This statute which authorizes railroad companies at their arbitrary will to deprive citizens of their civil rights, which takes away all

remedy for such a deprivation and subjects those so deprived to fines for endeavoring to enforce those rights, is as obnoxious to the Constitution as a law which directly destroys them.

The true interpretation of the fourteenth amendment is to be found in the decisions of the Supreme Court when it was composed of those great jurists who had been active in public affairs when it was proposed and enacted and who could not fail to know its purpose and its meaning. In *Strauder v. West Virginia*, 100 U. S. 303, 306, 25 L. Ed. 664, that court said:

"This is one of a series of constitutional provisions having a common purpose, namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoyed. * * * They especially needed protection against unfriendly action in the states where they were resident. It was in view of these considerations the fourteenth amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the states. It not only gave citizenship and the privilege of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that a law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states; and, in regard to the colored race for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored—exemption from legal discrimination implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy and discriminations which are steps towards reducing them to the condition of a subject race."

This separate coach law of the state of Oklahoma, with its specious requirement that the separate coaches or compartments it requires shall be "equal in all points of comfort and convenience," with its actual provision that colored citizens may be excluded without remedy by carriers from all the more comfortable and convenient cars they haul upon their trains in Oklahoma, from the chair cars, from the sleeping cars and from the dining cars, with its deprivation of colored passengers of their privilege and right which they had before this law was enacted, to ride in and use such cars and their comforts and conveniences equally with white passengers, with its deprivation of the protection of that right by the laws which white passengers still enjoy, and with its imposition of fines for attempting to enforce their equal right, in my opinion defies the spirit, defeats the purpose, violates the express prohibition of the fourteenth amendment, is unconstitutional and void. And as the complainants allege in their bill and the demurrers admit that the defendants under the authority of this law are continually depriving, and will continue to deprive, these complainants of these rights secured to them by this amendment, unless they are enjoined

by the courts, I am unable to escape the conclusion that they are entitled to an injunction to prevent what seem to me to be acts whose only, but futile, excuse is this law of the state which violates the Constitution.

This view of the case renders unnecessary any discussion of the question whether this statute is void because it constitutes a breach of the contract between the people of the state of Oklahoma and the people of the nation made by the latter's acceptance of the condition of their admission as a state prescribed by section 3 of the enabling act (Statutes of Oklahoma 1909, p. 50) that:

"The Constitution shall be republican in form and shall make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence."

But I do not desire to be deemed to assent to any proposition that any terms of the contract between the state and the nation made at the time of its admission may be violated by the former with impunity after the acceptance of its Constitution and its admission into the Union. That question was much debated 60 years ago, without as within the courts. Leaving it aside here, the fact that the enabling act required, and the people of Oklahoma assented, to the agreement that there should be no distinction between civil and political rights on account of race or color in that state, is very persuasive that they and the Congress of the United States understood this to be the substantial meaning of the Constitution of the United States, and in my opinion no such distinction should now be permitted to be perpetuated.

There is another reason why the bill in this case should be sustained. The majority concede that this separate coach law violates the commercial clause of the Constitution if it embraces or relates to interstate commerce at all. *Hall v. De Cuir*, 95 U. S. 485, 24 L. Ed. 547; *County of Mobile v. Kimball*, 102 U. S. 691-697, 26 L. Ed. 238; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 566-577, 7 Sup. Ct. 4, 30 L. Ed. 244; *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 488-499, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700.

By its express terms, which are free from all ambiguity, it applies to all commerce in the transportation by railroad of passengers in the state of Oklahoma, to interstate to the same extent as to intra-state commerce, to passengers who are brought into, to those who are carried out of, and to those who are carried through the state to the same extent as to those who are transported only within its borders. And it is a penal statute which subjects the former as well as the latter to fines for its violation. It first provides that every railroad company doing business in that state shall furnish separate coaches and waiting rooms for the white and negro races, and then contains the following enactments which must be amended by judicial construction by the insertion of the words contained in the parentheses below or by words of similar import in order to exclude interstate commerce from its terms and effect:

"It shall be unlawful for any person (except passengers who are brought into, or carried through, or out of the state of Oklahoma), to use, occupy or remain in any waiting room, toilet room, or at any water tank in any passenger depot in that state set apart to a race to which he does belong." Section 2.

"The term negro as used herein includes every person of African descent as defined by the Constitution" (except passengers who are brought into, or carried through, or out of the state of Oklahoma). Section 3.

"If any passenger (except passengers brought into, or carried through, or out of the state of Oklahoma), upon a railway train, * * * shall ride in any coach, or compartment not designated for his race, after having been forbidden to do so by the conductor of the train or car, or shall remain in any waiting room not set apart for the race to which he belongs, he shall be guilty of a misdemeanor and upon conviction shall be fined not less than five nor more than twenty-five dollars. Should any passenger (except passengers brought into, or carried through, or out of the state of Oklahoma), refuse to occupy the coach or compartment or room to which he or she is assigned by the officer of such railway company, said officer shall have the power to refuse to carry such passenger on his train, and should any passenger (except passengers brought into, carried through, or out of the state of Oklahoma), or any other person not a passenger, for the purpose of occupying or waiting in such sitting or waiting room not assigned to his or her race, enter said room, said agent shall have power, and it is made his duty, to eject such person from such room, and for such neither they nor the railroad company which they represent, shall be liable for damages in any courts of this state." Section 6.

"* * * Provided nothing herein contained shall be construed to prevent any railway companies in this state from hauling sleeping cars, dining or chair cars attached to their trains to be used exclusively by either white or negro passengers, separately but not jointly." (Except that all such cars shall be equally open to the joint use of those white and negro passengers who are brought into, carried through, or out of the state of Oklahoma.) Section 7.

When the Supreme Court of a state has construed or has clearly indicated by its decisions that it will interpret a statute of a state that by general terms embraces subjects within and without the constitutional power of the state to be limited in its meaning and effect to the former, that construction necessarily prevails in all the courts of the state, and practically amends the statute and restricts its practical operation and effect to subjects within the constitutional power of the state. As no rights of citizens of the United States under its Constitution are or can be injuriously affected by a statute thus limited, the Supreme Court of the United States and this court have held that a state law thus amended by judicial legislation and limited by the highest court of the state that enacted it may be permitted to stand, although it would have been unconstitutional and void if the Supreme Court of the state that enacted it had interpreted it to embrace subjects without as well as within the constitutional power of the state, or if in the absence of construction by the highest court of the state it embraced such subjects by its terms under the established canons of interpretation. This, and this only, as I understand them, is the meaning and the legal effect of the decisions relative to this question in Louisville, etc., Ry. Co. v. Mississippi, 133 U. S. 587, 591, 10 Sup. Ct. 348, 33 L. Ed. 784, Chesapeake & Ohio Ry. Co. v. Kentucky, 179 U. S. 388, 395, 21 Sup. Ct. 101, 45 L. Ed. 244, and Butler Bros. Shoe Co. v. United States Rubber Company, 84 C. C. A. 167, 185, 156 Fed. 1, 19, cited by the majority. In each of

these cases the Supreme Court of the state had either expressly interpreted (133 U. S. 591, 10 Sup. Ct. 348, 33 L. Ed. 784), or had indicated that it would interpret (179 U. S. 395, 21 Sup. Ct. 101, 45 L. Ed. 244; 156 Fed. 19, 84 C. C. A. 185), the statute in question to be limited in its meaning and effect to the subjects within the constitutional power of the state. These decisions, however, fail to consider or to determine, as it seems to me, the question which the statute in hand presents. The Supreme Court of Oklahoma has not construed, restricted, or limited this law, nor has it given any intimation that it will ever do so. If, when this statute comes before that court for construction, it holds that this law means what it clearly and repeatedly declares, that every passenger whether interstate or intrastate is subject to its provisions and its fines, the statute is unquestionably violative of the commercial clause of the Constitution and void. And, in the absence of any construction by that court, this statute must be equally violative of the Constitution if its true interpretation and effect is to subject interstate passengers to its provisions and penalties. We are therefore remitted in the consideration and decision of this case to the law and to the established rules for the construction of statutes for an answer to the question whether or not the national courts may by judicial construction amend a statute which in plain terms applies without discrimination to subjects without and subjects within the constitutional power of the state so as to exclude the former and include the latter in order to take the law out from under the ban of the Constitution. This question, under circumstances similar to those under which this statute comes before this court, has been repeatedly answered by the Supreme Court and by this court.

In *United States v. Reese*, 92 U. S. 214, 218, 221, 23 L. Ed. 563, Congress had enacted a law which prescribed punishment for the unlawful refusal to accept votes from all voters while its constitutional power was limited to prescribing the penalty for refusing to receive votes "on account of the race, color, or previous condition of servitude of the voter." The contention of the government was that the act was constitutional as to all refusals to receive votes on account of the race, color, etc., of the voter, and that it could be sustained to this extent and permitted to fail in other cases, because the two classes of cases and the two portions of the act applicable to them were readily separable. But the argument failed. The Supreme Court said:

"We are therefore directly called upon to decide whether a penal statute, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall together. The language is plain. There is no room for construction, unless it be as to the effect of the Consti-

tution. The question, then, to be determined, is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only."

In Trade-Mark Cases (United States v. Steffens) 100 U. S. 82, 25 L. Ed. 550, Congress possessed the constitutional authority to protect trade-marks in interstate and foreign commerce, and it enacted a statute which by its terms protected trade-marks in all commerce. The court was urged to restrict this law by construction to trademarks in interstate and foreign commerce and to sustain it. But it cited and quoted from the opinion in the Reese Case, and held the act unconstitutional.

In Virginia Coupon Cases (Poindexter v. Greenhow) 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, the same argument was again met and overthrown with this declaration, which was subsequently quoted and affirmed in Income Tax Cases (Pollock v. Farmers' Loan & Trust Co.) 158 U. S. at page 636, 15 Sup. Ct. at page 920 (39 L. Ed. 1108):

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In Sprague v. Thompson, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115, the Legislature of Georgia had enacted a statute which would have been valid if it had not contained certain unconstitutional exceptions. The Supreme Court of that state sustained it upon the ground that the body of the act was readily separable from the exceptions. The Supreme Court reversed that decision, and said:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confesedly the Legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

In Chicago, Milwaukee & St. Paul Ry. Co. v. Westby, 102 C. C. A. 65, 78, 178 Fed. 619, 632, the same question came before this court under circumstances similar to those presented in the case at bar, and after a review of the foregoing authorities, and many others, it held that:

"A statute of a state which includes by general language in a single class those within and those without the constitutional class may not be limited by judicial construction to the latter class and then sustained."

While it is true that, where a statute is constitutional in part and unconstitutional in part, the former part in proper cases may be sustained, while the latter part fails, yet indispensable conditions of such

a result are: (1) That the constitutional part and the unconstitutional part are capable of separation so that each may be read and may stand by itself (*Baldwin v. Franks*, 120 U. S. 679, 685, 686; 7 Sup. Ct. 656, 30 L. Ed. 766); and the constitutional and unconstitutional parts of this statute are so consolidated in its terms which are made applicable to "every passenger" and "every railroad company" without distinction between interstate and intrastate passengers, that such a separation is impossible; (2) that the insertion of words or terms is not necessary to separate the constitutional part from the unconstitutional part and to give effect to the former only (*Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. Ed. 318; *United States v. Reese*, 92 U. S. 214, 218, 221, 23 L. Ed. 563; *The Trade-Mark Cases*, 100 U. S. 82, 99, 25 L. Ed. 550; *United States v. Harris*, 106 U. S. 629, 641, 642, 1 Sup. Ct. 601, 27 L. Ed. 290; *Virginia Coupon Cases [Poindexter v. Greenhow]* 114 U. S. 270, 305, 5 Sup. Ct. 903, 962, 29 L. Ed. 185; *Sprague v. Thompson*, 118 U. S. 90, 94, 6 Sup. Ct. 988, 30 L. Ed. 115; *Income Tax Cases [Pollock v. Farmers' Loan & Trust Co.]* 158 U. S. 601, 636, 15 Sup. Ct. 912, 39 L. Ed. 1108; *Cella Commission Co. v. Bohliger*, 78 C. C. A. 467, 471, 147 Fed. 419, 423, 8 L. R. A. [N. S.] 537; *Ballard v. Mississippi Cotton Oil Co.*, 81 Miss. 507, 34 South. 554, 555, 62 L. R. A. 407, 95 Am. St. Rep. 476), and the statute in hand cannot be so amended by the omission of words or terms or in any other way than by the insertion thereof (witness the sections quoted above and the words and terms set forth in the parentheses which are requisite to conform the statute to a constitutional enactment); (3) that the unconstitutional part is not so connected with the general scope of the law that the court cannot clearly see that the Legislature would have enacted and intended to give effect to the constitutional part, although the unconstitutional part was stricken out. To my mind this statute clearly discloses that the patent intention of the Legislature of Oklahoma was to exclude not only colored intrastate passengers, but every colored passenger from the coaches and cars occupied by white persons. The statute would have failed of its entire purpose if interstate colored passengers had not been excluded thereby, for a part of the colored passengers in the coaches and cars occupied by the white persons were as obnoxious to the Legislature as all of them. The members of the Legislature never had any intention to pass any law that would have secured or permitted such a result and it is far from clear that they would have passed the statute with an exception of interstate passengers. This conclusion is sustained, not only by the reason of the case, but by the established rules for the interpretation of the statute itself. Its terms are unambiguous and its meaning evident. It subjects "every passenger" to its provisions and penalties. Where a statute is unambiguous and its meaning is evident, it must be held to mean what it clearly expresses and no room is left for construction. *United States v. Ninety-Nine Diamonds*, 139 Fed. 961, 964, 72 C. C. A. 9, 2 L. R. A. (N. S.) 185; *Brun v. Mann*, 151 Fed. 145, 157, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The fact that the Legislature subjected "every passenger" to the

provisions of the law and made no exception of interstate passengers raises a conclusive legal presumption that they intended to make no such exception, and in my opinion it would be unjustifiable judicial legislation for the courts to do so. Cella Commission Co. v. Bohlinger, 78 C. C. A. 467, 473, 147 Fed. 419, 425, 8 L. R. A. (N. S.) 537; Omaha Water Co. v. City of Omaha, 77 C. C. A. 267, 147 Fed. 1, 12 L. R. A. (N. S.) 736; Madden v. Lancaster County, 12 C. C. A. 566, 572, 65 Fed. 188, 194; Wrightman v. Boone County, 31 C. C. A. 570, 572, 88 Fed. 435, 437; Union Central Life Ins. Co. v. Champlin, 54 C. C. A. 208, 210, 116 Fed. 858, 860. It seems to me that this statute cannot be restricted lawfully by construction to intrastate passengers because the part applicable to that class is not separable from the part applicable to the unconstitutional class, the interstate passengers, so that each part may be read and may stand by itself, because it is not apparent that the Legislature would have passed the act if it had been limited to the constitutional class, but it is plain that they would not have done so, because the Legislature excepted neither class, and the legal presumption is that it intended to except none, because the statute cannot be restricted to the constitutional class by the elimination of words or clauses, that result can be attained only by the introduction into it of express terms or words, and because its terms are plain and its meaning is evident, and it ought not to be construed to mean that which it does not express. In view of these considerations, rules, and authorities, my opinion is that the separate coach law of Oklahoma applies to interstate passengers and interstate commerce to the same extent that it does to intrastate passengers and commerce, and that for that reason it is violative of the commercial clause of the Constitution and void. For the reasons which have now been stated, at perhaps too much length, I think that the decree below should be reversed, that the demurrs of the defendants should be overruled, and that they should be required to answer the bill.

In re SWEETSER.

KYLE et al. v. HAMMOND et al.

(Circuit Court of Appeals, First Circuit. February 21, 1911.)

No. 917.

BANKRUPTCY (§ 451*)—COURTS—JURISDICTION.

The Circuit Court of Appeals, possessing, under Act March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. St. 1901, p. 549) § 6, a general right of review, unless otherwise provided by law, has no jurisdiction to review a decision of the Circuit Court in bankruptcy proceedings under Act March 2, 1867, c. 176, 14 Stat. 517, repealed by Act June 7, 1878, c. 160, 20 Stat. 99, with the proviso that it shall continue in force until any matter arising thereunder has been disposed of, as if the act had not been repealed.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 451.*

Jurisdiction of Circuit Courts of Appeals in general, see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In the matter of Elbridge L. Sweetser, bankrupt. From an order of the Circuit Court (181 Fed. 617), rendered on the petition of John C. Hammond and others, creditors, Warren Ozro Kyle and another, assignees, appeal. Dismissed for want of jurisdiction.

See, also, 185 Fed. 219.

Fred Joy and Warren Ozro Kyle, for appellants.

Hollis R. Bailey, for appellees.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This case arises under the statute in bankruptcy ordinarily known as that of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). There was a proceeding in the District Court, which came before the Circuit Court on a revisory petition under that act. It is easier and simpler to describe this proceeding by reference to *Wiswall v. Campbell*, 93 U. S. 347, 23 L. Ed. 923, than by any attempt to give an abstract of the statutes in reference thereto. It was there held that, as the law existed in 1867, the proceeding stopped in the Circuit Court, and could not be taken to the Supreme Court. This rule was applied under exactly the same circumstances we have here, and in the present condition of the law, with reference to the act of 1867 by this court in *Huntington v. Saunders*, 72 Fed. 10, 18 C. C. A. 409, and *Id.*, 77 Fed. 394, 23 C. C. A. 198. In that case, which was decided by a full Court of Appeals on February 3, 1896, it was held, under the same circumstances which exist here, that the Circuit Court of Appeals had no jurisdiction to revise the action of the Circuit Court.

The court in the latter case especially noted the peculiar phraseology of section 6 of the act of March 3, 1891 (26 Stat. 828, c. 517 [U. S. Comp. St. 1901, p. 549]), establishing this court, which gave this court a general right of review "unless otherwise provided by law." The full effect of those words has never been clearly understood, but what might be supposed to illustrate some phases of their efficiency was removed in the cases relied on by the appellants here, namely, *Lau Ow Bew v. United States*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340, *Hubbard v. Soby*, 146 U. S. 56, 13 Sup. Ct. 13, 36 L. Ed. 886, and *The Paquete Habana*, 175 U. S. 677, 680, 20 Sup. Ct. 290, 44 L. Ed. 320, and especially in *North American Company v. Smith*, 93 Fed. 7, 35 C. C. A. 183, which last case referred to appeals in admiralty suits relating to sums less than \$50. Some of these cases were decided before *Huntington v. Saunders*, and some later. The appellants, however, overlook the fact that none of the decisions cited by them touch the case at bar, because Act June 7, 1878, c. 160, 20 Stat. 99, which repealed the bankruptcy act of 1867, after providing that it should take effect on the 1st day of September, 1878, added as follows:

"In any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded

with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed."

This reserved all such rights as are involved in this petition, and were involved in *Wiswall v. Campbell*; yet, while it saved them, it directed the same proceedings as though there had been no repeal. In this particular, the subject-matter of the appeal, including the case at bar, is entirely taken out of any other legislation of a general character, including the statute of March 3, 1891, establishing this court.

We might have brought this present appeal to the *reductio ad absurdum*, because, if, as the appellants claim, the act establishing the Court of Appeals is applicable, its effect would have been to have required a direct appeal from the District Court to this court, and the appeal provided by the bankruptcy statute of 1867 from the District Court to the Circuit Court would have disappeared. Consequently the only effect would have been to have directed on this appeal that the appeal to the Circuit Court be dismissed; but as, of course, no one cares to be left in that precarious condition, we have concluded to reiterate the established rule, and apply it here.

The appeal is dismissed for want of jurisdiction, and the appellees recover their costs on the motion to dismiss. They are entitled to interest on the amount awarded in the decree appealed against from the time that decree was entered; and the case is remanded to the Circuit Court, to proceed in accordance with our opinion passed down the 21st day of February, 1911.

QUACKENBUSH V. CITY OF YANKTON, S. D.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1911.)

No. 3,457.

MUNICIPAL CORPORATIONS (§ 1035*)—CONTRACTS—VALIDITY—BURDEN OF PROOF.

A municipal corporation, which denies liability on a contract on the ground that it imposes an indebtedness beyond the constitutional limit, has the burden of proof to affirmatively establish such fact.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1035.*]

In Error to the Circuit Court of the United States for the District of South Dakota.

Action at law by John E. Quackenbush against the City of Yankton, S. D. Judgment for defendant, and plaintiff brings error. Reversed.

C. H. Winsor and C. J. B. Harris, for plaintiff in error.

A. H. Orvis (A. L. Wyman, City Atty., and L. B. French, on the brief), for defendant in error.

Before HOOK, Circuit Judge, and RINER and W. H. MUNGER, District Judges.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

HOOK, Circuit Judge. This was an action by Quackenbush to recover upon contract for the building of a concrete bridge. The city defended upon two grounds: First, that the specifications were not complied with; and, second, that the contract was void, because in violation of a provision of the state Constitution that the indebtedness of a city, exclusive of that for water and sewerage, should never exceed 5 per centum of the assessed valuation of the taxable property therein for the preceding year. The case was tried to a jury, which returned a general verdict for the plaintiff. The city, as permitted by the local practice, then moved for judgment notwithstanding the verdict, upon the ground that the undisputed evidence sustained the second defense. The motion was sustained, and judgment rendered accordingly. Of this the plaintiff complains.

The bill of exceptions before us, which recites that it contains all the evidence upon the second defense, shows that when the bridge contract was made the indebtedness of the city, exclusive of that for water, was already in excess of 5 per cent. of the assessed valuation; but there was no showing whatever that none of such indebtedness was for sewerage, or, if any, that the remainder was still in excess of the constitutional limit. The defense based on the constitutional limit of indebtedness therefore failed. The presumption is the municipal authorities performed their duty and acted within the law, and any contention to the contrary must be supported by affirmative proof. It is urged that some evidence on the question must have been omitted from the bill of exceptions by oversight; but it is plain we cannot proceed on that assumption. It is more likely the trial court was misled by mistake of counsel as to what the evidence showed.

As there was a general verdict for the plaintiff on the entire case, it follows that the judgment for the city should be reversed, and the cause remanded, with direction to enter judgment for the plaintiff.

NATIONAL BINDING MACH. CO. v. JAMES D. McLAURIN CO.

(Circuit Court, S. D. New York. March 2, 1911.)

1. PATENTS (§ 235*)—INFRINGEMENT—DEFENSES.

Infringement is not avoided by the fact that defendants' machine does not work as perfectly as complainants', provided it is intended to work in the same way.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. § 235.*]

2. PATENTS (§ 328*)—INFRINGEMENT—BINDING MACHINE.

The Piper patent, No. 700,816, for a device for supporting and delivering paper for wrapping or binding purposes, claims 2 and 5 construed, and held infringed.

In Equity. Suit by the National Binding Machine Company against the James D. McLaurin Company. Decree for complainant.

This is the usual suit in equity for the infringement of patent No. 700,816, which is a device for supporting and delivering paper for wrapping and binding purposes. The device consists of a holder for a roll of gummed paper

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

tape, in combination with a roller for moistening the paper and a knife for cutting it off after it has been pulled out to any desired length. The combination is completed by a mechanism for removing the paper from the top of the roller so that it will not stick to it. As specified in the patent, this is accomplished by having the paper before it reaches the roller pass over a swinging guide which holds the free end away from the roller. When the free end is pulled, it comes in contact with the roller, because the swinging guide is depressed, but, after the paper is cut, the guide is so weighted that it again carries the free end of the paper away from the roller.

The defendant's device consists of a horizontal roller for a roll of gummed paper. Close to the periphery of the holder is an upright post, and a short distance from this post and in substantially radial line with it are twin posts. Continuing on the same radius is the base of an upright sponge holder which keeps moist by capillary attraction. Still further on the radius is a serrated edge which acts as a knife blade. The operation of the defendant's machine is as follows: The gummed tape is passed below the peripheral post between the twin posts and over the face of the sponge. As it is pulled across the face, it becomes wet, and then is torn off upon the serrated edge. The sponge case is so placed that its face is substantially parallel to the radius already mentioned. Its base, however, is upon that radius, and, as its height is about three-quarters of an inch, the plane of the moistening surface is that distance above the radius mentioned. Consequently, as the tape is drawn between the twin posts, it makes an angle with the radius in question dependent upon the distance between the twin posts and the nearer side of the sponge-box. This angle is the same as the angle made by the tape with the face of the sponge, which is, as has been said, parallel with the radius. As the tape is drawn over the face of the sponge, it must be bent at the edge of the face through this angle, and, when the end is cut off, the paper tends to re-establish itself in a straight line, the tendency resulting from the natural energy of the paper, and therefore varying with its stiffness. The greater the angle between the face of the sponge and the tape, the greater the force with which the paper tends to leave the face of the sponge. In much the greater number of cases the tape does not leave the edge of the sponge nearer the twin posts, but rests lightly in contact with it either across the whole face of the tape or if the tape curls longitudinally then at the two points where either edge touches the edge of the sponge. This contact takes place almost universally and in all instances in which the experiment has been made by the court. The testimony, however, is to the effect that in a certain number of cases the tape rests clear of the edge of the sponge.

In the commercial form of the complainant's machine, the tape likewise always touches the wet roller. After it has been torn off at the serrated edge which replaces the knife of the patent disclosure, a spring bale draws the tape back from the roller preventing any sticking between the two, but, the tape curling longitudinally, its edges actually touch the roller lightly in all cases; the stiffness of the paper not being sufficient to counteract the force of gravity.

The two claims in issue are as follows:

"(2) The combination of a holder for a mass of paper, a device for moistening the surface of the paper, and a device which automatically moves the paper away from the moistening device, arranged between the paper holder and the moistening device, substantially as set forth."

"(5) The combination of a support for a roll of paper, a roller for moistening the surface of the paper, a knife for severing the paper adjacent to the said roller, and means for moving the free end of the paper which is adjacent to the surface of the moistening roller away therefrom, substantially as set forth."

Frederick L. Emery, for complainant.

T. Hart Anderson, for defendant.

HAND, District Judge (after stating the facts as above). The defendant does not assert that these claims are invalid, but does insist

that under their natural meaning and the prior art they must be limited so as not to cover the defendant's machine. There can be no question that the serrated edge is a mechanical equivalent for the knife, and that the sponge is an equivalent for the roller; nor is there any substantial difference in the fact that the complainant's machine is vertical and the defendant's horizontal. The real issue is upon the following words in claim 2:

"A device which automatically moves the paper away from the moistening device arranged between the paper holder and the moistening device."

And in claim 5:

"Means for moving the free end of the paper which is adjacent to the surface of the moistening roller."

Before taking up the literal meaning of these claims, it will be best to consider their interpretation from the file wrapper and the prior art. The original of both claims was as follows:

"A guide for holding the paper out of contact with the roller when the paper is not being used."

Against this was cited Hobbs No. 542,384, whereupon the present claims were substituted in substantially their present form and were at once passed without objection. Claim 2 is differentiated from Hobbs, in the first place, because it was automatic, and, in the second place because it was between the paper holder and the moistening device, neither of which was the case in Hobbs. Claim 5 is differentiated because the free end of the paper was not adjacent to the moistening roll in Hobbs. It is true that the defendant says that the frame containing the paste bath in Hobbs might be lowered so as to approach the knife, but the purpose of the machine was to keep a considerable length of paper between the paste bath and the knife, since it was only upon that paper that the paste would be tempered which was the main purpose of the machine. That purpose would be defeated if the knife was closely approximated to the paste bath, so that the free end of the paper could be said to be adjacent to the moving device.

The reference and changes consequent thereon in no sense limit the character of the device itself. The defendant insists that the means indicated must be themselves moving, but this is obviously not so, because the means in Hobbs were moving, and, if that had been the purpose of the citation, it was not answered by the change of the claims. The file wrapper therefore contains nothing of interest.

Next as to the prior art as a basis for construing the claims. In it there is nothing of consequence except Bruen, No. 305,892, and Hobbs already cited. Bruen, with slight modifications, would unquestionably have been a good anticipation of the defendant's machine. Had the roller in that case been raised, a serrated edge been added, a continuous gummed strip been used, and the machine placed horizontally, it would certainly have been the equivalent of the defendant's; but these changes were by no means obvious. It is true that the slot in Bruen through the natural energy of the paper would tend to lift the free end of the tape from the roller G, and it might have been enough to overcome both the adhesion of the gum to the roller and the force

of gravity. Certainly, if it had been placed horizontally, it would have done as well as the defendant's machine as originally patented. If the differentiation between the patent in suit and Bruen rested only in the moving means, the defendant would not infringe, but there is a wider differentiation between Bruen and the patent in suit than this, for Bruen was designed for a very different kind of use. It is true that it was used to moisten package fasteners, but the fasteners were to be torn off at the perforations, and must necessarily therefore be of predetermined length. They were not intended to be moistened, before they were detached, for the roller was not adapted to moisten them by a straight draft over the roller tank; so that the problem did not arise of detaching the free end from the roller. Apparently each piece was to be wetted after it was torn off, like a postage stamp. Were this not so, practical difficulties would have arisen in operating the machine. Had the piece been pressed down at the far end of the roller tank, thus serving as a knife edge, it would have stuck there. If the exact line of perforation did not touch the edge, the paper would not have torn correctly. If the machine was not horizontal, it is doubtful whether the paper would have freed itself from the roller. All these things show that the patent in suit shows a quite new idea; that is, the idea of a continuous roll of paper to be wet by the draft upon it and cut in various lengths. The fact that this idea has been the basis for a new method of making up parcels and so of a new industry is answer enough to the claim that it was obvious. A mechanical equivalent must be the same thing used for the same purpose, and in Bruen the same thing was not used for the same purpose as in the defendant's. I do not think, therefore, that Bruen should limit the claims, because the patent in suit would still be a valid patent, even if the disclosures had actually shown the same removing means as Bruen.

The question remains whether the defendant's machine removes the tape from the sponge at all within the meaning of the claims, and in deciding that question the action of the patent in suit itself may fairly be considered. The purposes of moving the tape from the roller are three: First, page 1, lines 62, 63, 64, to "prevent the strip from becoming wet and weakened so that it will readily break"; and second, page 2, lines 5, 6, 7, 8, so that the "danger that the paper shall stick to this part of the apparatus while the parts are at rest is reduced to a minimum"; third, page 2, lines 25-29, "so that the free end of the paper is directly over the moistening roller in position to be pressed against the moistening roller by hand, should such end of the paper be found to be dry." All these purposes are secured, provided that the tape be detached from the surface of the moistener, even though it rest lightly against the moistener, and, as I have said, in the complainant's device it does rest against the moistener, but not so as to become wet or to stick. The defendant's device secures all those three purposes. The first it secures because the contact between the tape and the edge of the sponge is too light to moisten the tape; the second because the paper's native resiliency removes it from the face of the sponge in a majority of instances; the third be-

cause the angle through which the free end of the paper moves brings it more nearly over the face of the sponge. I know that the diagrams of the patent in suit show the tape to be quite disconnected from the roller, and that the patent itself speaks of the strip as remaining out of contact with the roller (page 1, line 60; page 2, line 22), but I believe that the relevant contact is that which insures the operation of the machine, and that both the complainant's commercial machine and the defendant's machine accomplish.

It is true that in a large number of instances the tape in the defendant's machine actually sticks to the face of the sponge. To that extent the machine does not operate with certainty. However, the removal of the tape depends altogether upon the angle at which it crosses the edge of the space of the sponge face. If the twin posts are moved nearer the sponge, the angle between the tape and the face of the sponge approaches 90 degrees, and, with a slight change in position, the tape will not stick to the face of the sponge at all. This can be easily tested by holding a lead pencil firmly upon the radius line at a point between the twin posts and the sponge. The question is one of degree, therefore, and in the actual machine in evidence the twin posts are so placed as not to insure detaching the tape from the sponge.

[1] However, it is no defense to infringement that the defendant's machine does not work as perfectly as the complainant's, provided that it is intended to work in the same way. Cimiotti Unhairing Co. v. Bowsky (C. C.) 95 Fed. 474; Hubbard v. King Ax Co. (C. C.) 89 Fed. 713; Robinson v. Sutter (C. C.) 8 Fed. 828. The machine does detach the paper in a majority of instances for all effective purposes, and it does so because it contains means for doing so, which the horizontal position of the roll permit to be generally operative. It is not necessary to determine whether the original patent of the defendant would infringe or not. I can see no purpose in the peripheral pin, except that, by making the angle smaller through which the paper is bent at the twin posts, it relieves the pressure of the tape against the edge of the sponge, a pressure caused by the reaction of the paper to a straight line, and so dependent upon the size of the angle through which it has been bent.

[2] The only remaining question is the purely verbal one as to whether the defendant's machine has means for moving the paper when the paper in fact moves itself. I think the distinction is entirely scholastic. The fact is that in the defendant's machine, owing to the bending of the paper during draft, a certain static energy is stored up which effects the removal of the paper after it has been released. It seems to me that the means by which that energy is stored in the paper are means for moving the paper as much as though the energy was stored up in a spring bale, or in a guide working by gravity. The court is not concerned with the scholastic metaphysics as to which of the necessary factors to produce the result is its causa causans.

Let the usual interlocutory decree pass, with costs.

In re ROHRER.

(District Court, S. D. Ohio, W. D. January 26, 1911.)

No. 4,423.

1. WAREHOUSEMEN (§ 15*)—RECEIPTS—PLEDGES.

Pledges of so-called warehouse receipts against pledgor's whisky stored in his own warehouse are invalid; there being nothing about the whisky to indicate that any one else had any interest in it excepting the government's interest in payment of taxes.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 31-37; Dec. Dig. § 15.*]

2. PROPERTY (§ 9*)—OWNERSHIP—PERSONALTY.

Ownership of personalty is presumed from possession.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9;* Evidence, Cent. Dig. §§ 78, 87.]

3. PLEDGES (§ 11*)—POSSESSION BY PLEDGEE—NECESSITY.

Possession must accompany a pledge, the pledgee having a qualified ownership, but there may be a symbolic or constructive delivery of possession if it is as effectual against the general owner as a delivery of the property.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 28-35; Dec. Dig. § 11.*]

4. WAREHOUSEMEN (§ 15*)—RECEIPTS—PLEDGES.

A pledge of warehouse receipts symbolically passes possession to the pledgee.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 31-37; Dec. Dig. § 15.*]

5. WAREHOUSEMEN (§ 3*)—DEFINITION.

A "warehouseman" is one who for business and for hire keeps and stores the goods of another.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. § 4; Dec. Dig. § 3.*]

For other definitions, see Words and Phrases, vol. 8, p. 7392.]

In the matter of David Rohrer, bankrupt. On question of validity of pledges. Orders directed.

Kramer & Kramer, for Republican Dist. Co. and Mountain Dist. Co.
H. L. Ferneding, John Shea, and D. B. Van Pelt, for Geo. H. Goodman Co.

Robertson & Buchwalter, for Sadler.

E. H. & R. A. Kerr, for Detrick Dist. Co.

W. H. Mackoy, for White.

Walter A. Ryan, for Pearl Street Market Bank.

Young & Young and Ben. L. Heidingsfeld, for Heidingsfeld.

Jackson W. Sparrow, for Burckhardt Estate.

Ferdinand Jelke, Jr., for Hofer.

Rowe, Shuey, Matthews & James, for Stiver and others.

Cobb, Howard & Bailey, for Edwards.

Dale & Kusworm, for Bankrupt.

Healy, Ferris & McAvoy and James E. Robinson, for Petitioners.

Gilbert N. Bettman, for Cross-Petitioner.

R. M. Ochiltree, for Merchants' Nat. Bank.

Thomas B. Paxton, Jr., for C. Sandheger Co.

A. J. Ullman, for Beech Hill Dist. Co.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

HOLLISTER, District Judge. David Rohrer had a distillery and distillery warehouse in connection therewith in Montgomery county, Ohio. In the warehouse were stored 9,849 barrels of whisky made in the distillery. During a number of years prior to the time he was adjudged a bankrupt he issued so-called warehouse receipts against his own whisky in his own warehouse as security to persons who had loaned him many thousands of dollars in the aggregate. In some instances the same whisky was described in different receipts issued to different persons. In one instance six different persons had receipts describing the same whisky. He also sold some of the whisky to innocent purchasers.

[1] It is claimed by the trustees in bankruptcy and by the purchasers that the pledges were invalid, in that there was no delivery of possession actual or constructive. The sole question involved in the present submission goes to the validity of the pledges. It will serve no useful purpose to enter into a lengthy discussion of the many decisions cited by counsel bearing upon this question; but a brief reference to some of them and the principles underlying the case may be sufficient.

It is clear that Rohrer's possession of this whisky was complete as against everybody except the government of the United States, which, through its officers, acted merely as guardian or watchman, to the end that the whisky warehoused by the distiller himself should not escape the payment of the tax on distilled spirits. The pledgees build their case on the language of Judge Acheson, in *McCullough v. Large* (C. C.) 20 Fed. 309, in whose opinion Mr. Justice Bradley, sitting with him on the circuit, concurred. The question was whether a sheriff acting under process issued by a state court could seize the whisky of a distiller in his own distillery warehouse under a writ of execution. The language is:

"The whisky in question was virtually in the possession of the United States—held for internal revenue tax—and the sheriff could not rightfully disturb that possession."

This case was decided in 1884, and in it no reference was made to *United States v. 36 Barrels of High Wines, 7 Blatchf. 459, Fed. Cas. No. 16,468*, decided in 1870 by the circuit judge in the Northern District of New York. In that case the district judge in a proceeding for condemnation for certain barrels of high wines and grape brandy which had been fraudulently removed from a distillery warehouse without the payment of the tax charged the jury that property in such a warehouse cannot be considered in the possession or custody or within the control of the distiller. To this charge the attorney for the United States excepted. The Circuit Court reversed the judgment; Judge Woodruff saying among other things:

"The warehouse in this case was a part of the distillery premises, in the proprietorship of the claimants and the spirits in question were their property. The act nowhere in terms provides that the government inspector shall have any possession, custody, or control of the spirits, but only a custody of the warehouse, jointly with the owner. This is giving to the inspector, through his participation in the custody of the warehouse, and by the discharge of his duty to keep the same locked when not personally present, a means of guarding against the illegal removal of spirits, but invests him with

no legal possession thereof. Whatever custody or control he has over the spirits is purely incidental, or a consequence of his joint custody of the place where they may happen to be, and he has not, as a legal proposition, a custody of the spirits themselves. In point of law the owner of the spirits, and the owner of the warehouse wherein they are stored, is in possession of the spirits; and I have no hesitation in saying that he could maintain any action known to the law adapted to redress an illegal interference with his possession."

And it is further said with much else that is pertinent:

"So, here, in my judgment, the owner of both warehouse and spirits has possession and custody and control within the meaning of the act in question, even though, for the purpose of guardianship over the rights and interests of the government in the tax due thereon, the inspector be deemed to have a joint custody with him."

In *United States v. Witten*, 143 U. S. 76, 12 Sup. Ct. 372, 36 L. Ed. 81, the action was on a bond given by Witten as principal to the United States. The condition was that the principal should pay or cause to be paid the taxes due on certain distilled spirits in his warehouse before the spirits should be removed and within three years from the date they were entered for deposit in the distillery warehouse. It was alleged that at the date of the bond Witten had on deposit in his distillery warehouse certain distilled spirits, and had failed to pay within three years from the date of entry the taxes due. The defendants were permitted to offer evidence tending to show that the locks on the doors of the warehouse, placed there by revenue officers, were not such as required by law, and were insufficient and insecure, and that the warehouse was broken open and the spirits stolen. The court refused to instruct the jury that, even if these facts were proved, yet the government was entitled to recovery. The Supreme Court held that these facts afforded no defense; Mr. Justice Gray saying:

"Under the requirements of the internal revenue laws, the warehouse was provided by the owner of the distillery, at his own expense and on his premises, and although declared to be a bonded warehouse of the United States, and required to be under the direction and control of a government storekeeper, was in the joint custody of the storekeeper and the owner. The deposit of the spirits in the warehouse was solely for the benefit of the distiller, and to enable him to give bond for the payment of the tax on the spirits, instead of paying the tax at once. The government assumed no responsibility to him for their safekeeping. If he was not satisfied with the security of the warehouse, he had only to take any measure consistent with the access and supervision of the revenue officers to make it more secure, or else to pay the tax and remove the spirits. The only duty which the revenue officers owed in regard to the security of the warehouse and the safekeeping of the spirits therein was to the government, and not to the defendants."

In *Van Schoonhoven v. Curley et al.*, 86 N. Y. 187, the Court of Appeals of New York were of opinion that under such circumstances as these the distiller was not a warehouseman in the usual sense, but, as they say, "from necessity and force of law" only. At best, then, the government and the distiller have the joint custody of the warehouse, and so the statute says. Rev. St. § 3271 (U. S. Comp. St. 1901, p. 2122).

[2] The possession of personal property presumes ownership. The ownership is general or qualified. [3] Possession must accompany

the pledge of personal property; the pledgee having a qualified ownership for the purposes of the pledge. There may be a symbolical or constructive delivery of possession to a pledgee, but that delivery must be as effectual against the general owner as the delivery of the property it represents. The property itself passes either actually or constructively out of any dominion or control of the owner, otherwise there is no pledge. [4] Warehouse receipts symbolically pass possession from the general to the qualified owner, the pledgee, because the possession of the actual property has so far passed out of the hands of the general owner that acts of dominion exercised by him are no longer possible. When the pledgees took these receipts, they knew that the owner could satisfy such control as the government had jointly with him by paying the tax. They knew that such control as the government had might be raised at any moment, and that the owner would then be under no restraint whatever, and could roll the barrels out of the warehouse without let or hindrance from anybody. This would not be possible when goods are in a warehouse in the ordinary sense. [5] A warehouseman is a third person who for business and for hire keeps and stores the goods of another. Black, Law Dict. He is a person who receives goods and merchandise to be stored in his warehouse for hire. Bouvier's Law Dict. and other authorities cited in Bank v. Whitehead, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302; Bucher v. Commonwealth, 103 Pa. 528; Bank v. Shearer, 225 Pa. 470, 74 Atl. 351; Conrad v. Fisher, 37 Mo. App. 352, 8 L. R. A. 147; Union Trust Co. v. Trumbull, 137 Ill. 146, 27 N. E. 24. The owner stores his goods there and parts with possession. By contract with him the warehouseman has actual possession and the owner symbolical possession. The owner passes his symbolical possession on by pledge of the receipt. This is good because the owner has no dominion over the goods themselves, and the pledgee succeeds to his right to get the actual goods by presenting the receipt to the warehouseman who will not, without it, part with them. The owner after pledging the receipt cannot himself get the goods. A delivery of actual possession prevents fraud of the pledgor. The delivery of the symbol should be no less effective. If he warehouses his own goods and issued receipts against them, the door is open for the grossest frauds; this case being an example.

If whisky is stored in a general bonded warehouse provided by section 51 of the act of August 27, 1894, c. 349, 28 Stat. 564 (U. S. Comp. St. 1901, p. 2143), which puts it into the joint custody of the storekeeper and third person, the proprietor of the warehouse, the owner, would be out of possession, and such frauds would be impossible. In Casey v. Cavaroc, 96 U. S. 467, 24 L. Ed. 779, the reason is given for the necessity of the change of possession from the owner to the qualified owner, the pledgee. Mr. Justice Bradley says in that case:

"The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

In *Fourth St. Nat. Bank v. Millbourne Mills Co.'s Trustee*, 172 Fed. 177, 96 C. C. A. 629, the Circuit Court of Appeals for the Third Circuit after making the same quotation from *Casey v. Cavaroc* say:

"It is true that a symbolical or constructive delivery is recognized in favor of articles of great bulk or difficulty of handling; but the policy of the law is against the relaxation of the rule. *Sholes v. Asphalt Co.*, 183 Pa. 528, 38 Atl. 1029. And even as to these there must be a surrender of dominion and a setting apart of the property, with such distinctive marks as will serve to indicate that, while in the apparent possession of the owner, it is not in fact his. *Philadelphia Warehouse Co. v. Winchester* (C. C.) 156 Fed. 600. As is well said by Judge Bradford in that case, there must be enough to negative ostensible ownership, nothing of which is to be found here."

In *Bank v. Millbourne Mills*, *supra*, the second headnote is justified by what is said in the opinion. It reads:

"A man cannot make a warehouse of himself as to his own goods, and by issuing and pledging warehouse receipts make a valid transfer as against his creditors of property which remains in his possession and under his control, without anything to distinguish it from his other property, or to indicate that he is not the unqualified owner."

There is nothing about this whisky to indicate that anybody but Rohrer had any interest in it whatever, except the government, and that interest was solely that the tax would be surely paid before the whisky was actually removed. It is true each barrel of whisky had a mark and number, and that these marks and numbers were carried into the receipts, but there was no way to tell by looking at the barrels that they belonged for any purpose to anybody but the owner, nor were they put into the charge of any one as agent for the pledgee, facts which clearly distinguish the case from *In re Cincinnati Iron Store Co.*, 167 Fed. 486, 93 C. C. A. 122.

Under the laws of Ohio, a pledge of chattels good as against creditors, subsequent purchasers, and mortgagees in good faith must be filed in the manner prescribed, unless there is an immediate delivery followed by actual and continued possession of the things mortgaged. Section 4150, Rev. St. In *Thorne v. First National Bank*, 37 Ohio St. 254, the law is declared to be that:

"An instrument in the form of a warehouse receipt, executed by a debtor, who is not a warehouseman, for the sole purpose of securing such creditor, is void as against other creditors, where the property remains in the possession of such debtor."

This case is directly in point, and its authority is not in the least disturbed by the decision of the Supreme Court of Ohio in *Hunt v. Bode et al.*, 66 Ohio St. 255, 64 N. E. 126. The pledgor there had not issued a receipt against his own goods in his own warehouse. He had no possession of the chattels except such as was evidenced by the receipt in question, the validity of which was not attacked. By delivering the receipt to the bank, he symbolically delivered the possession of the property. His equity in the property as represented by the receipt was valuable. This he pledged to Dieckmann, and notified the bank. After the bank's claim was satisfied, nobody but Dieckmann could get the balance. The pledgor's possession was gone. The bank had it to pay itself and Dieckmann.

I have only referred to some of the most important cases among the very many cited by counsel. To my mind they show conclusively that the referee reached the proper conclusion as shown by the admirable opinion filed by him in the case. The referee did not follow the decision of the district judge in the Eastern District of Pennsylvania in *Re Miller Pure Rye Distilling Co.* (D. C.) 176 Fed. 606, in which the exact question was decided in favor of pledgees. Counsel for the pledgees rely upon that case as establishing every principle they contend for in this and commend to the court the reasoning of the learned judge in his opinion in that case as coinciding with the conclusions they had reached before that case was decided. It appears that the Circuit Court of Appeals for the Third Circuit has reversed that judgment. Mr. Thomas B. Paxton, Jr., one of the opposing counsel, has filed and submitted in this case an uncertified typewritten paper purporting to be a decision of that court, dated November 9, 1910; the opinion being written by Archbald, District Judge.†

It is assumed that the decision is what it purports to be, and this court, being in entire agreement with it, cheerfully follows it. But, whether that decision was made or not, the reasons given in what purports to be the opinion, and upon the authorities cited for the invalidity of the pledges, are it seems to me unanswerable. Orders may be taken accordingly.

The relative rights of the trustees and purchasers, the relative rights of the pledgees and the trustees, as affected by *York v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, and the status of those pledgees who filed their receipts as if chattel mortgages, were not argued orally or by brief by both sides in those controversies, and are therefore not now decided.

UNITED STATES v. SWIFT et al.

(District Court, N. D. Illinois. March 22, 1911.)

No. 4,509.

1. CRIMINAL LAW (§ 42*)—IMMUNITY TO ONE FURNISHING EVIDENCE—STATUTE GOVERNING INVESTIGATIONS BY COMMISSIONER OF CORPORATIONS.

The immunity statute governing the giving of testimony before the Commissioner of Corporations is Act Feb. 11, 1893, c. 83, 27 Stat. 443 (U. S. Comp. St. 1901, p. 3173), expressly made applicable by Act Feb. 14, 1903, c. 552, § 6, 32 Stat. 827 (U. S. Comp. St. Supp. 1909, p. 92), creating the Department of Commerce and Labor.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.*]

2. CRIMINAL LAW (§ 42*)—IMMUNITY TO WITNESS—CONSTRUCTION OF STATUTE.

Immunity Act Feb. 11, 1893, c. 83, 27 Stat. 443 (U. S. Comp. St. 1901, p. 3173), which relates to evidence given in government investigations, and provides that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, * * *" was enacted to satisfy the demand of the fifth constitutional amendment, and does so by affording the witness absolute immunity from future prosecution for any offense arising out of the transactions to which his testimony relates, and which might be aided, directly or indirectly, thereby, so as to leave no ground on which the constitutional privilege

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Opinion withdrawn on rehearing and judgment of lower court affirmed, *Taney v. Penn Nat. Bank*, 187 Fed. 689.

may be invoked. It operates as an act of general amnesty for all such offenses; but it is not intended to be, and cannot be made, a shield against prosecution for offenses committed after the testimony is given or the evidence furnished, since a person cannot be said to have been a witness against himself in respect to an offense which had not been committed when the testimony was given.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.*]

3. CRIMINAL LAW (§ 198*)—FEDERAL ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE—ACQUITTAL—EFFECT.

A conspiracy to restrain or monopolize interstate commerce, in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), is necessarily a continuing one, and its illegality is not alone in the act of confederating or engaging in the conspiracy, but also in its continuation, so that a judgment of conviction or acquittal in a prosecution of those engaged in it is not a bar to their subsequent prosecution for continuing and carrying forward the same conspiracy thereafter, which is a new violation of the law.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 198.*]

4. CRIMINAL LAW (§ 42*)—IMMUNITY TO ONE FURNISHING EVIDENCE—EFFECT OF STATUTE.

Defendants were indicted in 1905 for conspiracy to monopolize interstate commerce in fresh meats, in violation of the Sherman anti-trust act (Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]); but an acquittal was directed, on the ground that they were immune from prosecution because of testimony given and evidence furnished by them before the Commissioner of Corporations in relation to the transactions which formed the basis for the indictments. *Held*, that such immunity did not extend to a subsequent prosecution for continuing the same conspiracy thereafter, nor did it obliterate the facts testified to, which, if legally competent and relevant, might be shown in the subsequent prosecution.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 42.*]

5. INDICTMENT AND INFORMATION (§ 137*)—MOTION TO QUASH—GROUNDS—COMPETENCY OF EVIDENCE BEFORE GRAND JURY.

Except in states having statutes on the subject, courts will not review the evidence received by a grand jury on a motion to quash, for the purpose of passing on its competency.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 483; Dec. Dig. § 137.*]

6. CRIMINAL LAW (§ 278*)—PLEAS IN ABATEMENT—GROUNDS.

In the federal courts, a plea in abatement in a criminal case may properly raise an issue of fact as to what evidence was presented to the grand jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 638-642; Dec. Dig. § 278.*]

7. WORDS AND PHRASES—“IMMUNITY.”

“Immunity” does not mean that no acts in fact were ever done, but that there may be no prosecution in respect thereto. Immunity does not wipe out the history of events.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3411, 3412.]

8. PARDON (§ 1*)—NATURE OF “PARDON”—“AMNESTY.”

A “pardon” or “amnesty” secures against the consequences of one's acts, and not against the acts of themselves. It involves forgiveness; not forgetfulness.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 1, p. 373; vol. 6, pp. 5168-5172; vol. 8, p. 7745.]

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

Criminal prosecution by the United States against Louis F. Swift and others. On motions to quash and pleas to the indictment, and motion to strike pleas from files. Motions to quash and to strike denied, and rule on government to reply to pleas.

The indictment in this case charges a combination in restraint of trade and commerce among the several states, and contains five counts. The first, second, and fifth counts charge the engaging by the defendants in the combination therein described "during the ten years next preceding the finding and presentation of this indictment, * * *" and therefore continuously and at all times during the three years next preceding the finding and presentation of this indictment." The fourth count charges the engaging in a similar combination "at all times during the three years next preceding the finding and presentation of this indictment," and, further, that "during all the times mentioned in this indictment said defendants, together with other persons whose names are to the jurors unknown, have maintained and made effective an agreement, understanding, and arrangement among themselves whereby they have fixed, regulated, and controlled the prices," etc. The third count charges the engaging in such a combination "continuously and at all times during the three years next preceding the finding and presentation of this indictment," without any subsequent qualifying words as to time.

The separate pleas in abatement filed on behalf of the respective defendants are of two classes: (A) Pleas of those defendants who were impleaded in the indictment of July 1, 1905; (B) pleas of those defendants who were not impleaded in the indictment of 1905. The defendants in this case who were formerly indicted, and whose pleas here are identical, are Louis F. Swift, Edward F. Swift, Charles H. Swift, J. Ogden Armour, Arthur Meeker, Thomas J. Connors, and Edward Morris. Seven separate pleas in abatement have been filed on behalf of each of these defendants.

The first plea is directed at the first count of the indictment. It sets out verbatim the first and seventh counts of an indictment returned on July 1, 1905; the special pleas in bar filed October 23, 1905, by each of those defendants to the former indictment, including the first and seventh counts thereof; the additional special pleas in bar filed on November 22, 1905, to the former indictment; the replications to those special pleas; the verdict of the jury sustaining the special pleas, rendered on March 21, 1906; the judgment on that verdict, entered on March 29, 1906, in favor of those defendants. The plea then sets out certain evidence of and concerning the matters and things heard and considered by the grand jury which returned the indictment of July 1, 1905, and which it avers was also heard by the grand jury which returned the indictment herein; that there was no evidence presented to the grand jury which returned this indictment, of and concerning the engaging by these defendants in the combination described in the first count, other than evidence of and concerning the acts, transactions, matters, and things charged in the indictment of July 1, 1905; that the acts, transactions, matters, and things which are stated and charged in the first count of this indictment are the same acts, transactions, matters, and things which were stated and charged in the first and seventh counts of the indictment of July 1, 1905; that the evidence described was material to the charges contained in the first count of this indictment, and that the consideration of the same by the grand jury was prejudicial to the defendants. The plea closes with averments of diligence.

The second, third, and fourth pleas are identical with the first, save only that they are directed at, respectively, the second, fourth, and fifth counts of this indictment.

The fifth plea responds to the entire indictment. In it is incorporated, by reference, the record fully set out in the first plea, and the averments of diligence. It also avers that after the making of the investigation by the Commissioner of Corporations, as described fully in the special pleas in bar filed to the indictment of July 1, 1905, the Commissioner of Corporations reported the information and data so gathered by him to the President of

the United States, and embodied in the printed volume known as the "Garfield Report," a part of the information obtained from the several defendants; that the Garfield Report is a public document, which is incorporated by reference; that in 1904 and 1905 the Garfield Report and the information and evidence secured from the defendants were delivered to the Attorney General of the United States and to the district attorney for the Northern district of Illinois; and upon information and belief that the Garfield Report and the evidence secured from the several defendants were used by the attorneys for the United States in this proceeding in preparing and searching out evidence against the defendants, which was introduced before and considered by the grand jury returning this indictment; that such evidence, so searched out and prepared with the use and aid of the evidence so secured from the several defendants, which was introduced before the grand jury returning this indictment, was material evidence, and prejudicial to the defendants.

The sixth plea also responds to the entire indictment. The record of the 1905 proceedings set out in the first plea, and the averments of diligence, were also incorporated by reference. In addition it avers that the attorneys for the United States submitted to the grand jury which returned this indictment evidence of and concerning the acts, transactions, matters, and things respecting which the several defendants had previously produced evidence before the Commissioner of Corporations in the course of his investigation, referred to and described in the record of the former proceedings, and respecting which acts, transactions, matters and things the several defendants had become immune from prosecution, as adjudged in the former proceeding; that evidence of and concerning such acts, transactions, matters, and things, respecting which the several defendants were immune, was used by the attorneys for the United States and by the grand jury in preparing and searching out other evidence against the defendants, and the evidence so prepared and searched out was used before and considered by the grand jury; and that such evidence was material and its use prejudicial. Certain portions of the evidence respecting immune transactions was then described, namely, certain corporate records and the testimony of several witnesses, and the averment that such evidence was considered by the grand jury.

The seventh plea also responds to the entire indictment. The 1905 proceedings set out in the first plea, and the averments of diligence were there incorporated by reference. It is also averred that the grand jury which returned this indictment heard evidence which was of and concerning the acts, transactions, matters, and things charged in the indictment of July 1, 1905, and on account of which the several defendants had been adjudged to be immune from prosecution. It describes, also, certain corporate records and the testimony of certain witnesses, which was heard and considered by the grand jury returning the indictment of July 1, 1905, with the averment that it was also heard and considered by the grand jury which returned this indictment. It avers that such evidence was material and prejudicial, and that there was no evidence presented to the grand jury of and concerning the engaging by these defendants in the supposed combination in the indictment herein charged, other than evidence of and concerning the acts, transactions, matters, and things charged in the indictment of July 1, 1905.

Identical motions to quash have been filed on behalf of each of the defendants on whose behalf were presented the foregoing pleas in abatement, and therein is set forth the record of the former proceedings, incorporated by reference to the first plea in abatement; that the attorneys for the United States presented to, and the grand jury returning this indictment heard and considered, evidence respecting the same acts, transactions, matters, and things concerning which the respective defendants had theretofore produced evidence before the Commissioner of Corporations; that the grand jury returning this indictment heard evidence of and concerning the same acts, transactions, matters, and things respecting which evidence had been heard and considered by the grand jury which returned the indictment of July 1, 1905, and as to all of which immunity from further prosecution had been adjudged. Certain portions of such evidence were described, namely, corporate records and the testimony of certain witnesses. The motions state

that such evidence was material and prejudicial, and that there was no evidence heard by the grand jury returning this indictment concerning the engaging by these defendants in a combination, other than evidence of and concerning acts, transactions, matters, and things stated and charged in the indictment of July 1, 1905.

(B) Identical pleas in abatement have been filed on behalf of Edward Tilden, Francis A. Fowler, and Louis H. Heyman, defendants herein, who were not impleaded in the indictment of 1905.

The first of these pleas avers and describes the investigation of the fresh meat industry, conducted under a resolution of the House of Representatives, by Commissioner Garfield, in 1904; that in the course of that investigation the defendants were required to furnish evidence respecting the method of business pursued in the conduct of the fresh meat business of certain of the corporations named in the present indictment; that such evidence so furnished related to several of the acts, transactions, matters, and things charged in this indictment; that on March 3, 1905, and afterwards, Commissioner Garfield reported the information and data so gathered by him to the President of the United States, and embodied a part of it in what is known as the "Garfield Report," a public document incorporated therein by reference; that in 1904 and 1905 the Garfield Report and other evidence and information secured from these defendants were delivered to the Attorney General of the United States, and to the district attorney for the Northern district of Illinois, and that the evidence so secured by the Commissioner from these defendants was made use of by the attorneys for the United States in searching out other evidence against them, and which was introduced before, and heard and considered by, the grand jury which returned this indictment; that such evidence was material and prejudicial. The plea ends with an averment of diligence.

In the second plea the three defendants aver and describe the conducting of the Garfield investigation in 1904; that the Commissioner secured evidence and information from them of and concerning acts, facts, circumstances, matters, and things referred to in the present indictment as being and constituting the supposed engaging by the defendants in the unlawful combination; that thereafter the defendants could not be subjected to any penalty or forfeiture for or on account of the respective transactions, matters, and things concerning which they had so testified or produced evidence before the Commissioner; that the attorneys for the United States presented to, and the grand jury which returned this indictment heard and considered, evidence of and concerning the same acts, transactions, matters, and things respecting which the defendants had produced evidence before the Commissioner of Corporations, and for and on account of which they had become and were immune from prosecution; that the evidence consisted in part of certain corporate records and the testimony of certain witnesses, who are referred to; that the attorneys for the United States and the grand jury which returned this indictment used evidence of and concerning transactions respecting which these defendants were immune from prosecution in preparing and searching out other evidence against them, and the grand jury which returned this indictment heard and considered such evidence so prepared and secured; that all of such evidence was material and prejudicial; and that the defendants were diligent in presenting the matter to the court.

The third plea on behalf of these three defendants is identical with the second, excepting that it avers upon information and belief that there was no evidence presented to the grand jury of and concerning the engaging by the defendants in the supposed combination charged in the indictment, other than evidence of and concerning the acts, transactions, matters, and things respecting which the defendants had theretofore produced evidence before the Commissioner of Corporations, and respecting which they had thereby become and were immune from prosecution.

Motions to quash were filed on behalf of Tilden, Fowler, and Heyman, containing statements descriptive of the Garfield investigation in 1904; that the defendants were required to furnish evidence in the course of such investigation; the compilation of the Garfield Report, which was incorporated by reference; that the report and the evidence secured from the defendants

were in 1904 and 1905 obtained by the attorneys for the United States, and were used by them in preparing and searching out evidence against the defendants, all of which was introduced, heard, and considered in the investigation and proceeding before the grand jury which returned the present indictment; that the grand jury heard and considered evidence of and concerning the same acts, transactions, matters, and things respecting which evidence had been secured from the defendants by the Commissioner of Corporations in the course of his investigation, and used such evidence in preparing and searching out other evidence, which was also used and offered against the defendants; that part of the evidence consisted of corporate records and the testimony of certain witnesses; that there was no evidence presented to the grand jury of and concerning the engaging by the defendants in the supposed combination charged in the indictment, other than evidence of and concerning the acts, transactions, matters, and things respecting which the defendants had theretofore produced evidence before the Commissioner of Corporations; that the evidence used was material and prejudicial. The matters and things set forth and averred in the plea in abatement were incorporated by reference.

The government moved to have the motions to quash the indictment denied and the pleas in abatement stricken from the files. The defendants asked to have the motions to quash sustained, or for a rule on the government to reply within a short day to the pleas in abatement.

Geo. W. Wickersham, Atty. Gen., Edwin W. Sims, U. S. Atty., and Wm. S. Kenyon, James H. Wilkerson, Pierce Butler, James M. Sheean, Oliver E. Pagan, Elwood G. Godman, and Barton Corneau, for the United States.

John S. Miller, Moritz Rosenthal, Levy Mayer, George T. Buckingham, M. W. Borders, Albert Veeder, Ralph Crews, Alfred R. Urion, and Henry Veeder, for defendants.

CARPENTER, District Judge (after stating the facts as above). The broad question before the court for decision is the same, whether raised by the motions to quash or by the pleas in abatement; and inasmuch as the government's motion to strike the pleas in abatement from the files involves certain technical questions of criminal procedure, I shall dispose first of the motions to quash.

Stripped of all unessentials, the case is this: In 1904 all of the defendants gave information and evidence (whether under compulsion or not is immaterial, so far as the present investigation is concerned) to the Commissioner of Corporations, an officer in the Department of Commerce and Labor. What that information and evidence was we are not now informed, but may assume that it related to interstate commerce in the fresh meat industry. In 1905 a federal grand jury in this district indicted the defendants (except Tilden, Fowler, and Heyman), under the Sherman act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), for combining and conspiring together in restraint of trade and commerce in fresh meat among the several states. Special pleas in bar were interposed, averring that the information and evidence given by the defendants to Commissioner Garfield had been turned over to the Department of Justice, and by it presented to the grand jury, which returned a true bill based thereon, and that the defendants, by reason of having given the information and evidence, were immune from prosecution concerning the transactions, matters, and things about which they had testified or

furnished evidence. Issue was joined on those pleas, and on March 21, 1905, a jury, by direction of the District Judge, rendered a verdict of not guilty. Subsequently judgment was entered on that verdict.

In September, 1910, a federal grand jury returned an indictment against all of the defendants, charging them, in violation of the Sherman act, with combining and confederating together in restraint of trade in fresh meat between the several states, etc., for the "past ten years," and "continuously and at all times during the three years next preceding the finding and presentation of this indictment."

By motions to quash this indictment, and by pleas in abatement (identical as to pertinent facts), the defendants make the issue that by having given information and evidence to the Commissioner of Corporations in 1904 they became immune from prosecution in 1905, as was determined by a judgment of record in this court, and that the "immunity statute in question forbids, not only their indictment for or on account of the transactions, matters, and things for which they are immune, but also the use of the immune transactions in aid of a prosecution for a continuation of the immune offense," and that "the inclusion of such immune transactions in the (present) indictment is a violation of their rights under the fifth amendment to the federal Constitution and the immunity statute."

The motions state and the pleas aver that no evidence was presented to the grand jury which returned the present indictment, except of the transactions, matters, and things concerning which the defendants gave information to the Commissioner of Corporations in 1904, and concerning which they have been adjudged to be immune from prosecution.

In short, the question now presented is: Assuming that the defendants informed the Commissioner in 1904 that they were conspiring or combining together in violation of the Sherman act, was the immunity granted to them by the statute, and by the judgment of this court, so perfect that they may continue indefinitely in their unlawful undertaking?

[1] The pertinent immunity act is that of February 11, 1893 (27 Stat. 443 [U. S. Comp. St. 1901, p. 3173]), which provides:

"That no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents * * * on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise," etc.

The provisions of the appropriation act of February 25, 1903 (32 Stat. 854, 903, 904, c. 755), urged by defendants' counsel to be involved, have no bearing upon the question, because they claim to have received immunity by virtue of testimony given in an investigation carried on by the Commissioner of Corporations, and the immunity provision of the act of February 25, 1903, applies only to causes arising under (1) the act to regulate commerce (Act Feb. 4, 1887, c. 104,

24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]); (2) the Sherman act; and (3) the customs act (Act June 10, 1890, c. 407, 26 Stat. 131 [U. S. Comp. St. 1901, p. 1886]).

The act making the provisions of the statute of February 11, 1893, applicable to investigations conducted by the Bureau of Corporations is the act of February 14, 1903 (32 Stat. 825 [U. S. Comp. St. Supp. 1909, p. 87]), establishing the Department of Commerce and Labor, section 6 of which provides that the provisions of the act of February 11, 1893, shall apply to witnesses subpoenaed by the Commissioner of Corporations.

[2] It seems necessary at the outset to consider the scope of the constitutional protection and the character and scope of the protection necessary to be afforded in immunity acts, in order to supplant the constitutional privilege. The fifth amendment to the Constitution provides:

"Nor shall any person be compelled in any criminal case to be a witness against himself."

The first statute of immunity offered as the equivalent of the constitutional shield was the act of February 25, 1868 (15 Stat. 37, c. 13). This statute later was re-enacted into section 860 of the Revised Statutes (U. S. Comp. St. 1901, p. 661), in the following language:

"No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying, as aforesaid."

Section 860 was before the Supreme Court of the United States in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, and was held to afford an insufficient compensation for the privilege granted by the fifth amendment. The court said:

"We are clearly of the opinion that no statute, which leaves the party or witness subject to prosecution after he answers the incriminating questions put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that prohibition. In view of the constitutional provision, a statutory enactment to be valid must afford absolute immunity against future prosecutions for the offense to which the question relates."

To meet the requirements of the rule thus laid down by the Supreme Court, the act of February 11, 1893, was passed, providing that:

"No person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise," etc.

In this form the matter was presented in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, where a majority of the court held, after quoting extensively from the opinion in *Counselman v. Hitchcock*:

"The clause of the Constitution in question is obviously susceptible of two interpretations. If it be construed literally as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then as he must necessarily, to a large extent, determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency, * * * the practical result will be that no one could be compelled to testify to a material fact in a criminal case unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, upon the other hand, the object of the provision be to secure the witness against a criminal prosecution which might be aided, directly or indirectly, by his disclosure, then if no such prosecution be possible—in other words, if his testimony operated as a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question. * * *

"Stringent as the general rule is, however, certain classes of cases have always been treated as not falling within the reason of the rule, and therefore constituting apparent exceptions. When examined, these cases will all be found to be based upon the idea that, if the testimony sought cannot possibly be used as a basis for or in aid of a criminal prosecution against the witness, the rule ceases to apply; its object being to protect the witness himself, and no one else—much less that it shall be made use of as a pretext for securing immunity to others. * * *

"The act of Congress in question, securing to witnesses immunity from prosecution, is virtually an act of general amnesty, and belongs to a class of legislation which is not uncommon, either in England or in this country. Although the Constitution vests in the President 'power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,' this power has never been held to take from Congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction, although, as was said by this court in *Ex parte Garland*, 4 Wall. 333, 380 [18 L. Ed. 366], 'it extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.' * * *

"* * * Amnesty is defined by lexicographers to be an act of the sovereign power granting oblivion or a general pardon for a past offense, and is rarely, if ever, exercised in favor of single individuals, and is usually exerted in behalf of certain classes of persons who are subject to trial, but have not yet been convicted. * * *

"It is entirely true that the statute does not purport, nor is it possible for any statute, to shield the witness from the personal disgrace or opprobrium attaching to the exposure of his crime; but as we have already observed the authorities are numerous and very nearly uniform to the effect that if the proposed testimony is material to the issue on trial, the fact that the testimony may tend to degrade the witness in public estimation does not exempt him from the duty of disclosure. A person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation, and ought not to call upon the courts to protect that which he has himself esteemed to be of such little value. The safety and welfare of an entire community should not be put into the scale against the reputation of a self-confessed criminal, who ought not, either in justice or in good morals, to refuse to disclose that which may be of great public utility in order that his neighbors may think well of him. The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge. If he secure legal immunity from prosecution, the possible impairment of his good name is a penalty which it is reasonable he should be compelled to pay for the common good. If it be once conceded that the fact that his testimony may tend to bring the witness into disrepute, though not to incriminate him, does not entitle him to the privilege of silence, it necessarily follows that if it also tends to incriminate, but at the same time operates as a pardon for the offense, the fact that the disgrace remains no more entitles him to immunity in this case than in the other."

In Hale v. Henkel, 201 U. S. 43, at page 67, 26 Sup. Ct. 370, at page 376, 50 L. Ed. 652, the court said:

"The interdiction of the fifth amendment operates only when a witness is asked to incriminate himself—in other words to give testimony which may possibly expose him to a criminal charge. But if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present not a past criminality, which lingers only as a memory, and involves no present danger of prosecution. * * * The extent of this immunity was fully considered by this court in Counselman v. Hitchcock, 142 U. S. 547 [12 Sup. Ct. 195, 35 L. Ed. 1110], in which the immunity offered by Rev. Stat. § 860, was declared to be insufficient. In consequence of this decision an act was passed applicable to testimony before the Interstate Commerce Commission, in almost the exact language of the act of February 25, 1903, above quoted. This act was declared by this court in Brown v. Walker, 161 U. S. 591 [16 Sup. Ct. 644, 40 L. Ed. 819], to afford absolute immunity against prosecution for the offense to which the question related, and deprived the witness of his constitutional right to refuse to answer. Indeed, the act was passed apparently to meet the declaration in Counselman v. Hitchcock, 142 U. S. 589 [12 Sup. Ct. 195, 35 L. Ed. 1110], that 'a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates.'"

An analysis of the three cases just quoted from shows that there is no such thing as a constitutional right of absolute silence in all cases. The constitutional right is limited to those cases only in which speech would incriminate, and it follows that if the answer to the question cannot tend in any way to incriminate the witness, because liability to prosecution on account of anything about which he may testify has been removed, there is no ground on which the constitutional privilege can be invoked. The immunity act gives no substitute for this constitutional privilege. The privilege continues to exist to its fullest extent in any case in which the answer may tend to incriminate. The Congress of the United States had no power to take away the privilege, to abridge it, or to substitute anything for it. The most that Congress could do was to remove any criminality which might result from the answering of the question or the giving of the evidence. When that was done, the situation became such that the constitutional privilege did not apply, and could not be relied upon. It became, so far as the witness was concerned, as though his acts never had been criminal, and as though his testimony under no circumstances could incriminate him.

As to the claim that the immunity is for the future as well as in the past, it may be observed that in Brown v. Walker, *supra*, the court said:

"If, upon the other hand, the object of the provision [the fifth amendment] be to secure the witness against a criminal prosecution which might be aided, directly or indirectly, by his disclosure, then if no such prosecution be possible—in other words, if his testimony operated as a complete pardon for the offense to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question."

The words "complete pardon for the offense to which it relates" indicate clearly that there must have been some violation of the law at the time the evidence was given. In Hale v. Henkel, *supra*, the court said:

"But, if the criminality has already been taken away, the amendment ceases to apply. The criminality provided against is a present, not a past, criminality, which lingers only as a memory and involves no danger of prosecution."

If the amendment does not apply to a past criminality, which lingers only as a memory, a fortiori it cannot apply to future criminality, not yet conceived in the minds of the parties. In the Counselman Case, *supra*, the court said:

"In view of the constitutional provision, a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the question relates."

A question put to a witness cannot relate to something which does not exist. As to all crimes committed at the time the information was had from the defendants, there may have been immunity. It cannot be claimed now as to crimes which had not then been committed, or even contemplated. That this is true follows conclusively from the fact that the constitutional privilege guards only against the giving of incriminating evidence. Incriminating evidence cannot be given, unless a crime in fact has been committed.

What were the offenses here to which the "questions related"? Obviously, if the present indictment contemplates a crime supposed to have been committed within three years prior to its return (and it is clear that it does), then the old immune evidence did not and could not relate to the offense charged.

The claim of the defendants is, as I have analyzed the arguments of their counsel, that as to the matters, transactions, and things about which they testified in 1904, and as to everything related thereto or resulting therefrom, there can be no prosecution in 1910. I do not decide, and it is not necessary for me to decide, the same question which was presented to Judge Humphrey in 1905. *United States v. Armour* (D. C.) 142 Fed. 808. What I must decide is whether, granting that the defendants were entitled to immunity from prosecution for any crime committed at the time they testified before Commissioner Garfield, they are now immune, and forever will be immune, from prosecution for any acts concerning, or discovered by reason of, the matters, transactions, and things about which they then testified.

[3] It may be well to consider what is meant by a conspiracy or combination, as defined in the Sherman act. At common law the existence of the conspiracy agreement or confederation constituted the crime, without even a single overt act in pursuance of it. *Bannon et al. v. United States*, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494. The gist of the offense, therefore, is the fact of confederating. Section 5440 of the Revised Statutes (U. S. Comp. St. 1901, p. 3676) has not altered the nature of the offense, or the rules of law governing it, save in one particular, namely, that the conspiracy may not now be prosecuted until one overt act has been committed. Section 5440 gives a *locus paenitentiae* until the commission of some overt act. After the commission of such overt act, the law of conspiracy is unaffected by that section. *United States v. Britton*, 108 U. S. 199, 2 Sup. Ct. 531,

27 L. Ed. 698; Bannon et al. v. United States, 156 U. S. 464, 15 Sup. Ct. 467, 39 L. Ed. 494; Williamson v. United States, 207 U. S. 425, 28 Sup. Ct. 163, 52 L. Ed. 278.

If, then, a conspiracy is indictable at common law before any overt act, likewise it must be indictable at common law at any time after the commission of an overt act, if the conspiracy agreement or confederation still exists. A conspiracy agreement to accomplish an unlawful object is, in its very nature, a continuing arrangement between the conspirators, the duration of which will depend upon the nature of the object which they propose to accomplish. Considering the infinite variety of possible conspiracies, both as to plan and purpose, it is impossible to lay down any unvarying rule concerning the extent of their duration, other than to say that they continue until they are abandoned, or the object of the conspiracy is accomplished. So long as the parties contemplate further action, if necessary to the attainment of their ultimate object, the agreement or confederation still exists. This further action may consist alone in accepting the benefits of an agreement previously made.

In *United States v. Kissel* (decided by the Supreme Court of the United States December 12, 1910) 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168, Mr. Justice Holmes said:

"A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success. A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true; but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous. The partnership may endure as one and the same partnership for years. A conspiracy is a partnership for criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the overt act of all, without any new agreement specifically directed to that act."

In *United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the contract forming the defendant association had been made before the Sherman act was passed; but a continuance of the association after the enactment of the statute was held to be within the prohibition. Mr. Justice Peckham said:

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract, at the time it was entered into, was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of any act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain machinery and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was entered into, the continuation of the agreement, after it had been declared to be illegal, became a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and if the agreement be continued it then becomes a violation of the act. There is nothing of an ex post facto character about the act. The civil remedy by injunction and the liability to punishment under the criminal provisions of the act are entirely

distinct, and there can be no question of any act being regarded as a violation of the statute which occurred before it was passed. After its passage, if the law be violated, the parties violating it may render themselves liable to be punished criminally; but not otherwise."

In Northern Securities Co. v. United States, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. Ed. 679, the court, under the Sherman act, restrained a continuance of a combination already formed. This must have been because such continuance was as much condemned by the act as its original formation.

In United States v. MacAndrews (C. C.) 149 Fed. 823, Judge Hough, in overruling a demurrer to an indictment charging a violation of sections 1 and 2 of the Sherman act, said:

"It is true that the gist of the alleged offense is the combination or the attempt at monopoly, but it is not true that the offenses are complete when the combination is mentally formed or the mental intention to monopolize arises. The statutory offense, and the one charged herein, does not depend upon 'a single agreement, but [on] a course of conduct intended to be continued'; yet, nevertheless, 'the thing done and intended to be done is perfectly definite.' Swift v. United States, 196 U. S. 400 [25 Sup. Ct. 276, 49 L. Ed. 518]. That case arose on the civil side of the court; but it is to be remembered that the same facts and acts which expose violators of this statute to civil suits also render them subject to indictment. In this case, while the time is indefinite, the thing done is definite, and that is all that the statute requires.

"To show that an exact time may be, and therefore must be, assigned for the commission of the offense of combination, the defendants argue upon the meaning of the word 'engage' as used in the statute, and strenuously urge that, since the offense prohibited is that of 'engaging in' a combination, it must be complete as soon as the accused employs his attention or effort in or about the same, that such employment of attention or effort is capable of precise assignment in point of time, and they challenge the prosecution to name the day.

"The statute is not directed against such an abstraction as this. It does not require on the part of the prosecution clairvoyance to discover or locate the offense. Its prohibition is not directed against a state of mind, but against a state of facts. The facts do not simultaneously occur; the events are not contemporaneous. It may, and naturally would, require time for the working parts of the combination to become co-operative, or for the monopoly to become more than a hope; and what is forbidden and renders the actors obnoxious to the criminal law is not an undiscoverable thought or hope, but a perfectly obvious result or condition. The condition or state of facts against which the statute is directed is a continuing condition, and therefore the offense of creating and maintaining that condition is necessarily a continuing offense, and does not, from its very nature, require greater particularity in assignment than is used in this indictment."

The books say sometimes that each overt act "renews" the conspiracy. This can be true only in the sense that the overt act constitutes renewed or further evidence of the continued existence of the conspiracy. A conspiracy is always required to support the overt act. A conspiracy agreement commonly continues in actual existence until after the object of the conspiracy has been accomplished. Its actual continuance always is a question of fact, and the indictment in this case charges a continued actual existence of the conspiracy from its inception in 1904, up to the time of the return of the indictment.

Is the original confederation or unlawful agreement the only violation of the statute, or is a continuation or carrying out of that agree-

ment, evidenced by a conscious participation therein by the parties, equally a violation of the law? The fact that conspiracies generally may be, and usually are, continuing agreements or understandings, emphatically is true of conspiracies to restrain or to monopolize commerce. In such cases, not only may the conspiracy endure, as in the case of conspiracies generally, until a single complete result is effected, but the result intended by the conspirators is itself, quite inevitably, a continuing condition of things. Restraint or monopolization of commerce for a moment or a day is not the object of a conspiracy to restrain or monopolize it. The conspirators seek continuous restraint and monopolization.

The argument of the defendants is that the crime of conspiracy is noncontinuing, because the essential element of the offense is the act of confederating or plotting, which is in itself inherently a non-continuing act. The authorities which have just been cited are to the contrary. The question of the continuous or noncontinuous nature of a conspiracy depends entirely upon the agreement of the parties and the object to be effected. It is always possible that the conspiracy or confederation itself may contemplate a continuous course of action on the part of those engaged in it. An agreement to pursue an illegal course for 10 or 15 years, by its very nature, would be an agreement which was continuous. Take a concrete case. Assume that the defendants in 1904 entered into a written agreement to stifle competition, or to control prices, in the fresh meat industry through the medium of the National Packing Company. Would indictment and conviction in 1905 have given them an everlasting license to continue their unlawful acts, exempt and immune from prosecution?

[4] It must be conceded that, had the defendants been convicted in 1905, no question of immunity arising, no further prosecution could be had for the same offense. If, however, the conspiracy having been entered into and the various media through which it was to be made operative and effective having been created, all in 1904, proof of the facts upon which the former conviction was had (properly safeguarded by the rules of evidence) could be shown in a prosecution instituted in 1910, based upon a continuous conscious participation by the defendants in the original undertaking; that is to say, the continued operation of the unlawful combination, notwithstanding the former conviction, is in itself a new violation of the law. The indictments in this case are not for any crime committed at the time the privileged evidence was given, but for a subsequent crime, and that subsequent crime consists in the continuation of the original agreement.

Again, suppose in 1904 the defendants admitted to the Commissioner of Corporations that they had conspired together to restrain the fresh meat trade in this country. Suppose that the confession were used to search out other evidence tending to show that the conspiracy organized in 1904 had been in continuous operation up to and including the month of September, 1910. Can they stand boldly upon the proposition that with respect to those matters, transactions, and things which they had confessed they are immune for all time to

come? Not only immune from punishment concerning the things of the past which they disclosed, but immune from punishment for continuing in their unlawful engagement? Not only that, but immune from the use of the evidence against them for any purpose at any time thereafter?

Immunity does not mean license. If it does, then one need only to confess his crime, and his license to violate the law becomes perpetual. Any consideration of the so-called immunity or constitutional privilege which results in the giving of license to continue an unlawful act, or immunity from prosecution for future crime, would be intolerable.

The defendants must rest squarely upon the proposition that the immunity granted by the statute is broader than the privilege of the Constitution. However, both the Constitution and the immunity statute apply only to incriminating evidence; the former by construction given by the Supreme Court of the United States, and the latter by its very terms.

I cannot agree that the immunity act purposely was made attractive as a kind of bonus or bribe to induce innocent disclosures by the promise that a future crime concerning the acts, transactions, and things testified about would pass unpunished. I do not believe that the defendants here accused are immune for all time to come from the punishment prescribed by the Sherman act, with respect to interstate commerce in meat in this country. No matter how the arguments of counsel are analyzed, they lead ever to that result. It must follow, if their position is sound, that a general statement of one's business made to the Commissioner of Commerce and Labor will prevent the government from using such information in any way, for the purpose of ferreting out or prosecuting future crimes connected with that business.

The defendants claim, also, that the use of privileged or immune evidence before the 1910 grand jury was a violation of their constitutional rights; that the evidence was itself "unconstitutional," as distinguished from "incompetent"; that the immunity or amnesty or pardon afforded by the fifth amendment and the immunity act obliterated the acts themselves about which they had furnished evidence to Garfield. In this connection, much stress has been laid upon cases involving pardons. It is urged that:

"The legal effect of the pardon or amnesty (the same thing) is to wholly obliterate the offense, and all its consequences; to furnish a legal equivalent for conclusive proof that the pardoned acts never existed."

In other words, after a pardon, there is "oblivion" as to the past. If, however, there be any "oblivion," it is not as to the actual happening of things, but as to the attending consequences. Amnesty or pardon obliterates the offense, it is true, at least to such extent that for all legal purposes the one-time offender is to be relieved in the future from all its results; but it does not obliterate the acts themselves. It puts the offender in the same position as though what he had done never had been unlawful; but it does not close the judicial eye to the fact that once he had done the acts which constituted the

offense, and the cases arising under the pardons and under the general amnesty granted at the close of our Civil War do not support, but, on the contrary, dispel the idea that the acts themselves, as distinguished from their penal consequences, were obliterated by pardon or amnesty. Thus in the Garland Case, 71 U. S. 333, 18 L. Ed. 366, the sole question was whether or not Gen. Garland could be permitted to practice law in the Supreme Court when, because he had held office under the government of the Confederate States, he could not take the then required oath that he had never given aid and comfort to, or held office under, enemies of the United States. The whole controversy arose because the facts were not obliterated, because Garland could not take the oath without being guilty of perjury. Had the facts been obliterated, the simple way out would have been for Gen. Garland to take the oath; but it was admitted on all hands, and stated by the court, that he could not do so.

An officer in the employ of the government, overzealous, perhaps, in the performance of his duty, shoots and wounds seriously a person whom he thinks has been guilty of a crime. The officer had no authority to use violence, and was indicted and held for trial on a charge of assault with intent to kill. The executive, believing that the circumstances warranted his interference, pardons the officer. Does the pardon wipe out the physical fact that he shot and wounded seriously his victim? Does the pardon prevent the victim from recovering damages in a civil action? Clearly, it does not. Certainly it cannot be claimed that the pardon granted in 1861 to Gen. Garland for "taking part in the late rebellion against the government," etc., not only rendered him immune from punishment, but branded him a Union soldier or a noncombatant.

[7] There is nothing in the law of pardons which will warrant the court in reaching a conclusion that the amnesty or immunity claimed to be afforded by the law to the defendants in 1904 wiped out the physical existence of the transactions, matters, and things concerning which they then testified. The difference between a crime committed and forgiven, and its physical occurrence, must not be overlooked. Immunity does not mean that no acts in fact were done, but that there may be no prosecution in respect thereto. Immunity does not wipe out the history of events.

[8] A pardon or amnesty secures against the consequences of one's acts, and not against the acts themselves; it involves forgiveness, not forgetfulness. If the claimed immunity did not obliterate the physical existence of the facts about which the defendants furnished evidence to Garfield in 1904, but merely purged them of criminality and rendered them inherently harmless, there is no legal reason why those facts or the evidence concerning them, if competent and relevant, may not be used to trace the history of, or establish, an unlawful conspiracy charged to have been in operation in 1910.

My conclusion is this: The Constitution guaranteed to the defendants the right of silence only with respect to evidence which might tend to incriminate them. The immunity act rendered the constitutional provision inapplicable, by destroying the incriminating effect of

the evidence given, and by providing absolute immunity from prosecution for any crime already committed concerning the matters, transactions, and things testified about. The immunity furnished related to present, and not future, crimes. That immunity purged the evidence given of all unlawful characteristics, and assured the defendants that up to the time they testified they had done no wicked or wrongful thing. The immunity act did not, and could not, alter or destroy the transactions, matters, and things concerning which the information was furnished. They must exist still as facts, harmless and pure, to be sure, but still tangible facts; and those facts, proper foundation having been laid, and when legally competent and relevant, may be shown at any time, in any action, civil or criminal.

If I am right in my conclusion as to the effect of the fifth amendment and the immunity statutes, upon the evidence given by the defendants to the Commissioner of Corporations in 1904, then the only question remaining is whether the court ought to quash an indictment because incompetent evidence was presented to the grand jury.

[5] The cases are uniform to the effect that, except in those states in which, by statute, indictments are required to be returned on "legal" or "competent" evidence, the courts will not review the evidence received by a grand jury for the purpose of passing upon its competency. In the first place, no official record of the evidence introduced before the grand jury ordinarily is kept. In the second place, if, on a motion to quash, the competency of the evidence presented could be inquired into, the trial courts would be obliged to sit as courts of review, to examine into the correctness of every ruling made upon the evidence by the grand jurors. The obstructions to justice and the unnecessary and uncalled-for waste of time, and consequent expense to the state as well as to defendants, which would result from such a course, are too obvious to need comment.

In addition to this, the grand jurors are laymen. They do not know, and cannot be expected to know, the technical rules of evidence; and while, no doubt, it is the duty of the prosecutor to give them such aid as he may in that respect, he has no control over them. As a matter of fact, under the common law, and in the state of Illinois, where the common law prevails, grand jurors are entitled to indict upon their personal knowledge, and upon their experience as men of affairs, upon what has transpired in the community with reference to the case under their investigation. They cannot be expected to know what evidence is or is not legally competent. If, therefore, indictments are to be quashed because incompetent evidence was heard by the grand jury, the return of a true bill practically will become an impossibility.

The authorities cited by defendants, in which indictments were quashed because the accused was called before the grand jury and examined, or because private counsel was permitted to appear and address the grand jury, are not in point. In those cases the indictments were quashed, not because incompetent evidence was received, but because the proceedings of the grand jury were unconstitutional and unlawful. Clearly, if the grand jury were improperly impaneled,

or if certain classes of persons unlawfully were excluded from serving thereon, the matter could be brought to the attention of the court, and disposed of, by a motion to quash the indictment.

The two propositions are radically different. It is one thing to quash an indictment because the accused, in violation of his constitutional right, is brought before the grand jury and browbeaten or maltreated, or because private counsel is permitted to harangue the jurors, or because other like fundamental wrongs are permitted, and quite another thing to quash an indictment because a witness is asked concerning facts which mayhap do not tend to prove the charge which the grand jury is to inquire into. The one reaches to the organization or fundamental power of the grand jury to act; the other, granting that the grand jury was properly impaneled and had the power to proceed, involves the proposition that it acted upon incompetent evidence, and therefore reached an irrational conclusion.

The motions to quash will be denied, and the clerk will enter an order to that effect.

[6] The pleas in this case raise an issue of fact as to what evidence was presented to the grand jurors. Grand jurors and witnesses before them are sworn not to disclose what takes place in the jury room. The authorities are conflicting as to whether it is proper in a plea in abatement to raise an issue of fact as to matters which the policy of the law requires to be kept secret. The Supreme Court, however, in Hale v. Henkel, *supra*, used the following language:

"The suggestion that a person who has testified compulsorily before a grand jury may not be able, if subsequently indicted for some matter concerning which he testified, to procure the evidence necessary to maintain his plea, is more fanciful than real. He would have, not only his own oath in support of his immunity, but the notes often, though not always, taken of the testimony before the grand jury, as well as the testimony of the prosecuting officer, and of every member of the jury present. It is scarcely possible that all of them would have forgotten the general nature of his incriminating testimony, or that any serious conflict would arise therefrom"

—indicating that such matters properly may be brought to the notice of the court by plea.

The motion to strike the pleas in abatement from the files will be denied, and a rule entered upon the government to reply. If, however, the government sees fit to file a demurrer to the pleas, inasmuch as all of the parties to this cause have indicated a desire to have the matter disposed of upon the merits, and inasmuch as I have treated the questions involved as if a demurrer had been interposed, such demurrer will be sustained as of course.

In re CUMMINGS.

(District Court, E. D. Pennsylvania. May 5, 1911.)

No. 1.938.

BANKRUPTCY (§ 136*)—WITHHELD ASSETS—CONTEMPT—DEFENSES.

A bankrupt having been ordered on November 18, 1909, to pay to his trustee \$69,317.14, such order was affirmed by the District Court on February 21, 1910; the order fixing March 21st as the time of payment. This order was again affirmed by the Circuit Court of Appeals, mandate being filed on March 10, 1911, and on trustee's petition the time of payment was extended to April 26th, and the bankrupt not having complied, a rule was granted against him for contempt. *Held* that, while the bankrupt's plea of physical inability to comply constituted a defense to the rule, his bare denial of ability was insufficient to establish the fact.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. § 136.*]

In the matter of the bankruptcy proceedings of John E. Cummings. On rule to attach the bankrupt for contempt. Allowed.

M. Hampton Todd, for trustee.

John E. Cummings, in pro. per.

J. B. McPHERSON, District Judge. On November 18, 1909, the referee ordered the bankrupt to pay \$69,317.14 to his trustee. The District Court affirmed the order on February 21, 1910, afterwards fixing March 21st as the time of payment. On appeal the decree of the District Court was affirmed (184 Fed. 718), and the mandate was filed below on March 10, 1911. On April 12th, upon the trustee's petition, the District Court ordered payment on or before April 22d. The bankrupt answered, asserting his inability to pay, whereupon the trustee asked for an attachment. On April 26th the pending rule was granted returnable May 3d, and on May 1st the bankrupt filed an answer, again asserting that he could not possibly comply. On May 3d a hearing was had before the court, at which the statements of witnesses were heard in the bankrupt's behalf, and he himself made an argument against the rule. No further hearing was asked for, and the matter was thereupon submitted.

A similar situation was considered in *Re Marks* (D. C.) 176 Fed. 1018, and part of what was there said is now applicable in every respect, and may therefore be repeated:

"The question for decision is whether the bankrupt should be committed to prison for failure to comply with the order of June 24th; and upon this question the brief of the trustee's counsel concedes that:

"All the cases are practically harmonious in the declaration that, if the court is convinced that the bankrupt is unable to comply with the order, he should not be committed for contempt. Without the physical ability to comply, there can be no contempt."

"Unquestionably that is the rule in this circuit. The Court of Appeals approved it in *Trust Co. v. Wallis*, 11 Am. Bankr. Rep. 360, 126 Fed. 464, 61 C. C. A. 342, and there are decisions elsewhere to the same effect. It will be observed that the present case differs from those which involved the preliminary question whether the referee or the District Court should make an order on the bankrupt to pay money or deliver goods. Here that point has been passed. It has been finally decided that in February, 1908, the bankrupt

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes.

had in his possession or under his control the sum of \$3,000 belonging to his estate in bankruptcy; and it only remains to inquire whether he is now able to pay. In this proceeding the court will not re-examine the question whether the order should ever have been made—either at all, or in the particular amount fixed by the referee. The trustee has therefore an unimpeachable right to the money specified in the order, and presumptively the bankrupt is able to pay it; but the admission must nevertheless be made that the presumption may not correspond with the fact, and that in reality the bankrupt cannot comply with the order. Unless he has the physical ability to comply, he should not be committed for contempt. In practical effect, although perhaps not in legal contemplation, this would revive the abolished penalty of imprisonment for debt. If he cannot pay, and if this inability is the result of his own criminal act, he may, of course, be punished by the criminal law, although no civil remedy may be available in the situation. Even if he has misappropriated the money, the court has not the power to imprison him in a proceeding for contempt; for this would deprive him of his constitutional right to submit the charge of misappropriation to a jury in the proper criminal court, and would deprive him, also, of the inseparable right to be exempt from imprisonment for such an offense until he shall have been lawfully convicted. And it is also true that he cannot be imprisoned in a proceeding for contempt, if for any other reason he cannot produce the money; for the court cannot imprison as a punishment. It can only imprison to compel obedience to its order. But with an order to pay in force against him, and with the need to overcome the presumption of his ability to comply, it will no doubt happen at times that a bankrupt may fail to meet the burden of proof, and may be obliged to go to jail until he satisfies the court that he was telling the truth when he pleaded poverty. Certainly his bare denial of present ability to pay may be properly regarded with suspicion, and he may be required to satisfy the court with clearness that obedience to the order is wholly beyond his power. Such situations must be dealt with as they arise. No general rule can be laid down, and each case must stand upon its own facts. A decision upon the general subject has been recently reported from the Second Circuit. *Re Stavrahn*, 174 Fed. 330 [98 C. C. A. 202]."

I shall only add that the bankrupt's bare denial of present ability to pay does not satisfy me of the fact, and I must therefore enforce the order of April 12, 1911.

And now, May 5, 1911, the rule is made absolute. The bankrupt is adjudged in contempt for failing to obey the order of April 12, 1911, and the marshal is directed to take him into custody and commit him to the jail of Philadelphia county, there to remain until he pays to his trustee \$69,317.14, with \$20 costs, or until the further order of the court.

MEMORANDUM DECISIONS

CITY OF URBANA, OHIO, v. KIRBY. (Circuit Court of Appeals, Sixth Circuit. May 2, 1911.) No. 2,088. Appeal from the Circuit Court of the United States for the Southern District of Ohio. See, also, 174 Fed. 348. Stephens, Lincoln & Stephens, L. D. Johnson, and Harold W. Houston, for appellant. Thornton M. Hinkle, Ernst, Cassatt & Cottle, and Thomas J. Frank, for appellee.

PER CURIAM. Appeal dismissed, on stipulation of counsel.

ELKINS ELECTRIC RY. CO. v. WESTERN MARYLAND RY. CO. et al. (Circuit Court of Appeals, Fourth Circuit. May 2, 1911.) No. 1,020. Appeal from the Circuit Court of the United States for the Northern District of West Virginia, at Philippi. W. B. Maxwell, for appellant. B. A. Richmond and E. A. Bowers, for appellees. Before PRITCHARD, Circuit Judge, and BRAWLEY and CONNOR, District Judges.

PRITCHARD, Circuit Judge. The learned judge who heard this case below prepared an exhaustive opinion clearly setting forth the various points at issue. We have carefully considered the record and the evidence that was heard by the court below, and in view of the facts and circumstances surrounding this case we are of opinion that the rulings of the lower court were eminently proper. Inasmuch as the opinion of the lower court, reported in 163 Fed. 724, contains a full statement of the facts and deals with the various questions of law presented, we adopt the same as the opinion of this court. For the reasons stated, the decree of the lower court is affirmed.

FREDERICKSON v. ATCHISON, T. & S. F. RY. CO. (Circuit Court of Appeals, Ninth Circuit. May 1, 1911.) No. 1,951. In Error to the Circuit Court of the United States for the Southern Division of the Southern District of California. See, also, 177 Fed. 206. Burt Chellis and Harris & Swanson, for plaintiff in error. E. W. Camp, U. T. Clotfelter, and A. H. Van Cott, for defendant in error.

PER CURIAM. On motion of Mr. E. W. Camp, counsel for the defendant in error, and good cause therefor appearing, ordered, writ of error in above-entitled cause dismissed.

GAY et al. v. HUDSON RIVER ELECTRIC POWER CO. et al. SAME v. HUDSON RIVER ELECTRIC POWER CO. (Circuit Court of Appeals, Second Circuit. March 28, 1911.) Appeal from the Circuit Court of the United States for the Northern District of New York. Suits in equity by Eben H. Gay and Joseph W. Jackson against the Hudson River Electric Power Company and others and against said company alone. From an order allowing an appeal taken by receivers for defendant to stand on conditions, the New England Trust Company appeals. Modified and affirmed. For opinion below, see 184 Fed. 631. Tyler & Young (B. E. Eames, Charles H. Tyler, Owen D. Young, and Robert A. Pritchard, of counsel), for appellant. Kellogg & Rose (L. Lafin Kellogg and Alfred C. Pette, of counsel), for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. With some modifications this order should stand. The necessary changes may be effected by striking out the last six lines of the first paragraph of the order, and inserting in their place, after the words "as

security for the payment to the National Contracting Company of," the following: "The amount of any judgment for costs which the said National Contracting Company, the appellee, may recover as a result of said appeal." As thus modified, the order is affirmed.

LAMBERT'S POINT TOWBOAT CO. v. MOSS et al. (Circuit Court of Appeals, Fourth Circuit. May 12, 1911.) No. 1,033. Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk. See, also, 182 Fed. 388, 104 C. C. A. 598. Robert M. Hughes, for appellant. Jeffries, Wolcott, Wolcott & Lankford and L. L. Lewis, U. S. Atty., for appellees.

PER CURIAM. Appeal dismissed in open court by consent, at cost of appellant.

PENNSYLVANIA STEEL CO. v. SUSSWEIN. (Circuit Court of Appeals, Second Circuit. May 25, 1911.) No. 273. In Error to the Circuit Court of the United States for the Southern District of New York. Battle & Marshall (H. S. Marshall, of counsel), for plaintiff in error. Roger Lewis (Bronson Winthrop and George Winthrop, of counsel), for defendant in error. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judgment affirmed, on the opinion of Judge Hand (184 Fed. 102).

SAMUEL W. PECK CO. v. ROSE, RODGERS & ROSE. (Circuit Court of Appeals, Second Circuit. April 17, 1911.) No. 276. In Error to the Circuit Court of the United States for the Southern District of New York. Joseph L. Levy and H. S. Wallenstein, for plaintiff in error. James, Schell & Elkus (Abram I. Elkus and Joseph M. Proskauer, of counsel), for defendant in error. Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. An examination of the bill of exceptions shows that certain papers, marked "Exhibit MM" were received in evidence. The record does not contain these exhibits. We think that the record is incomplete without them, and that they should be supplied. If counsel cannot agree upon copies thereof, the trial judge should certify to correct copies of the papers introduced at the trial and marked "Exhibit MM," which copies should be returned to the clerk of this court and printed by him as part of the record.

SAMUEL W. PECK CO. v. ROSE, RODGERS & ROSE. (Circuit Court of Appeals, Second Circuit. May 23, 1911.) No. 276. In Error to the Circuit Court of the United States for the Southern District of New York. Joseph L. Levy and H. S. Wallenstein, for plaintiff in error. James, Schell & Elkus (Abram I. Elkus and Joseph M. Proskauer, of counsel), for defendant in error. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Judgment affirmed.